

SERVED: July 21, 2015

NTSB Order No. EA-5754

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 8<sup>th</sup> day of June, 2015

_____	)	
Application of	)	
	)	
JAMES L. ROBERTS	)	Docket 352-EAJA-SE-18645RM
	)	
for fees and expenses under the	)	
Equal Access to Justice Act	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

On remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), we revisit applicant’s appeal of the written initial decision and order denying his application for legal fees and expenses under the Equal Access to Justice Act (EAJA),<sup>1</sup> issued by then-Chief Administrative Law Judge William E. Fowler, Jr., on June 13, 2011. In the written initial decision as well as a subsequent order denying reconsideration of the written initial decision, issued by then-Acting Chief Administrative Law Judge Alfonso J. Montaña on April 30, 2012, the law judges concluded, although applicant prevailed in an enforcement action

<sup>1</sup> 5 U.S.C. § 504(a).

brought by the Federal Aviation Administration (FAA) Administrator, applicant did not personally incur attorney fees in defending the enforcement action. The Board subsequently affirmed the denial of the application for legal fees and expenses under the EAJA.<sup>2</sup> The D.C. Circuit granted applicant's petition, vacated the Board's decision, and remanded the case for a determination of the appropriate amount of fees and expenses to be awarded.<sup>3</sup> We remand the case to the law judge for a full review of fees and expenses in accordance with this order and the decision of the D.C. Circuit.

*A. Facts*

In 2010, applicant prevailed in an action brought by the Administrator to suspend his mechanic certificate as a result of allegedly improper maintenance work he performed in the course of his employment as Director of Maintenance at Darby Aviation. Although a law judge initially affirmed the Administrator's order of suspension, the Board reversed on appeal, concluding the Administrator failed to prove applicant violated the Federal Aviation Regulations as charged.<sup>4</sup>

Applicant then filed an application under the EAJA for an award of \$66,693.27 in fees and expenses that his attorneys billed in the course of defending him in the certificate action.<sup>5</sup> The record contains copies of multiple invoices issued by law firm Anderson Weidner as well as an invoice issued by applicant's predecessor counsel. Predecessor counsel's invoice lists the

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<sup>2</sup> Application of Roberts, NTSB Order No. EA-5696 (2014).

<sup>3</sup> Roberts v. NTSB, 776 F.3d 918 (D. C. Circuit 2015).

<sup>4</sup> Administrator v. Roberts, NTSB Order No. EA-5556 (2010); pet. for recon. denied, NTSB Order No. EA-5568 (2011).

<sup>5</sup> Applicant was represented briefly at the outset of the underlying proceeding by attorney Roy King and subsequently was represented by attorneys with law firm Anderson Weidner.

client as “Darby.” Although the majority of the invoices were directed to applicant’s attention at Darby Aviation’s mailing address, one invoice initially was directed to the attention of Elton Darby, chief financial officer of Darby Aviation, and listed fees for legal work performed for applicant’s case as well as other matters on behalf of Darby Aviation.<sup>6</sup>

Multiple other invoices—even those directed to applicant—also list fees and expenses not associated with applicant’s case. For example, although it was subsequently amended, an entry for April 2, 2010, billed for 1.2 hours of legal work for the following:

Telephone conference with R. Screen; review response to D. Anderson’s questions; correspond regarding R & G Aviation; conference with D. Anderson regarding status and issues on sale of business.<sup>7</sup>

The first item—a phone call with Rick Screen, who testified on applicant’s behalf in the underlying action—was related to applicant’s case, but other entries appear unrelated. Other records included similar entries, which applicant’s counsel acknowledged in an affidavit.<sup>8</sup>

In addition, applicant submitted an affidavit by Elton Darby in which Mr. Darby attested the company “inadvertently” paid \$1,992.32 in fees associated with applicant’s case, which were “mistakenly” included in Anderson Weidner invoices “for work performed [by Anderson Weidner] for Darby Aviation in separate matters.”<sup>9</sup> He attested the payment was credited to Darby Aviation’s account with the firm.<sup>10</sup> Mr. Darby further attested by affidavit, “[t]here [wa]s

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<sup>6</sup> Invoice No. 1615, undated, included in Exhibit A to original application for attorney fees.

<sup>7</sup> Invoice, dated November 4, 2010.

<sup>8</sup> See Affidavit of Deanna L. Weidner, undated.

<sup>9</sup> Affidavit of Elton Darby, dated June 13, 2011, at 1.

<sup>10</sup> Id.

no express indemnity agreement between my company, Darby Aviation, or me, and [applicant]”<sup>11</sup> and Darby Aviation “ha[d] paid only a fraction of [those] expenses.”<sup>12</sup> Applicant took the position in the proceeding before the law judge and before the Board that he was personally liable to Anderson Weidner for all fees and expenses associated with the firm’s representation of him in the certificate action. Applicant’s counsel attested by affidavit that applicant “ha[d] agreed to pay any fee award . . . to Anderson Weidner” and, in fact, “[wa]s legally obligated to pay any amounts not recovered.”<sup>13</sup>

*B. The Board’s Opinion and Order*

In our prior opinion and order in this case, we affirmed the law judge’s order denying applicant’s application for attorney fees and expenses. We found the record failed to show that applicant bore responsibility for paying his legal fees. Although affidavits by applicant’s counsel and employer, executed in connection with applicant’s EAJA application, attested to applicant’s responsibility for paying the fees, we noted the record lacked any direct statement by applicant himself showing he personally was liable for the fees. Moreover, aside from multiple invoices, we found no direct evidence, such as an advance representation agreement or other business record created at or near the time an agreement should have been executed, that clearly established applicant’s personal responsibility for legal fees. As a result, we found applicant was not entitled to recover fees under the EAJA.

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<sup>11</sup> Id.

<sup>12</sup> Affidavit of Elton Darby, undated.

<sup>13</sup> Affidavit of Deanna L. Weidner, dated April 11, 2011, at 1.

### C. D.C. Circuit Decision

After hearing oral argument in this case, the D.C. Circuit issued a decision finding the Board's opinion and order was arbitrary and capricious. The Court held "that the NTSB should have considered that under the Alabama law of *quantum meruit*, [applicant] was obligated to pay his attorneys for the value of their services; as such [applicant] 'incurred' fees and may obtain EAJA fee-shifting."<sup>14</sup> The Court reasoned, notwithstanding the lack of a valid fee contract, no evidence existed to show applicant's attorney intended to provide applicant with gratuitous legal services. After reviewing Alabama law, the Court concluded the Board erred in failing to award fees and expenses.

However, the Court expressly left several issues undecided on remand. First, the Court noted "not all of the fees and expenses submitted in this case [were] necessarily eligible for reimbursement."<sup>15</sup> Additionally, the Court did "not foreclose an exploration by the NTSB on remand of whether 'inadequate documentation, failure to justify the number of hours sought, inconsistencies, and improper billing entries' should reduce the reimbursement allowed in this case."<sup>16</sup>

## 2. Decision

Based upon the Court's decision vacating the Board's opinion and order, we expressly find applicant is entitled to legal fees and expenses under the Alabama law of *quantum meruit*.

The narrow question for the law judge in this case on remand is the amount of fees and expenses applicant may recover from the Administrator under the EAJA. In this regard and as

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<sup>14</sup> Roberts, 776 F.3d 918, 919. *Quantum meruit* is "[a] claim or right of action for the reasonable value of services rendered." Black's Law Dictionary 1276 (8th ed. 2004).

<sup>15</sup> Id. at 923.

<sup>16</sup> Id.

noted by the D.C. Circuit in its decision, we are mindful that, under our Rules of Practice, an applicant must provide complete documentation of the services for which he seeks fees and expenses.<sup>17</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's application under the EAJA is granted; and
2. The case is remanded to the law judge for a determination of the proper amount of legal fees and expenses to award.

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT AND WEENER, Members of the Board, concurred in the above opinion and order.

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<sup>17</sup> See 49 C.F.R. § 826.23 and Roberts, 776 F.3d 918, 923; see generally Application of Yialamas, NTSB Order No. EA-5211 at 7-8 (2006).

Served: April 30, 2012

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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Application of

JAMES L. ROBERTS

Docket 352-EAJA-SE-18645

for fees and expenses under the  
Equal Access to Justice Act.

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**ORDER DENYING RECONSIDERATION OF INITIAL  
DECISION DENYING AWARD OF ATTORNEY FEES AND  
EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Served: Deanna L. Weidner, Esq.  
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**Alfonso J. Montañó, Acting Chief Administrative Law Judge:** On June 13, 2011, Chief Administrative Law Judge William E. Fowler, Jr., issued a written initial decision (“WID”) in this matter, in which he denied applicant’s application for an award, under the Equal Access to Justice Act (“EAJA,” codified at 5 U.S.C. § 504), of legal fees and expenses incurred in connection with an appeal of a July 1, 2009 order, by which the Administrator of the Federal Aviation Administration (“FAA”) suspended applicant’s airman mechanic certificate with airframe and powerplant ratings and inspection authorization for 120 days, for alleged violations of §§ 43.9(a)(1) and 43.13(a) of the Federal Aviation Regulations (“FAR,” codified at 14 C.F.R.).<sup>1</sup> In that WID, Judge Fowler found

<sup>1</sup> The EAJA provides that “[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the

that, while applicant was the prevailing party in the underlying certificate matter and the Administrator was not substantially justified in proceeding with a certificate action against him, the fees and expenses for which he sought reimbursement had not been incurred by him, and he was, therefore, not entitled to an EAJA award. Applicant subsequently filed a timely request for reconsideration of that EAJA denial, to which a reply was submitted by the Administrator. In early November 2011, while that request was under active consideration by Judge Fowler, he took ill, and he has been on extended sick leave since that time. Accordingly, I have undertaken review of the request for reconsideration in Judge Fowler's stead. In so doing, I have thoroughly reviewed Judge Fowler's WID, the reconsideration request and the Administrator's reply thereto, and the record in this EAJA proceeding as a whole. For the reasons set forth below, I will deny applicant's request.

### I.

By way of background, the charges against applicant in the underlying certificate action related to maintenance he performed on May 9, 2008, on N840RG, a Gulfstream G-II aircraft operated by Darby Aviation. At all relevant times, applicant served as Darby Aviation's Director of Maintenance.

Attached as an exhibit to applicant's EAJA application was a series of eight billing statements from Anderson Weidner, LLC. Seven of those invoices were addressed to applicant and one was addressed to Elton Darby, at Darby Aviation's place of business. Six of the statements that were addressed to applicant covered legal fees and expenses for the periods of November 25-30, 2009; December 1-4, 2009; January 6-29, 2010; February 2-26, 2010; March 1-31, 2010; and June 1, 2010-February 23, 2011.<sup>2</sup> The seventh such statement was a separate invoice for expense items dated from March 5 to May 5, 2010. The statement addressed to Mr. Darby covered legal fees and expenses for the period from April 1 to May 31, 2010.<sup>3</sup>

The Administrator, in the answer to the application, posited that applicant's submission of an invoice addressed by Anderson Weidner, LLC, to Mr. Darby at Darby Aviation's business address, rather than to applicant, evidenced that the legal fees and expenses applicant sought to recover were not actually incurred by him.

Applicant's subsequent reply to the Administrator's answer explained (at 10) that the billing statement in question had *inadvertently* been addressed to Mr. Darby, and the reply was accompanied by a new series of invoices from Anderson Weidner, LLC, all of which showed applicant as the addressee. The billing statements that applicant submitted with the reply for the periods of November 25-30, 2009, December 1-4, 2009, January 6-

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position of the agency was substantially justified or that special circumstances make an award [of such fees and expenses] unjust." 5 U.S.C. § 504(a)(1).

<sup>2</sup> The statement for the billing period from December 1 to 4, 2009 also showed an expense item for postage, dated March 3, 2010.

<sup>3</sup> That statement also showed an expense item for Westlaw services, dated June 30, 2010.

29, 2010, February 2-26, 2010 and March 1-31, 2010 were identical to those he provided with the application, and added to the statement he had initially furnished for the period from June 1, 2010 to February 23, 2011 were entries for April 5-11, 2011.<sup>4</sup> Insofar as the invoice submitted with the reply for the period from April 1 to May 31, 2010 is concerned, in addition to showing applicant, rather than Mr. Darby, as the addressee, it contained numerous entries that did not appear in the statement that accompanied the application for that period. These additional entries pertained to matters involving Darby Aviation that were not related to applicant and his certificate action, which Judge Fowler specifically identified in his WID (at 11-12). Judge Fowler's review and comparison of the sets of invoices that applicant initially submitted with his EAJA application and that which was later provided in connection with the reply to the Administrator's answer led him to make the following finding (WID at 12, emphasis added):

In view of these numerous items [shown primarily on the resubmitted invoice for the period from April 1 to May 31, 2010] that included matters pertaining to Darby Aviation's business that were clearly not related to applicant, but were nominally billed to him<sup>[5]</sup> . . . , the undersigned believes that they likely originally appeared on billings that were sent to Darby for all legal services provided to that company by Anderson Weidner, LLC, including the representation of applicant in the underlying certificate action, and that *Darby Aviation* was responsible to Anderson Weidner, LLC, for payment of *all* such legal fees and associated expenses, including those arising from that firm's representation of applicant in that matter.<sup>6</sup>

Citing a previous decision of the Board in *Application of Livingston*, NTSB Order EA-4797 (1999), Judge Fowler denied applicant's EAJA claim on the basis that applicant did not incur the fees and expenses for which he was seeking reimbursement.<sup>7</sup>

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<sup>4</sup> This expanded statement contained identical information for the dates from June 1, 2010 to February 23, 2011 as appeared in the invoice for that period that accompanied the application.

<sup>5</sup> Also of note was a May 5, 2010 expense item for court reporting services that could not (for reasons stated in the WID at 12, n.13) have been attributable to applicant's underlying proceeding.

<sup>6</sup> I have independently reviewed and compared the two sets of invoices furnished by applicant, and have concluded that the billings originally submitted with the application were likely sanitized, both to show that they were sent to applicant, rather than Mr. Darby/Darby Aviation, and to remove references to any work performed by Anderson Weidner, LLC, for Darby Aviation that did not involve the certificate action against applicant — with the exception that the addressee shown on the statement for the period from April 1 to May 31, 2010 was, apparently as a result of inadvertence, not changed to applicant — and that, after the Administrator pointed out that said invoice showed Mr. Darby, rather than applicant, as the addressee, applicant, again as a likely result of oversight, provided the *original* version of that invoice, rather than the sanitized one, with the exception that it was modified to show him as the billing's addressee.

<sup>7</sup> Before engaging in the aforesaid analysis as to whether the fees and expenses sought by applicant were incurred by him, Judge Fowler noted (WID at 10-11) that applicant had initially acted *pro se* in the underlying proceeding, and that Deanna L. Weidner, Esq., did not enter an appearance in that matter on his behalf until February 1, 2010. As a consequence, Judge Fowler opined (*id.* at 11) that applicant "would not be entitled to recover fees for any services [Ms. Weidner] or any other attorneys associated with her firm may have rendered on his behalf prior to that date."

## II.

Applicant's request for reconsideration avers (at 2, footnote omitted) that "[e]ven if Darby Aviation also incurred a liability to Anderson Weidner, LLC, that liability did not relieve [applicant] of his liability to [that firm]. Anderson Weidner, LLC rendered services for the benefit of [applicant]; [it] has not been paid for its services rendered on [applicant]'s behalf; and [applicant] was never relieved of his obligation to pay these fees." The request for reconsideration seeks to distinguish *Livingston* from the case at bar on the basis that the outcome in *Livingston* "was based in part upon the fact that the attorneys [there] had been paid and that one of the purposes of the EAJA . . . was to encourage attorneys not to be deterred by representing [entities] that cannot afford to pay for quality representation" (*id.*). In support of this position, the request cites a prior Board decision in *Application of Scott*, NTSB Order EA-4472 (1996), and a decision of the United States Court of Appeals for the Eighth Circuit in *Securities and Exchange Commission v. Comserv Corp.*, 908 F.2d 1407 (1990). The reconsideration request further argues, in the alternative (and for the first time in connection with this EAJA proceeding), that, "[e]ven if the debt were incurred by Darby Aviation also, [it] was merely jointly and severally liable with [applicant] and . . . is also eligible to receive an EAJA award" under the "real party in interest" doctrine (*id.* at 3-4).<sup>8</sup>

The reconsideration request's attempt to distinguish this case from *Livingston* is not well-founded. In *Livingston*, the EAJA applicant was alleged in the underlying certificate action to have operated an aircraft on a ferry flight to Zaire while it was in a state of disrepair, and had unauthorized supplemental oil and fuel tanks (the ferry flight was discontinued with an emergency landing in Quebec). After the certificate action was dismissed for a lack of sufficient evidence, the pilot initiated an EAJA claim, in connection with which it was found that the legal fees and expenses associated with the underlying proceeding had been paid by International Jet Charter, Inc. ("IJC"), the applicant's former employer, for which he had conducted the ferry flight. There, the Board observed that while the applicant had argued "that IJC merely 'advanced' the legal fees and expenses

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<sup>8</sup> As to Judge Fowler's determination that applicant would not be entitled to recover fees for any services Ms. Weidner or other attorneys associated with Anderson Weidner, LLC, may have rendered on his behalf prior to her entry of appearance in the underlying proceeding on February 1, 2010 (see n.7, *supra*), the request for reconsideration avers (at 4) that "there is no law holding that an attorney cannot be paid for services rendered until the attorney files a notice of appearance. Certainly, the attorney would be able to bill for the drafting of the notice of appearance and for the initial analysis of the case." In response to this argument, I must point out that Rule 6(d) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.6(d)) provides that "[a]ny party to a proceeding who is represented by an attorney or representative shall notify the Board of the name, address and telephone number of that attorney or representative," and that, "[i]n the event of a change in representation, the party shall notify the Board . . . and the other parties to the proceeding . . . before the new attorney or representative may participate in the proceeding in any way" (emphasis added). It must also be noted that the application herein sought reimbursement for a total of 30.6 hours of legal work performed between November 25, 2009 and January 29, 2010, which would appear to far exceed both the amount of time and the period of time an attorney would customarily spend on the tasks of providing a client with an initial analysis of a case and drafting an 18-line notice of appearance that included a hearing continuance request (due to a scheduling conflict Ms. Weidner had on the dates of February 17-18, 2010, for which the hearing, at the time, was set).

and he now ‘owes [it] back,’<sup>9</sup> which “implies that [he] would owe the monies regardless of the outcome of the litigation for which IJC allegedly advanced its monies, . . . there is no evidence of any such obligation or agreement.”<sup>10</sup> In *Livingston*, the Board noted that what appeared to exist was an arrangement between the employee/applicant and IJC “to the effect that, *if [a]pplicant recovers fees and expenses under the EAJA, he will reimburse IJC for the attorney fees and expenses which it paid on his behalf in defending this action.*”<sup>11</sup> A similar arrangement seems to have existed here. Although the reconsideration request attempts to distinguish this case from *Livingston* on the basis that the employer there had already paid the legal fees and expenses for which reimbursement had been sought under the EAJA, whereas no payment has yet been made to Anderson Weidner, LLC, in this matter, the scheme — *i.e.*, that the employer is wholly obligated to pay the legal fees and expenses associated with the employee’s defense in the underlying certificate action, and the employee has consented to reimburse the employer for such fees and expenses *to the extent that they are awarded in an EAJA proceeding* — is the same. In this regard, it must be noted, as was the case in *Livingston*, that there is no definitive evidence that applicant had entered into an agreement with Anderson Weidner, LLC, to personally pay the legal fees and expenses generated by that firm in connection with his defense of the underlying certificate action, regardless of the outcome of that proceeding.<sup>12</sup>

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<sup>9</sup> NTSB Order EA-4797 at 4 (brackets supplied by Board).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4-5 (emphasis added), quoting judge’s EAJA WID at 14 (brackets supplied by Board).

<sup>12</sup> I note that Ms. Weidner stated, in an April 11, 2011 affidavit attached to applicant’s reply to the Administrator’s answer to his EAJA application, (at ¶¶ 4-6) that applicant “is legally obligated to pay for the fees and expenses associated with this case;” that she “did not agree to represent [him] pro bono;” and that he “has agreed to pay any fee award under the Equal Access to Justice Act to Anderson Weidner, LLC,” and “is legally obligated to pay any amounts not recovered.” (Ms. Weidner reiterated those statements in an undated affidavit she submitted on June 10, 2011, in connection with a response to a request for additional information that was made by personnel from this office, at Judge Fowler’s direction, during a conference call with counsel for the parties that took place on that date. See WID at 10 and June 10, 2011 Memo to Docket File.) However, the record is devoid of any contemporaneous documentation — such as a retainer agreement — of such an unconditional legal obligation on applicant’s part. *Cf. Application of Peacon*, NTSB Order EA-4921 at 7 (2001), in which the Board, in setting forth its requirements for the authentication of contingent fee arrangements offered to support EAJA awards, made the following pronouncement (emphasis original):

*In the future, to support a finding of an actual contingency arrangement, we will require written documentation created at the time counsel is hired. Oral statements, under oath or not, will not suffice. Nor will written agreements entered [into] after the fact. With the possibility of EAJA recovery well known to the administrative bar, it is not unreasonable to expect that parties be aware of our precedent at the time of going forward. Nor is it unreasonable to expect parties to enter written agreements evidencing their obligations to each other.*

In addition, the attestations of Ms. Weidner are inconsistent with the information identified in the billing records provided by applicant (and cited in the WID at 11-12) that led Judge Fowler to conclude that it is Darby Aviation, and not applicant, that is responsible to Anderson Weidner, LLC, for

While applicant has pointed out that the Board recognized in *Livingston* that one of the EAJA's purposes is to assure that parties will not be dissuaded from engaging in litigation with the government due to issues associated with the affordability of counsel, it must be noted that the Board found in that case that the employee/applicant, "by virtue of his arrangement with IJC was, 'from the very inception of the underlying [litigation], . . . able to pursue his defense . . . secure in the knowledge that he would incur no legal liability for attorneys' fees.'"<sup>13</sup> For the reasons set forth above, it seems that applicant here is in the same situation.

The reconsideration request's citation of *Scott* is also inapposite here. In that case, which was decided before *Livingston*, the Board determined that an EAJA applicant may be deemed to have incurred legal fees and expenses pursuant to a *contingent fee arrangement*, under which he had agreed that, "if EAJA recovery occurs," he would pay his representative (who, in that case, was a non-attorney) "fees and expenses up to the awarded amount" (NTSB Order EA-4472 at 4). I am also aware that the Eighth Circuit has, in *Cornella v. Schweiker*, *supra*, (applying 28 U.S.C. § 2412), held that a party represented by *pro bono* counsel in the underlying proceeding is entitled to recover fees and expenses under the EAJA.<sup>14</sup> The situations in *Scott* and *Cornella* differ from the one presented here — and those that existed in *Livingston* and *Comserv* — in that the *Scott* and *Cornella* fee arrangements were between the EAJA applicants and their counsel, rather than between counsel and a third party.

As to the reconsideration request's alternative argument that, "[e]ven if the debt were incurred by Darby Aviation also, [it] was merely jointly and severally liable with

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the payment of legal fees and expenses associated with that firm's work on applicant's behalf in the underlying proceeding.

<sup>13</sup> NTSB Order EA-4797 at 7, quoting *SEC v. Comserv Corp.*, *supra*, 908 F.2d at 1414 (brackets and ellipses supplied by Board). In *Comserv*, the court applied 28 U.S.C. § 2412, the EAJA statute that pertains to *civil lawsuits* brought by or against the federal government (5 U.S.C. § 504 applies to governmental *administrative actions*). *Comserv* arose from an underlying proceeding in which the SEC sought an injunction against that company and four of its officers, including Thomas A. Johnson, from engaging in certain acts and practices that the SEC believed were in violation of federal securities laws. While *Comserv* and the three other officers against whom the suit was brought entered into consent decrees, Johnson did not, and the SEC continued its lawsuit against him, in which he ultimately prevailed. In the ensuing EAJA proceeding, it was noted that *Comserv* had agreed to pay Johnson's legal fees and expenses in the underlying matter. While the Eighth Circuit observed in that case that the primary intent of the EAJA as a fee-shifting statute "was 'to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action'" (908 F.2d at 1415, quoting *Cornella v. Schweiker*, 728 F.2d 978, 981 (8th Cir. 1984)), it found that, to allow a shifting of fees in the circumstances presented there, "under a statute intended to remove the deterrent effect of fees[,] is pointless" (908 F.2d at 1415), and to hold that an EAJA applicant incurred legal fees and expenses in such a situation would be "to turn the world upside down" (*id.* at 1414-15, quoted by the Board in *Livingston* at 7).

<sup>14</sup> In so holding, the Eighth Circuit reasoned that, "[i]f attorney's fees to *pro bono* organizations are not allowed in litigation against the federal government, it would more than likely discourage involvement by these organizations in such cases, effectively reducing access to the judiciary for indigent individuals." 978 F.2d at 986-87.

[applicant] and . . . is also eligible to receive an EAJA award” as a “real party in interest,” I have conducted a review of EAJA cases in which that principal has been applied, and note that it is typically used to *bar* a party that has participated in the underlying litigation, but is not eligible for an EAJA award — usually because it has a net worth or organizational size (in terms of number of employees) in excess of the statutory limits — from recovering legal fees and expenses it paid on behalf of co-parties through EAJA claims pursued by the co-parties. See, e.g., *Unification Church v. Immigration and Naturalization Service*, 762 F.2d 1077, 1081-83 (D.C. Cir. 1985). Here, the reconsideration request seeks to do the opposite — *i.e.*, establish that the real party in interest doctrine *permits* Darby Aviation to recover under the EAJA attorney fees and expenses it has paid and/or owes to Anderson Weidner, LLC, in connection with applicant’s defense in the underlying matter.

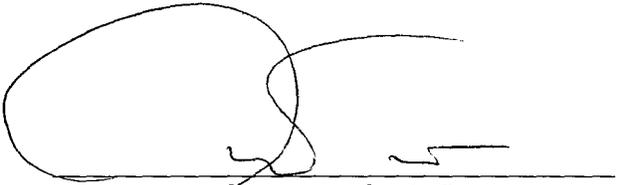
While the reconsideration request avers that Darby Aviation meets the net worth and organizational size limits to qualify for an EAJA award under 5 U.S.C. § 504, and while that company clearly had an interest in the outcome of the Administrator’s certificate action against its Director of Maintenance, it was, nevertheless, *not a party to the underlying proceeding*. As is noted above (see n.1, *supra*), the EAJA provides for awards of legal fees and expenses “to a prevailing party” in federal administrative actions where the position of the agency was not substantially justified, unless there are special circumstances that make such an award unjust, and further provides (at 5 U.S.C. § 504(b)(1)(B)) that the term “‘party’ means a party, as defined in section 551(3) of this title . . . .” In turn, 5 U.S.C. § 551(3) provides that, “[f]or the purpose of this subchapter— . . . ‘party’ includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.”

In *Southwest Marine, Inc., ex rel. Universal Painting and Sandblasting Corp. v. United States*, 43 F.3d 420 (9th Cir. 1994), Southwest Marine (“SWM”) contracted to refurbish a ship for the Department of the Navy. SWM, in turn, entered into a \$996,695 fixed-price subcontract with Universal Painting and Sandblasting (“UP&S”) to sandblast and paint the ship’s saltwater ballast and other tanks under SWM’s contract. However, due to unusual and unanticipated deterioration of the tanks, UP&S encountered significant labor and material cost overruns, which caused it to seek an equitable adjustment to the subcontract price under the Contracts Dispute Act. Since UP&S was not in privity with the government, it presented a notice to submit such a claim to SWM, which, in turn, filed the claim on its behalf with the Navy’s contracting officer. The contracting officer denied the claim, and, on appeal, the Armed Services Board of Contract Appeals (“ASBCA”) reversed the contracting officer, with UP&S in the end recovering over \$600,000 in damages from the Navy. UP&S then initiated an EAJA claim that ultimately reached the Ninth Circuit, which rejected its position that it was entitled to an EAJA award as the real party in interest in the underlying ASBCA proceeding. In so holding, the Ninth Circuit reasoned that, despite the fact that the outcome of the underlying proceeding had primarily affected UP&S’ interests, it was not a named party to that proceeding (and could not be a party thereto under the Contracts Dispute Act because it was not in privity with the government). Clearly, UP&S had a more direct and intimate interest in the outcome of the claim SWM prosecuted on its behalf before the ASCBA than Darby Aviation had in the result of the Administrator’s underlying certificate action against applicant in this matter. Thus, it

stands to reason that, if the real party in interest doctrine failed to provide a basis for an EAJA award to UP&S in *Southwest Marine*, it cannot support a claim for such an award to Darby Aviation here.

THEREFORE, IT IS ORDERED that applicant's request for reconsideration of the June 13, 2011 written initial decision denying his application for an award of attorney fees and expenses under the Equal Access to Justice Act is hereby DENIED.

Entered this 30th day of April, 2012, at Washington, D.C.



Alfonso J. Montañó  
Acting Chief Administrative Law Judge

## APPEAL ON DENIAL OF RECONSIDERATION

You are still entitled to appeal the initial decision or order from which your request for reconsideration has been denied herein. In order to do so, you must file a written notice of appeal within 10 days after the date on which this order denying reconsideration was served (the service date appears on the first page of the order). **If you previously submitted a notice of appeal from the initial decision or order, you must re-file the notice of appeal within 10 days after the date on which this order denying reconsideration was served.** (In this regard, see Rule 47(b) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.47(b).) You must file an original and 3 copies of the notice of appeal with the:

National Transportation Safety Board  
Office of Administrative Law Judges  
Room 4704  
490 L'Enfant Plaza East, S.W.  
Washington D.C. 20594  
Telephone: (202) 314-6150 or (800) 854-8758

You must also perfect the appeal by filing a brief in support of the appeal. **The brief must be filed within 30 days after the date of service of this order denying reconsideration or 50 days after the issuance of an oral initial decision from which reconsideration was denied, whichever is later.** You must file an original and one copy of the brief directly with the:

National Transportation Safety Board  
Office of General Counsel  
Room 6401  
490 L'Enfant Plaza East, S.W.  
Washington, D.C. 20594  
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief. Other parties to this proceeding may file a reply brief (original and one copy) with the Office of General Counsel within 30 days after the date on which they are served with the appeal brief.

**NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.**

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

**ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.**

Served: June 13, 2011

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\*\*\*\*\*

Application of

JAMES L. ROBERTS

Docket 352-EAJA-SE-18645

for fees and expenses under the  
Equal Access to Justice Act.

\*\*\*\*\*

**WRITTEN INITIAL DECISION AND ORDER DENYING  
AWARD OF ATTORNEY FEES AND EXPENSES  
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Served: Deanna L. Weidner, Esq.  
Anderson Weidner, LLC  
Suite 1450  
505 20th Street North  
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*(BY FAX AND  
CERTIFIED MAIL)*

Gerald A. Ellis, Esq.  
Federal Aviation Administration  
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*(BY FAX)*

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Sheffield, Alabama 35660  
*(BY CERTIFIED MAIL)*

**William E. Fowler, Jr., Chief Administrative Law Judge:** On February 23, 2011, applicant, through counsel, submitted to this office an application, under the Equal Access to Justice Act ("EAJA," codified at 5 U.S.C. § 504), for fees and expenses incurred in connection with his appeal of a July 1, 2009 order, by which the Administrator of the Federal Aviation Administration ("FAA") suspended his airman mechanic certificate with airframe and powerplant ratings and inspection authorization for 120 days, for alleged violations of §§ 43.9(a)(1) and 43.13(a) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.). The Administrator subsequently filed an answer to applicant's EAJA application on March 25, 2011, after which applicant submitted a reply to the Administrator's answer, on April 11, 2011. Those filings are all in order, and the matter is now ripe for disposition.

## I.

In the underlying air safety enforcement proceeding, applicant filed his appeal from the Administrator's suspension order on July 17, 2009. The Administrator then reissued that order as the complaint in the matter on July 20, 2009. The complaint contained the following factual allegations:

1. At all times material herein, you were and are now the holder of Mechanic Certificate No. [omitted], with airframe and powerplant ratings.
2. On or about May 21, 23, and June 20 2008, you performed maintenance on civil aircraft N35ED, a Learjet LR-35A.
3. You returned N35ED to service as airworthy following the above-described maintenance.
4. At the time you returned N35ED to service as described above, the aircraft was not in an airworthy condition in that it had fuel leaks that were not repaired in an acceptable manner.
5. On or about May 9, 2008, you performed maintenance on civil aircraft N840RG, a Gulfstream G-II.
6. You returned N840RG to service as airworthy following the above-described maintenance.
7. At the time you returned N840RG to service as described above, the aircraft was not in an airworthy condition in that it had fuel leaks that were not repaired in an acceptable manner.
8. The logbook entries for the above-described maintenance failed to adequately describe the maintenance that you performed.

On the basis of the facts alleged, the Administrator charged applicant with violations of FAR §§ 43.9(a)(1) and 43.13(a),<sup>1</sup> and ordered a 120-day suspension of his mechanic certificate for those alleged FAR violations.

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<sup>1</sup> The aforesaid FARs provide, in relevant part, as follows:

“§ 43.9 Content, form, and disposition of maintenance, preventive maintenance, rebuilding, and alteration records . . . .

(a) *Maintenance record entries.* . . . [E]ach person who maintains, performs preventive maintenance, rebuilds, or alters an aircraft, airframe, aircraft engine, propeller, appliance, or component part shall make an entry in the maintenance record of that equipment containing the following information:

- (1) A description (or reference to data acceptable to the Administrator) of work performed.

§ 43.13 Performance rules (general).

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16 [(which provides additional performance rules for inspections)]. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recom-

In an answer filed on July 30, 2009, applicant admitted Paragraph 1 and denied the complaint's remaining factual allegations. He also denied violating the regulatory provisions cited by the Administrator.

Subsequently, on November 25, 2009, the Administrator amended the complaint by withdrawing the allegations relating to N35ED (Paragraphs 2 through 4), stating that the inclusion of those allegations "was the result of a formatting error generated from the original Notice [of Proposed Certificate Action]," and noted that "[t]he withdrawal of those paragraphs reduced the sanction from the original notice and should therefore not affect the level of sanction requested in the Complaint [as amended]."<sup>2</sup>

Judge William A. Pope, II, who has since retired, was the presiding judge in the underlying proceeding, and an evidentiary hearing in that matter was held before him in two sessions, on March 8 and 9, 2010, and April 8 and 9, 2010. At the outset of the hearing, applicant amended his answer to the Administrator's complaint, to admit the allegations of Paragraphs 5 and 6 (see Tr. 8). As a result, the allegations remaining in dispute were that applicant had violated FAR §§ 43.9(a)(1) and 43.13(a), in that he performed maintenance on N840RG on May 9, 2008, but did not repair fuel leaks on that aircraft in an acceptable manner and returned the aircraft to service although it was not airworthy due to his failure to properly repair the fuel leaks, and that he failed to adequately describe the maintenance he had performed in the aircraft's logbook.

At the conclusion of the hearing, Judge Pope issued an oral initial decision ("OID"), in which he found that applicant had violated §§ 43.9(a)(1) and 43.13(a). With respect to the § 43.13(a) charge, Judge Pope determined that N840RG was leaking fuel on May 9, 2008, and that applicant did not perform maintenance on the fuel leaks in accordance with the requirements of the Gulfstream Maintenance Manual ("GMM"). However, Judge Pope also found that the fuel leaks, as classified in the GMM, did not render the aircraft unairworthy and that applicant, thus, did not return N840RG to service in an unairworthy condition, and he reduced the 120-day suspension of applicant's mechanic certificate that was ordered by the Administrator to a suspension of 60 days.

Both parties appealed Judge Pope's OID to the full five-member Board, which, in NTSB Order EA-5556 (served October 20, 2010), granted applicant's appeal, denied the Administrator's appeal, affirmed the IOD as to Judge Pope's finding with respect to the airworthiness of N840RG, reversed the OID as to Judge Pope's findings that applicant had violated FAR §§ 43.9(a)(1) and 43.13(d), and set aside the imposition of any sanction against applicant's mechanic certificate.

The Administrator subsequently filed with the Board a petition for reconsideration of that decision, which the Board denied in NTSB Order EA-5568 (served January 24, 2011).

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mended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator."

<sup>2</sup> All references hereinafter made in this Order to the "complaint" are to the complaint, as amended by the Administrator on November 25, 2009.

## II.

The undersigned has thoroughly reviewed the record in the underlying proceeding, including the hearing transcript and the exhibits accepted into evidence at the hearing. The Board, in NTSB Order EA-5556, provided a thorough and cogent summary of the evidence presented at the hearing, as follows (at 3-5 (footnotes and references omitted)):

On April 24, 2008, FAA Principal Maintenance Inspectors Joseph Arvay and Ken Hutcherson conducted an inspection of Darby Aviation. [(Applicant herein, who was referred to as “respondent” in the underlying proceeding, is Darby’s Director of Maintenance.)] Inspector Arvay asked Inspector Hutcherson to examine N840RG while Inspector Arvay inspected several other aircraft. Inspector Hutcherson smelled fuel, observed several hanging drops of fuel near the centerline strake, and observed fuel stains below N840RG. He pointed out these issues to Inspector Arvay and respondent. Respondent indicated N840RG had leaked fuel for 14 years and, as a Gulfstream II aircraft, had very liberal leak limits.

The inspectors obtained a copy of the Gulfstream Maintenance Manual (GMM), which provides step-by-step procedures for cleaning and repairing various classes of leaks based upon the rate of leak. The inspectors in this case acknowledged they never performed any tests on N840RG to determine the rate of the fuel leak. For heavy fuel seeps of less than 2 drops per minute, the GMM required “clean surface, record leak location, and inspect frequently.” Inspector Arvay admitted the term “inspect frequently” was ambiguous. He testified that, “to the best of [his] knowledge because it’s written so open, all that the FAA is concerned with is prior to flight to make sure that the aircraft is in a safe condition for flight.”

On April 28, 2008, the inspectors returned to Darby Aviation to review the maintenance documents on N840RG to see if respondent had been identifying the leaks and subsequently monitoring them.<sup>3</sup> The inspectors reviewed the logbook entries for N840RG, beginning in December 2006, and found no documentation showing the aircraft had a chronic leak.

As part of the logbooks Inspector Arvay later received from Darby Aviation, respondent had made a computerized logbook entry on May 9, 2008, certifying N840RG as airworthy and returning it to service. Respondent signed his name and wrote his certificate number next to the entry. As part of his airworthiness inspection, respondent was required to check for the presence of any leaks. Respondent’s logbook entry on May 9, 2008, indicated he “leaked [*sic*] checked” the aircraft before returning it to service.<sup>4</sup>

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<sup>3</sup> Said aircraft was not on the premises at that time because it was out on a flight.

<sup>4</sup> Ex. A-8 is a copy of that logbook entry. The leak check was accomplished as part of a 12-month inspection of the aircraft. Also admitted into evidence, as Ex. A-9, is a document that Inspector Arvay identified as a copy of a multipage “card” (headed “Gulfstream GII Computerized Maintenance Program”), relating to the May 9, 2008 computerized logbook entry, which bears the date May 1, 2008, on which one of the “Follow On” items listed is “Check for presence of leaks and/or fluid accumulations,” and the box for “NO SQUAWKS” is checked above applicant’s signature and handwritten certificate number. No explanation was provided as to why that card is dated May 1, 2008

Inspector Arvay also obtained maintenance records from West Star Aviation, which performed heavy maintenance for Darby Aviation. The records indicated that, on May 16, 2008, West Star Aviation repaired several leaks on N840RG, which were within limits for a heavy seep.

Mr. Richard Screen was the [D]irector of the Gulfstream II maintenance program at West Star Aviation in May 2008 when Darby Aviation brought N840RG in for heavy maintenance. During his testimony on behalf of respondent, Mr. Screen noted Gulfstream II and III aircraft typically leak because they are wet wing aircraft,<sup>5</sup> but further explained leaks were not problematic under the GMM if the rate of the leak was less than 2 drops per minute. In 17 years of working on Gulfstream aircraft, Mr. Screen could not recall seeing an entry in any logbook noting leaks were within limits. He stated a Gulfstream aircraft could leak one day and not leak the next, depending on the amount of fuel in the tank.

Applicant did not testify at the hearing. Judge Pope found both of the FAA inspectors and Mr. Screen to be credible witnesses. At the hearing, it was established that neither Inspector Hutcherson nor Inspector Arvay had expertise in, or significant experience with, Gulfstream aircraft, and that Mr. Screen has extensive experience and expertise in Gulfstream aircraft.

Exhibits A-4 and R-3 are both copies of a portion of the GMM headed “FUEL TANKS – REPAIR” (pages 801-02), which classifies fuel leaks in five categories, namely: slow seep (a leak that wets an area around the source up to ¾-inch in diameter); seep (a leak that wets an area around the source up to 1½ inches in diameter, but does not run or drip); heavy seep (a leak that wets an area around the source up to 3 inches in diameter, but does not run or exceed more than two drops per minute); drip (any leak that causes dripping from the aircraft structure at a rate of up to four drops per minute); and running leak (any leak that allows fuel to drip or run from the aircraft structure at a rate of four drops per minute or greater). Aircraft operating limitations depend on the type of leak(s) detected. Slow seeps, seeps and heavy seeps require “Clean surface, record leak location and inspect frequently.” Drips require “Return to suitable maintenance base, investigate the cause and repair before further flight.” Running leaks require that the aircraft be grounded immediately.

In his OID, Judge Pope noted that there was no direct evidence that N840RG was leaking fuel on May 9, 2008. Nevertheless, he found it significant that it was seen to be leaking fuel by the inspectors on April 24, 2008; that applicant related that it had leaked fuel for 14 years; and that it was later found to be leaking fuel by West Star Aviation on or about May 16, 2008. He reasoned that “[t]o believe that it stopped leaking fuel . . . on May 9th, then started again after that date defies reason and logic,” and that he was, therefore, “compelled to find that it was leaking fuel on or about May 9th, 2008, when . . . [r]espondent

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while the related logbook entry is dated May 9, 2008, although there is no dispute that the inspection/maintenance at issue occurred on May 9, 2008.

<sup>5</sup> As the Board observed in a footnote, “[a] ‘wet wing’ is an aircraft structure and fuel system design technique where the aircraft’s wing structure is sealed and used as the fuel tank, thus eliminating the need for fuel tanks or fuel bladders.” NTSB Order EA-5556 at 5 n.6.

signed the return to service and made that [‘leaked checked’] entry in the logbook. I find that in all likelihood the leaks were there for . . . [r]espondent to see if he had taken the trouble to look for them” (Tr. 423-24). Judge Pope also noted that applicant had not, as the GMM required, cleaned the surface and recorded the location of the leaks, and that, while leaks were brought to his attention on April 24, 2008, he did not take any action until May 9, 2008 (*id.* 424-27). Insofar as the logbook entry was concerned, Judge Pope found that “[t]here is no testimony and nothing in the logbook entry or any other reliable maintenance record to indicate what kind of fuel leaks [respondent] did look for or what procedures he followed in looking for them nor that he did anything to measure the quantity of the leaks and identify the source” (Tr. 424).

In reversing Judge Pope’s OID, the Board, upon a *de novo* review of the evidence, stated (NTSB Order EA-5556 at 8-12 (emphasis original, footnotes omitted)):

The Administrator bore the burden of proving that N840RG was leaking on May 9, 2008. The Administrator’s evidence showed respondent performed an airworthiness inspection of N840RG on that date. As part of the 12-month inspection, respondent was required to check the aircraft for leaks. Respondent wrote “leaked [*sic*] checked I/A/W [(in accordance with)] Alphjet International GMM,”<sup>6</sup> signed his name, and wrote his certificate number. Exh. A-8. The Administrator also introduced the corresponding maintenance card into evidence. Exh. A-9. On this card, respondent checked the box “no squawks,” indicating he observed no deficiencies while completing the card. *Id.* Neither of the FAA inspectors visited Darby Aviation on May 9, 2008. The inspectors did not observe N840RG leaking on that date and never measured the rate of leak under the requirements of the GMM.

In determining that respondent failed to make a specific logbook entry concerning the alleged leak, [Judge Pope] relied on leaks the FAA inspectors observed on April 24, 2008, and Mr. Screen observed on May 16, 2008. We believe these dates are too distant in time from May 9, 2008, to establish N840RG was indeed leaking on that date, and that respondent was therefore obligated to document the alleged leak. Furthermore, respondent’s comment to the inspectors that the aircraft had leaked for 14 years does not establish that the aircraft was leaking on May 9, 2008. On this topic, we consider relevant Mr. Screen’s testimony that Gulfstream aircraft could leak one day and not the next. We accordingly find the Administrator failed to present sufficient evidence to prove the aircraft was leaking on May 9, 2008. Therefore, under these circumstances, respondent’s logbook entry sufficed to fulfill his obligation under § 43.9(a)(1).

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Consistent with our finding regarding the logbook entry, we also find the Administrator did not meet his burden to prove respondent violated § 43.13(a), especially to the extent that the Administrator attempts to prove the § 43.13(a) violation by alleging N840RG was unairworthy under § 21.181(a) [(which provides that aircraft airworthiness certificates are effective as long as maintenance, preventative maintenance, and alterations are performed in accordance with Parts 43 and 91)]. In this case, the Administrator specifically pleaded that on or about May 9, 2008, when

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<sup>6</sup> Alpha Jet and Darby are related enterprises (Darby Aviation does business as Alpha Jet International).

respondent “returned N840RG to service . . . the aircraft was not in an airworthy condition in that it had fuel leaks that *were not repaired in an acceptable manner.*”

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The GMM only requires repair of leaks when a drip or a running leak is found. The FAA inspectors never determined the rate of the fuel leak for N840RG under the GMM. Mr. Screen testified that the leaks West Star Aviation found did not exceed the rate of more than 2 drops per minute, and that the GMM does not require repair of such leaks. Tr. at 356, 359. Mr. Screen also opined that N840RG was in an airworthy condition when he inspected it. Tr. at 351. Respondent’s logbook entry for May 9, 2008, indicates he leak-checked the aircraft before returning it to service. As the Administrator failed to prove by a preponderance of the evidence that any repairs were necessary, we reverse the law judge’s finding as to the § 43.13(a) violation.

As we find no § 43.13(a) violation, it logically follows that the Administrator failed to prove N840RG was unairworthy on May 9, 2008. On appeal, the Administrator argues it was not necessary to charge a violation of 14 C.F.R. § 21.181(a), because any time a mechanic fails to perform maintenance required by the maintenance manual, that failure alone renders the aircraft unairworthy. While such an interpretation may be valid, the Administrator did not provide evidence showing N840RG was leaking when respondent completed his airworthiness inspection on May 9, 2008, nor did the Administrator present testimony to establish the inspectors ever measured the rate of leak when they visited Darby Aviation. This lack of evidence regarding the measurement of the rate of leak, if any existed, defeats the Administrator’s argument that the GMM required any maintenance. Therefore, the Administrator’s argument concerning airworthiness also fails, as it is premised on respondent failing to perform certain maintenance required by the GMM.

Subsequently, in denying the Administrator’s petition for reconsideration, the Board observed that said petition raised arguments that were largely repetitious of the positions the Administrator had previously advanced in connection with the cross-appeals of Judge Pope’s OID. However, the Board assessed a principal additional position taken by the Administrator in connection with the reconsideration petition as follows (NTSB Order EA-5568 at 3 (emphasis original, references omitted)):

In this petition, the Administrator asserts, for the first time, “[i]t was [r]espondent’s duty to document the location of known leaks” regardless of whether the aircraft was leaking on May 9, 2008 — the date respondent returned it to service. The Administrator further contends “[t]he [c]omplaint d[id] not allege that the aircraft was leaking on May 9, nor was that the intent of the allegation.” We find this argument completely contrary to the arguments the Administrator asserted both at the hearing and on appeal before this Board. In fact, the Administrator’s entire case focused on whether the aircraft was leaking when respondent returned it to service. We find the Administrator’s current contention — that respondent should have recorded any *known* leaks and the rate of those *known* leaks regardless of whether the aircraft *actually* was leaking on May 9, 2008 — inconsistent with the Administrator’s charge and previous litigation positions. Presuming, as found in this case, an aircraft was not leaking on a given day, the Administrator cannot expect a mechanic to record the location of a non-existent leak, let alone record the rate of leak for the non-existent leak.

## III.

Under the EAJA, “[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award [of such fees and expenses] unjust.” 5 U.S.C. § 504(a)(1).

In this case, it is unquestioned that applicant was a prevailing party in the underlying air safety enforcement proceeding. Thus, the central question with which the undersigned is presented is whether the Administrator was substantially justified in pursuing a certificate action against him.

On the issue of substantial justification, it is well-settled that the burden is on the agency that prosecuted the underlying administrative action to demonstrate that it was substantially justified in so doing.<sup>7</sup> If the agency's case was weak or tenuous in nature, or without a reasonable basis in law or in fact, substantial justification will be found lacking.<sup>8</sup> Under the reasonableness in fact and law criteria, the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the agency's legal theory.<sup>9</sup> Reasonableness in fact and law should be judged as a whole, including whether “there was sufficient reliable evidence initially to prosecute the matter,” and at each succeeding step of the proceeding.<sup>10</sup> However, it is not whether the agency won or lost in such litigation that determines whether its position was substantially justified.<sup>11</sup>

Here, the Administrator's complaint in the underlying proceeding charged applicant with violations of FAR §§ 43.9(a)(1) and 43.13(a), for purportedly: (1) failing to repair fuel leaks in an acceptable manner during inspection/maintenance he performed on N840RG on May 9, 2008; (2) returning that aircraft to service in an unairworthy condition on that date due to such failure to properly repair the fuel leaks; and (3) failing to adequately describe the work he performed in the aircraft's maintenance records.

<sup>7</sup> See, e.g., *Application of Wendler*, 4 NTSB 718, 720 (1983), affirmed *sub nom.*, *Wendler v. Nat'l Transp. Safety Bd.*, Dkt. 83-1905 (10th Cir. 1985). This burden of proof is also specifically set forth in Rule 5(a) of the Board's EAJA Rules (codified at 49 C.F.R. § 826.5(a)).

<sup>8</sup> See, e.g., *Application of Catskill Airways, Inc., et al*, 4 NTSB 799, 800 (1983); *Application of Waingrow*, 5 NTSB 372, 375 (1985); *Application of McCrary*, 5 NTSB 1235, 1238 (1986), citing *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1486 (10th Cir. 1984). See also EAJA Rule 5(a).

<sup>9</sup> *Application of U.S. Jet, Inc.*, NTSB Order EA-3817 at 2 (1993); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *United States v. 2,116 Boxes of Boned Beef*, *supra*, 726 F.2d at 1487.

<sup>10</sup> *Application of U.S. Jet, Inc.*, *supra*, at 2; *Application of Philips*, 7 NTSB 167, 168 (1990).

<sup>11</sup> *Application of U.S. Jet, Inc.*, *supra*, at 3. See also *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986); *Application of Grant*, NTSB Order EA-3919 at 4 (1993).

In reversing Judge Pope's OID, the Board found grossly insufficient to support a finding of a violation of either § 43.9(a)(1) or § 43.13(a) evidence that leaks were previously found on N840RG on April 24, 2008 and/or subsequently found on or about May 16, 2008. In so doing, the Board noted that the record was wholly devoid of any evidence that said aircraft was leaking fuel on May 9, 2008. The only witnesses testifying on behalf of the Administrator were two FAA inspectors, neither of whom had expertise or significant experience with Gulfstream aircraft, and neither of whom observed N840RG on May 9, 2008. On the other hand, applicant's witness, Mr. Screen, who was the director of a repair station's Gulfstream II maintenance program, and had lengthy experience and expertise on Gulfstream aircraft, testified that, while Gulfstream II aircraft frequently leaked fuel (often in amounts considered minor under the GMM), they could readily leak fuel one day but not the next. Nevertheless, despite this being the common nature of Gulfstream II aircraft, the Administrator charged applicant with FAR violations in the underlying proceeding based on the supposition that, because fuel leaks were found on April 24, 2008 and again on or about May 16, 2008, that aircraft must have been leaking fuel on May 9, 2008 when applicant performed scheduled maintenance on it. Given the complete lack of evidence that N840RG was leaking fuel on May 9, 2008 and the known propensity of Gulfstream II aircraft to leak fuel intermittently, the undersigned believes that the Administrator's prosecution of the underlying certificate action under such circumstances was not reasonable in law and fact, and was, thus, not substantially justified.

#### IV.

Turning to the propriety of an award of fees and expenses to applicant in this matter, the undersigned notes that the Administrator has argued, in the answer to applicant's EAJA application, both that the amount of attorney fees he has claimed in his application is excessive, as that claim did not take into account the hourly limit on attorney fees for which reimbursement is permitted under Rule 6(b)(1) of the Board's EAJA Rules (codified at 49 C.F.R. § 826.6(b)(1)), and that the submission of a billing that was addressed by his counsel to Darby Aviation evidences that the attorney fees he seeks to recover were not actually incurred by him. As is noted above, a party that has prevailed against an agency in an administrative proceeding such as the underlying aviation safety enforcement action is, under the EAJA, entitled to reimbursement of fees and expenses *incurred by that party* where there was no substantial justification for the agency's prosecution of that action.

In his reply to the Administrator's answer, applicant states (at 10-11 (emphasis added)):

The Administrator's argument that because [applicant]'s counsel also represented Darby Aviation in other matters and that one of the invoices was *inadvertently* addressed to Elton Darby at Darby Aviation's place of business does not establish that [applicant] has not incurred the debt.

In fact, neither Darby Aviation, nor Elton Darby have paid [applicant]'s legal fees and expenses. . . . [Applicant] is legally obligated to pay the fees and expenses. . . .

. . . . [Applicant] has agreed to pay any fee award over to Anderson Weidner, LLC. . . . [He] is legally obligated to pay the fees any amounts not recovered.

Accompanying applicant's reply are copies of invoices that have been amended to reflect the hourly limit on attorney fees set forth in EAJA Rule 6(b)(1) and to all list applicant as the invoices' addressee.<sup>12</sup> Also accompanying the reply are affidavits from Deanna L. Weidner, Esq., applicant's counsel herein, and Elton Darby. In her affidavit, Ms. Weidner attests that applicant "is legally obligated to pay for the fees and expenses associated with this case" (¶ 4), and "has agreed to pay any fee award under the Equal Access to Justice Act to Anderson Weidner, LLC. [He] is legally obligated to pay any amounts not recovered" (¶ 6). Mr. Darby attests in his affidavit that applicant has "incurred fees and expenses in conjunction with [his] defense of the allegations asserted in this action" (¶ 4); that "Darby Aviation dba Alphajet International has paid only a fraction of [applicant]'s legal fees or expenses" (¶ 5); and that "[t]here is no express indemnity agreement between Darby Aviation and [applicant]" (¶ 6).

Nowhere in the original invoices applicant has submitted with his application, the amended invoices that are attached to his reply, or elsewhere in his submissions, is the payee of any fee or expense items so designated.

As a result of this, the undersigned directed personnel from this office to conduct a conference call with counsel for the parties, and request that applicant provide clarifying information. Subsequently, Mr. Darby and Ms. Weidner submitted affidavits in accordance with that request.

In his affidavit, Mr. Darby attests that "[i]n November and December, 2009, we received invoices from Anderson Weidner for work performed for Darby Aviation in separate matters. I did not learn until a later date that Anderson Weidner mistakenly included fees from [applicant's] case in those invoices, of which we paid \$1,992.32. . . . These are the only fees that we have paid to Anderson Weidner with regard to the [applicant's] matter and these fees were inadvertently paid. I have been told that these amounts have been credited to Darby Aviation. . . . There is no express indemnity agreement between my company, Darby Aviation, or me, and [applicant]" (¶¶ 4-6).

Ms. Weidner, in her affidavit, attests that, "[i]n November and December, 2009, we mistakenly sent invoices to Darby Aviation that included a few minor fees due on the [applicant's] case" (¶ 8). She goes on to detail billing entries from November 27 and 30, 2009, and December 2 and 4, 2009 (*id.*), and further attests, "I am not aware of any other fees for services rendered to [applicant] that were paid by Darby Aviation. It was a mistake that any of the [applicant's] time was included on the November 2009 and December 2009 bills to Darby Aviation and these items have been credited to the Darby Aviation invoices" (¶ 9).

The undersigned notes that applicant initially acted *pro se* in the underlying proceeding, and made submissions on his own behalf as late as November 24, 2009, and that Ms. Weidner did not enter an appearance as applicant's counsel in that matter

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<sup>12</sup> The invoice that was initially addressed to Elton Darby at Darby Aviation's place of business, and was amended to bear applicant's address, covers attorney services rendered by Anderson Weidner, LLC, between April 1 and May 31, 2010, and expenses for charges incurred for legal research on Westlaw on June 30, 2010.

until February 1, 2010. Consequently, applicant would not be entitled to recover fees for any services she or any other attorneys associated with her firm may have rendered on his behalf prior to that date, although applicant's reply is accompanied by amended invoices that include services rendered by Ms. Weidner her and her partner between November 25, 2009 and January 29, 2010. The matters referenced by Ms. Weidner and Mr. Darby in their most recent affidavits are, thus, of no consequence to any EAJA award to which applicant may be entitled.

Insofar as the attorney services rendered on or after February 1, 2010 are concerned, the undersigned has thoroughly reviewed the amended invoices accompanying applicant's reply and noted that certain descriptions of attorney services that were nominally billed to him obviously do not relate at all to him or his air safety enforcement case and associated EAJA claim. In particular, the following items were noted (quoting from the invoices, emphasis added to reference items clearly unrelated to applicant):

- |           |   |
|-----------|---|
| Mar-23-10 | Correspond with R. Screen (.2); review additional documents sent by [counsel for Administrator] in [applicant's] case (.6); begin draft of affidavit (1.0); <i>telephone conference with NTSB regarding answer date [applicant's answer in the underlying proceeding was filed long before March 23, 2010] and waiver of emergency procedures [the underlying matter here was a non-emergency proceeding] (.3); review rules of procedure (.5)"</i> |
| Apr-02-10 | <i>Emails regarding issues on sale of business; conversation with [partner] regarding the same and status of pending cases</i>  |
| Apr-02-10 | Telephone conference with R. Screen; <i>review response to D. Anderson's questions; correspond regarding R &amp; G Aviation; conference with D. Anderson regarding status and issues on sale of business</i>  |
| Apr-05-10 | <i>Emails regarding claims against FAA and issues on transfer of certificate; conversation with [partner] regarding the same; preparation for [applicant's] trial [(i.e., second session of his hearing in the underlying matter)]; review pleadings, schedules and Rule 11 letter</i>  |
| Apr-05-10 | Telephone conference with T. Ramee; telephone conference with R. Screen; work on M. Wannan affidavit; <i>conference with D. Anderson regarding transfer of certificate and claims against FAA</i>   |
| Apr-08-10 | Attend and assist with trial of [applicant's] case before Judge Pope; <i>draft and review Answer in manual case</i>   |
| Apr-09-10 | Attend and assist with trial and conclusion of [applicant's] case; <i>review release; conferences with [partner] re response; review complaint and</i>  |

	documents; <i>email E. Darby regarding questions about consideration and communications</i>
Apr-09-10	Closing arguments; telephone conference with [applicant]; telephone conference with R. Screen; telephone conference with E. Darby; telephone conference with J. Morrison; <i>telephone conference with Associated Press; work on press release; emails with E. Darby regarding the same; return travel from Nashville</i>
May-27-10	<i>Correspondence to Judge Benkin regarding closing argument extension; conversation with [partner] regarding [applicant's] brief</i> <sup>13</sup>

In view of these numerous items that included matters pertaining to Darby Aviation's business that were clearly not related to applicant, but were nominally billed to him on the submitted invoices, the undersigned believes that they likely originally appeared on billings that were sent to Darby for all legal services provided to that company by Anderson Weidner, LLC, including the representation of applicant in the underlying certificate action, and that Darby Aviation was responsible to Anderson Weidner, LLC, for payment of all such legal fees and associated expenses, including those arising from that firm's representation of applicant in that matter.<sup>14</sup> On that basis, the undersigned must conclude that applicant did not incur the fees and expenses for which he seeks reimbursement in this EAJA action. See *Application of Livingston*, NTSB Order EA-4797 (1999). Accordingly, his EAJA claim must be denied.

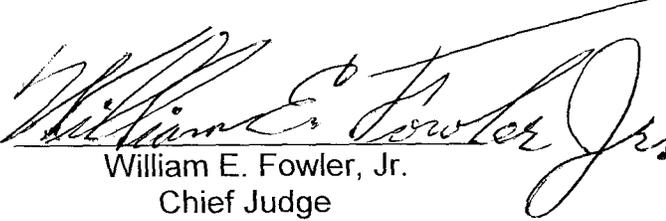
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<sup>13</sup> Also of note is a May 5, 2010 expense item, for \$907.80, that is listed on one of the amended invoices for "Neal R. Gross; copy of transcripts and exhibits." Court reporting services for the hearing in the underlying proceeding were provided by Free State Reporting, Inc., the Board's contracting court reporting service, and not Neal R. Gross and Company, Inc. Moreover, under the Board's court reporting contract, Free State provides copies of hearing transcripts in aviation safety enforcement proceedings to the parties free of charge.

<sup>14</sup> The involvement of Anderson Weidner, LLC, which provides legal counsel to Darby Aviation in other matters, in applicant's case for approximately two months before Ms. Weidner entered her appearance as his counsel in the underlying proceeding further suggests that Darby was financially accountable to that firm for the legal work it performed for applicant connection with that proceeding.

THEREFORE, IT IS ORDERED that the application in this proceeding for fees and expenses under the EAJA is hereby DENIED.

Entered this 13th day of June, 2011, at Washington, D.C.

  
William E. Fowler, Jr.  
Chief Judge