No. 24-1754

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

U.S. SECURITIES and EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

GREGORY LEMELSON a/k/a FR. EMMANUEL LEMELSON and LEMELSON CAPITAL MANAGEMENT, LLC,
Defendants – Appellants,

and

THE AMVONA FUND, LP,
Relief Defendant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF AMICUS CURIAE SOUTHERN POLICY LAW INSTITUTE SUPPORTING DEFENDANTS-APPELLANTS FOR REVERSAL

Theodore M. Cooperstein (Bar No. 1205620)
THEODORE COOPERSTEIN PLLC
1888 Main Street, Suite C-203
Madison, MS 39110
Telephone: (601) 397-2471
ted@appealslawyer.us

Counsel for Amicus Curiae

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DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Local Rule 26.1, *amicus curiae* Southern Policy Law Institute states that it has no parent corporation and no publicly held stock.

INTEREST OF *AMICUS*[1]

The parties on appeal have each consented to the filing of this *amicus curiae* brief.

The Southern Policy Law Institute (SPLI) is a nonprofit, nonpartisan 501(c)(3) public policy educational research organization charged with researching, developing, and promoting public policy alternatives that advance individual liberties, support local self-government, and promote entrepreneurship and job creation. SPLI is substantially supported by contributions. Its activities include publications, public events, media commentary, invited executive and legislative consultation, and community outreach.

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[1] *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel has made monetary contributions to its preparation and submission.

In the present appeal, SPLI urges reversal, because SPLI supports public interest litigation that defends economic opportunity and individual liberty. Appellant Lemelson's position favoring award of fees under the Equal Access to Justice Act (EAJA) corresponds to SPLI's desire to remove obstacles impeding, and maximize avenues for, proper remedies against improvident government action.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews decisions for award of fees under the Equal Access to Justice Act ("EAJA") for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 559 (1988); *id.* at 575 (Brennan, J., concurring in part); *Schock v. United States*, 254 F.3d 1, 4 (1st Cir. 2001). The Court will find an abuse of discretion "when a material factor deserving significant weight is ignored, when an improper factor was relied upon, or when all proper and. Improper factors are assessed, but the [district] court makes a serious mistake in weighing them." *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos*, 38 F.3d 615, 618 (1st Cir. 1994).

Facts upon which the court based its EAJA award are reviewed for clear error. *Sierra Club v. Sec'y Army*, 820 F.2d 513, 519 (1st Cir. 1987); *SEC v. Kluesner*, 834 F.2d 1438, 1439-40 (8th Cir. 1987).

The Court reviews *de novo* statutory interpretations and conclusions of law applying EAJA to particular claims and issues. *McLaughlin v. Hagel*, 767 F.3d 113, 117 (1st Cir. 2014); *Kluesner*, 834 F.2d at 1440.

The Government has the burden of proving there was substantial justification for its litigating position as to the matter on which the claimant prevailed. *Saysana v. Gillen*, 614 F.3d 1, 5 (1st Cir. 2010); *Schock*, 254 F.3d at 5. The Government "must show not merely that its position was *marginally reasonable*, but that its position must be *clearly reasonable*, well founded in law and fact, solid though not necessarily correct." *Kluesner*, 834 F.2d at 1440 (emphasis original). "[T]he government's case need not be frivolous to support an award of fees." *Dantron, Inc. v. U.S. Dep't Lab.*, 246 F.3d 36, 41 (1st Cir. 2001); *Pierce*, 487 U.S. at 566 n.2. A preponderance of evidence sets the Government's burden of proof. *Saysana*, 614 F.3d at 5.

II. EAJA awards fees to prevailing parties when the Government position was not substantially justified. Lemelson prevailed on two counts at jury trial. The Government was not substantially justified as to those counts.

The trial court ruled against Lemelson's request for fees based on the two claims against which Lemelson prevailed at trial, because the SEC had already defeated Lemelson's pretrial Motion to Dismiss, *SEC v. Lemelson*, 355 F. Supp. 3d 107, 109 (D. Mass. 2019) (Section 10(b) claim), and Lemelson's Motion for Summary Judgment, *SEC v. Lemelson*, 532 F. Supp. 3d 30, 39-45 (D. Mass. 2021) (Section 10(b) claim and Investment Advisers Act claim). Addendum to Appellant's Opening Brief (Add.) at 6. *SEC v. Lemelson*, No. 18-cv-11926, 2024 WL 3507495 (D. Mass. July 23, 2024). The court deemed these two claims therefore sufficiently justified.

Lemelson is the prevailing party as to the counts on which the jury returned a defense verdict. Add. 5 ("Defendants have proven they qualify as a 'prevailing party' under the EAJA on at least some of the SEC's claims."). As to those counts or claims, Lemelson is entitled to fees under EAJA, if the Government cannot substantially justify those claims. Add. 5; 2024 WL 3507495 at *2.

Case law defines "substantially justified" as "justified to a degree that could satisfy a reasonable person," *Pierce*, 487 U.S. at 565; *United States ex rel Wall v. Circle C Constr., LLC*, 868 F.3d 466, 470 (6th Cir. 2017); *Schock*, 254 F.3d at 5. "As a matter of ordinary usage, 'unreasonable' means 'not governed by reason' or 'exceeding reasonable limits; immoderate.'" 868 F.3d at 470. *See also Unreasonable*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("... 3. Not reflecting good judgment; irrational or capricious ... 4. Not within sensible of rational limits; excessive").

The Government position was not substantially justified.[2] As plaintiff before the jury, the Government had a burden to provide the jury with a preponderance of evidence proving the claims against Lemelson. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2131 (2024) ("federal securities law employs the burden of proof typical in civil cases"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (preponderance of the evidence standard

[2] Lemelson objects to the ruling that the SEC position was "substantially justified," but chose to focus the Opening Brief on the issue of "excessive demand" under the EAJA. Appellant's Opening Brief ("Br.") at 11 n.5. The Court should nonetheless consider the "substantial justification" issue, as it informs both provisions of the EAJA, and will guide the Court's resulting precedent.

applies); *Fishman Transducers, Inc. v. Paul*, 684 F.3d 187, 192-93 (1st Cir. 2012).

On each of two counts, the jury found for Lemelson, thereby, as finder of fact, the jury determined that the Government did **not** meet its burden of preponderance of the evidence. When the Government "falls short of the necessary quantum of proof, ... it does not demonstrate the [Government's] litigating position was justified, let alone 'substantially' so." *Loumiet v. Off. Controller Currency*, 650 F.3d 796, 800 (2011), *costs awarded pet'r*, 2012 WL 556151 (D.C. Cir. Feb. 1, 2012).

By denying fees to Lemelson, the trial court misread and misapplied the Supreme Court's controlling precedent in *Pierce v. Underwood*. Reviewing the history of the Government's case against Lemelson, the opinion noted that Lemelson had failed in both motions to dismiss the complaint and for summary judgment. Add. at. 5-6; 2024 WL 3507495 at *2. The court seized upon language in *Pierce*, 487 U.S. at 569, to deem this internal case timeline as a "string of losses [that] can be indicative"

of a substantially justified position of the Government obviating any fee award. Add. 6; 2024 WL 3507495 at *2.

But the *Pierce* Court was describing the situation of a government agency pressing a certain interpretation of the law, and applied to multiple defendants across multiple cases with differing facts in multiple courts — in that sequence of events, "a string of losses can be indicative; and even more so a string of successes." 487 U.S. at 569. The Supreme Court was describing a consistent application, over time, of a government legal position in a succession of **separate** litigations — and **not** a number of failed motions, in the same one case, against an individual defendant.

Indeed, to the contrary, as to any single case, this Court has noted, "A position which is substantially justified at the initiation may not be justified later in the agency's continuation of the litigation." *Schock*, 254 F.3d at 5. The "government's successes below are not, by themselves, enough to demonstrate that the government's position is substantially

justified." *McMillan v. DOJ*, 2016 WL 11812593 at *2 (Fed. Cir. June 9, 2016) (a string of successes "is not dispositive").

In denying the fees award under EAJA, the court abused its discretion in the absence of substantial justification for the Government charges. *See Circle C Constr.*, 868 F.3d at 470 (properly reading *Pierce* as to "the fact that **one other court** agreed or disagreed with the Government") (emphasis added).

EAJA requires "that the district court do more than explain, repeat, characterize, and describe the merits … decision. Courts evaluating substantial justification must instead analyze *why* the government's position failed in court." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (emphasis original) (Roberts, Cir. J.); *see also United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000) ("the district court must reexamine the legal and factual circumstances of the case from a different perspective than that used at any other stage of the proceeding"); *Taucher*, 396 F.3d at 1175 ("In considering substantial

justification under EAJA, however, it is not enough to repeat the analysis of the merits decision, and add adjectives.").

III. EAJA awards fees when the Government demand proves excessive in comparison to the trial result. The SEC sought disgorgement in the amount of $1.3 million, yet the trial court denied the disgorgement demand entirely. The SEC made excessive demands as to the counts on which Lemelson prevailed.

The trial court also denied the request for EAJA fees on the independent basis of excessive demand by the SEC. Add. 6. The court found the Government demand for disgorgement by Lemelson was not excessive, as the statute requires. Add. 7-9. Yet the fact that the court ultimately found SEC entitled to absolutely no disgorgement deems any significantly disparate amount demanded for disgorgement to have been "excessive." *See Excess*, BLACK'S LAW DICTIONARY ("2. ... exceeding one's authority or overstepping a prescribed limit or going beyond one's rights"). *See also Circle C Constr.*, 868 F.3d at 470 ("[T]he damages the government sought in this case were 'fairyland' rather than actual.").

EAJA requires award of fees when the Government original demand is "substantially in excess" in comparison to the final result obtained at

trial. 28 U.S.C. § 2412(d)(1)(D). *See Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 327 (D.C. Cir. 2004) ("There is scant case law interpreting § 2412(d)(1)(D)."). The SEC complaint alleged and tried before the jury sought a certain amount of damages in its unsuccessful demand for disgorgement by Lemelson of all profits. Add. 7-8.

Federal Rule of Civil Procedure 15 deems an amended complaint to relate back *nunc pro tunc*, as though stated in the original complaint. FED. R. CIV. P. 15(c). *Norfolk Cnty. Ret. Sys. v. Cmty. Health Sys., Inc.*, 877 F.3d 687, 693 (6th Cir. 2017) (In securities fraud case, Rule 15 "standard is met if the original and amended complaints allege the same general conduct and general wrong. … The allegations in the amended complaint thus relate back to those in the original complaint.").

The relation-back doctrine embraced by Rule 15(c) "has its roots in the former federal equity practice and a number of state codes." 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1496, at 64 (2d ed. 1990). *Compare* 28 U.S.C. § 2412(b) ("The United States shall be liable for such fees and expenses to the same extent that any other party

would be liable under the common law or under terms of any statute which specifically provides for such an award.").

The SEC amended complaint alleging $1.3 million in illicit profits to be disgorged relates back to the filing of the original complaint and thereby operates as a demand from start of the proceeding. FED. R. CIV. P. 15(c).

In *Scarborough v. Principi*, 541 U.S. 401 (2004), the Supreme Court held the relation back doctrine of amendment embraces applications for EAJA fees. "Just as failure initially to verify a charge or sign a pleading, written motion, or other paper, was not fatal to the petitioners' cases ..., so here, counsel's initial omission of the assertion that the Government's position lacked substantial justification is not beyond repair." 541 U.S. at 418-19 (Ginsburg, J.).

Rule 15 of the Rules of Civil Procedure by itself operated to relate the amended complaint back to the date of filing this action, for all purposes and effects of trial on the merits. FED. R. CIV. P. 15(c)(1)(B). So too, the Rule should equate the SEC amended statement of $1.3 million in disgorgement demanded to the initial SEC complaint and operate from the date of first

filing. *See FDIC v. Conner*, 20 F.3d 1376, 1386 (5th Cir. 1994) ("The best touchstone for determining when an amended complaint relates back to the original pleading is the language of Rule 15(c).").

If Rule 15 alone were not enough, the doctrine applied in *Principi* affirms its application to EAJA fee determinations: "The relation-back doctrine, we accordingly hold, properly guides our [EAJA] determination." 541 U.S. at 418.

The opinion held that the SEC claim for disgorgement was exempt from the statute, in that the demand merely represented "a recitation of the maximum statutory penalty." Add. 7; 2024 WL 3507495 at *3; *see* 28 U.S.C. § 2412(d)(2)(I). But a maximum statutory penalty must have an objective, outside reference to a statute. Br. 24 (maximum disgorgement amount has never been codified by statute). *See Liu v. SEC*, 591 U.S. 71, 85-86, 91 (2020). Instead, the opinion denying EAJA fees substituted a subjective self-referential standard from within the individual SEC complaint directed at this defendant — and not an objective, outside limit imposed by the

legislature on the Government's reach or enforcement power. This violates the spirit and the letter of EAJA.

The disgorgement awarded to the SEC after trial was **ZERO** dollars. *See* Br. 21. "To say that the government's demand was substantially in excess of the judgment, only understates matters." *Circle C Constr.*, 868 F.3d at 470. *See* Add. 9 ("The Court acknowledges the large disparity."); Br. 26. Accordingly, a disgorgement demand for $1.3 million is excessive under EAJA and Lemelson merits award of fees.

CONCLUSION

The Court should reverse and remand for calculation and award of fees to Lemelson under EAJA.

December 4, 2024

/s/ Theodore M. Cooperstein
Theodore M. Cooperstein (Bar No. 1205620)
THEODORE COOPERSTEIN PLLC
1888 Main Street, Suite C-203
Madison, MS 39110
Telephone: (601) 397-2471
ted@appealslawyer.us

Counsel for Amicus Curiae
Southern Policy Law Institute