

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<p>THE GRAY PANTHERS PROJECT FUND, et al.</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>TOMMY G. THOMPSON, Secretary of Health and Human Services,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p style="text-align: right;">Civil Action No. 01-01374 (HHK)</p>
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**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS’ APPLICATION FOR
ATTORNEY’S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

INTRODUCTION

The parties are in agreement on several key points. First, the defendant Secretary recognizes that his position was not substantially justified, *i.e.*, that his actions were not reasonable. See, *e.g.*, *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C.Cir. 2000). Second, the Secretary does not dispute that the market rates claimed by plaintiffs under 28 U.S.C. 2412(b) are appropriate. Third, he agrees that, with one exception (for 14 hours), plaintiffs are entitled to fees for all the hours claimed.

There remain two significant disagreements: (1) Although conceding that his actions were unreasonable, the Secretary contends, in the face of controlling circuit precedent directly on point, that his behavior did not amount to bad faith. (2) In the alternative, he argues that, even if there was bad faith, market rates should only be applicable for the work up through the preliminary injunction. The result of these differences is significant. It causes the fee amount to range from plaintiffs’ original request of \$166,744 (now increased because of additional work to

\$173,922) to defendant's suggestion of \$61,863 (on the theory that his actions were only unreasonable), a 63% reduction. Plaintiffs maintain, however, that, as the Secretary's behavior was an intentional violation of a clear statutory duty owed to Medicare beneficiaries, he should be sanctioned with a bad faith finding and an award of the full amount requested.

I. THE SECRETARY'S ACTIONS NECESSITATE A FINDING OF BAD FAITH WHICH WARRANTS AN AWARD OF FEES AT MARKET RATES FOR ALL THE WORK PERFORMED IN THIS CASE.

A. The Secretary's rationalizations cannot camouflage his flagrant, secretive, and unilateral decision to ignore explicit statutory directives designed to protect vulnerable Medicare beneficiaries, which is precisely the behavior defined as bad faith in this circuit.

The main dispute is whether the Secretary's behavior was bad faith, which allows fees to be awarded at market rates. The Secretary attempts to ignore the controlling case law by contending that the law does not support a bad faith finding based on the conduct which forced the litigation. He thus emphasizes that his actions after being ordered to comply with statutory directives were acceptable, while also attempting to minimize the misbehavior which required this litigation. The Secretary's view of the case law is grossly in error, but his twisting of events requires a response in order to place the matter in perspective for application of the correct legal principles.

The Secretary's revisionist view is premised in large part on his compliance with the court's preliminary injunction, which "involved quick action and very significant commitment of resources." Def. Opp. at 3. Left unsaid is that the Secretary's litigation position prior to the preliminary injunction was that he could *not* meet the deadline, but this Court harshly rebuked him for that attitude and directed him in no uncertain terms to comply. See Tr. of August 9, 2001 hearing (attached as ex. A to Pl. Opening Mem. on fees), at 11, lines 3-13; see also *id.* at 8,

lines 9-13. It was only due to those directives that he did comply. Memorandum Opinion of Sept. 6, 2002 (“Mem. Op.”) at 5 n. 5. The Secretary cannot recast the quality of his behavior by bragging that he complied with a court order which had left no doubt as to the Court’s dissatisfaction with his actions and intentions.¹

Another element of this approach is his contention that the blatantly illegal behavior was essentially benign. Def. Opp. at 9. That is factually wrong. The Secretary was responding to continuing complaints from MCOs and was trying to pacify them, which he did. See McMillan Declaration of August 3, 2001, ¶¶ 7-14, 16. That this was the motivating factor is demonstrated by the secrecy and speed with which he acted, all of which was done behind the backs of Medicare beneficiaries. See Pl. Opening Mem. at 2-3.

His contention that he did not intend to hide his actions, Def. Opp. at 10-11, borders on the disingenuous. His letter of May 25, 2001 was a direct repudiation of his position not only from previous years but from just a month before, when he had confirmed the traditional cycle of actions, including the MCOs’ filing date and the mailing of comparative written information.

¹ The Secretary also ignores the fact that he did not oppose plaintiffs’ summary judgment motion, a de facto admission that he had no argument on the merits. Instead, he used his compliance with the preliminary injunction as a springboard to urge dismissal of the case as moot. After this Court rejected that contention, the Secretary’s short-lived appeal of that dismissal was dismissed at his request on December 13, 2002, before briefing had even begun. 2002 WL 31818492 (D.C.Cir.). In short, the Secretary has offered no remotely legitimate argument – substantive or jurisdictional – in support of his position.

And he was fully aware that the change in filing date would harm beneficiaries: “[A]ny delay in renewal decisions and rate filings has a direct effect on the information that is provided to beneficiaries to make health care choices.” Thompson Letter of May 25, 2001 (attached as exhibit A to complaint).

Furthermore, the letter was just the first step; the memoranda which followed in the next three weeks explained that the written comparative information would not be sent to beneficiaries (because the plan information, under the Secretary’s revised schedule, would be received too late). While these memoranda were publicized on a web site for providers, they were not put on web sites for beneficiaries. See Pl. Opening Mem. at 13. The Secretary knew exactly what he was doing: he was cutting a deal which violated the statutes in order to appease a powerful provider group and to the detriment of beneficiaries from whom he was trying to hide his actions.

Furthermore, not only does the legislative action in 2002 “not exonerate the agency’s actions in 2001” (as the Secretary concedes), but it also does not show that the Secretary’s “concerns ... were *bona fide*” Def. Opp. at 10. Congress did *not* alter the Secretary’s obligation to mail the comparative written information to beneficiaries, the critical decision at the heart of this case. Mem. Op. at 4 n. 4. Whatever can be inferred from Congress’ temporary change in deadlines has no significance whatsoever with respect to the Secretary’s determination not to comply with the explicit mandate of 42 U.S.C. § 1395w-21(d), which has never been altered.

The Secretary’s effort to rewrite the factual background of this case is intended to fit into his legal theory. That theory, however, largely ignores the explicit holding of the D.C. Circuit

on which plaintiffs rely. It bears repeating, because the Secretary never directly confronts that decision:

Bad faith in conduct giving rise to the lawsuit may be found where a party, confronted with a clear statutory ... duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights.

American Hosp. Ass'n v. Sullivan, 938 F.2d 216, 220 (D.C.Cir. 1991) (“*AHA*”) (citation and quotation marks omitted). Given that standard, the Secretary’s discussion of his allegedly benign and efficient actions before and after the complaint was filed are essentially irrelevant: his blatant repudiation of the statutory scheme (which is far more than the mere “recalcitrance” required under the *AHA* standard above) “forced [plaintiffs] to undertake otherwise unnecessary litigation to vindicate plain legal rights.”²

² The Secretary’s argument that plaintiffs did not primarily attack the substance of the May 2001 decision, but only the process (Def. Opp. at 10), is simply wrong. The whole thrust of plaintiffs’ argument is directed at the Secretary’s decision to change the statutory scheme to allow late filings by MCOs and to refuse to mail the written comparative information. These actions forced plaintiffs to file this lawsuit and are at the heart of his bad faith. Plaintiffs’ discussion which the Secretary claims is “focused on process” demonstrates the extent of the misconduct and explains the Secretary’s determination to accomplish his goal, but his bad faith lies squarely in the decision to repudiate the statutory scheme.

Unable to confront the fact that his behavior fits precisely within this definition of bad faith, the Secretary pretends that *AHA* does not correctly state the law. Citing decisions from other circuits, he opines that “[t]he majority rule is that bad faith fees may *not* be premised solely on the business conduct from which the underlying cause of action arose.” Def. Opp. at 11. Whether that is the “majority rule” is of no consequence, however, for the law of *this* Circuit is that “[b]ad faith can support an award of attorneys’ fees in circumstances where the bad faith (1) occurred in connection with the litigation, *or* (2) was an aspect of the conduct giving rise to the lawsuit.” *Id.* at 219 (citation omitted).³ That is, the bad faith can be found in behavior at *either* point.

The Secretary then argues that the D.C. Circuit decisions somehow support his position. First, he contends that the *AHA* holding was in an ongoing litigation context. Def. Opp. at 11. The fallacy of this argument is that the Court of Appeals expressly stated that the offending rule published after the stipulation in that case was “conduct ... analogous to conduct giving rise to litigation ...” 938 F.2d at 220. In other words, the Court of Appeals affirmed the bad-faith finding precisely because the scenario of that case was *comparable to* a situation where conduct which gives rise to litigation. The decision strengthens rather than undercuts the validity of a

³ See also, *e.g.*, *Maritime Management, Inc. v. U.S.*, 242 F.3d 1326, 1335 (11th Cir. 2001) (quoting and relying on *AHA*); *Nepara Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688, 701-702 & n. 102 (D.C.Cir. 1986) (citing a line of decisions going back to 1951 which support a bad-faith finding when the bad faith “was an aspect of the conduct that gave rise to the lawsuit”); *McQuiston v. Marsh*, 707 F.2d 1082, 1086 (9th Cir. 1983); *Kramer v. Secretary of Defense*, No. 96-0497 (HHK) (D.D.C., March 29, 2001), at 4 (copy attached as Ex. 1 to Def. Opp.);10 Wright, Miller, and Kane, *Federal Practice & Procedure*, § 2675 at 349-353 (3d ed.1998).

bad-faith finding premised on prelitigation conduct which violates a clear duty.⁴

Second, the Secretary argues that the bad faith at issue in another decision by the Court of Appeals, *Ass'n of American Physicians and Surgeons, Inc. v. Clinton*, 187 F.3d 655 (D.C.Cir. 1999), could only be raised because it involved litigation conduct. The decision includes no discussion of any distinction between prelitigation and litigation conduct, however. Moreover, the Court of Appeals' reason for reversing the district court's finding of bad faith supports plaintiffs' position here, as it relies on the *AHA* standard:

The government was under no "clear" duty before then ... and therefore its silence, while apparently misleading, does not amount to bad faith. See *American Hosp. Ass'n v. Sullivan*, 938 F.2d at 222 ("[B]ad faith may be found where a party has violated a 'clear [legal] duty.'" (Ginsburg, J., dissenting, quoting majority opinion, 938 F.2d at 219).

187 F.3d at 661. In the instant case, of course, there was a "clear legal duty," and the Secretary knowingly and explicitly violated it.

⁴ The Secretary's alternative explanation for the *AHA* decision is that, without a bad-faith finding, no fees would have been awardable at all. Def. Opp. at 12. In other words, the decision was based not on application of the law to the facts, but on sympathy for the prevailing party's plight. This would be an astounding speculation in any situation, but it is especially striking here since the goal of a bad-faith award is not to compensate the injured party but to punish the wrongdoer. *Nepara*, 794 F.2d at 702. The focus is not even on the prevailing party.

The Secretary has concocted a legal barrier to a bad-faith finding which has been rejected in this Circuit. There exists no prohibition based on conduct causing the litigation. Rather, the violation of a clear statutory duty which forces litigation to vindicate plain legal rights is the paradigm of bad faith. That is precisely what happened here.⁵

The Secretary quotes Judge Ginsburg's observation that "[b]ad faith by a litigant is serious business" *AHA*, 938 F.2d at 223 (Ginsburg, J., dissenting). Plaintiffs are in complete agreement with that statement, but believe that it is even more serious when the bad faith is carried out by a governmental agency charged with protecting the rights of vulnerable beneficiaries. It was very serious business indeed when the Secretary of Health and Human Services, catering to a wealthy and powerful industry lobby, not only ignored the interests of the beneficiaries whom his agency is supposed to serve but secretly and quickly repudiated their clear statutory rights and protections. "[B]ad faith can be inferred 'where a party withholds ... action to which the opposing party is patently entitled.'" *Id.* at 223 (Ginsburg, J., dissenting) (quoting *Nepara Chemical, Inc.*, 794 F.2d at 702). Given that standard, the only inference to

⁵ The Secretary's pretense that plaintiffs' claim of bad faith is "predicated upon nothing more than the agency's issuance of the May 25, 2001 letter" (Def. Opp. at 13) underscores the weakness of his position. The letter *was* important because it began the process by announcing the reversal in policy to the MCO industry. But it was quickly followed by the three memoranda providing the details of that change, and the Secretary then proceeded to put the policy into practice. Moreover, all of this unfolded pursuant to the Secretary's secrecy, urgency, and deception, which allowed him to carry out this change in policy until the Court intervened.

draw here is bad faith.

“[T]he underlying rationale of fee-shifting upon a showing of bad faith is punishment of the wrongdoer rather than compensation of the victim.” *Nepara*, 794 F.2d at 702. The Secretary deserves to be punished.

B. All of the work in this case derives from the Secretary’s bad faith.

In the alternative, the Secretary contends that fees should be awarded at the market rate only for work done up through the preliminary injunction hearing. He theorizes that, at that point, his behavior no longer should be deemed bad faith. Def. Opp. at 13-14. The mistake of this argument is its confusion of bad faith which occurs in the violation of a clear legal duty and which necessitates litigation with bad faith occurring in a discrete phase of ongoing litigation.

In this case, *all* the work flows directly and necessarily from the bad faith. Had the Secretary not chosen to violate an explicit statutory scheme, and then acted to effect that decision secretly and quickly with the connivance of the provider industry and to the detriment of Medicare beneficiaries, then *none* of the work in this case would have been required. There is no logical cut-off point – including the issuance of the preliminary injunction – at which it can be said that the work derived from the Secretary’s bad faith came to an end. Just as the Secretary’s position which caused the litigation was unreasonable and therefore not substantially justified throughout the litigation (as the Secretary concedes), so too did his bad faith infect the entire litigation.

In *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990), the Supreme Court considered a similar issue, whether a separate substantial justification analysis must be undertaken regarding the EAJA application after it has been determined that the underlying conduct was not

substantially justified. In holding that the separate inquiry was not required, 496 U.S. at 160, the Court stated: “Any given civil action can have numerous phases. While the parties’ postures on individual matters may be more or less justified, the EAJA – like other fee-shifting statutes – favors treating a case as an inclusive whole, rather than as atomized line items.” *Id.* at 161-162 (citations omitted). Similarly, once the court has found conduct giving rise to the litigation to be in bad faith, there is no rationale or need to divide up the phases of the litigation. The government’s obligation to pay for all work reasonably performed flows directly from that finding.

The Second Circuit decisions cited by the Secretary (at 13) are not to the contrary. Both involve discrete misbehavior at specific points of the litigation so that proportioning the fees attributable to that behavior was appropriate. See *Ostano Commerzanstalt v. Telewide Systems, Inc.*, 880 F.2d 642, 650 (2d Cir. 1989) (district court directed to determine what portion of work derived from meritless defense and fabricated document); *Sierra Club v. U. S. Army Corps of Engineers*, 776 F.2d 383, 389, 391-392 (2d Cir. 1985) (fees awarded to compensate for expenses attributable to bad faith at trial). Defendant has not produced one decision where a court, having found bad faith in the conduct giving rise to the litigation, limited bad faith fees to a phase of the case based on the government’s action after litigation was commenced. There is no logic to such an approach when the conduct giving rise to the litigation is the basis for the bad faith finding. See, e.g., *North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transportation*, 151 F.Supp.2d 661, 674-676, later opinion, 168 F.Supp.2d 569, 581-583 (M.D.N.C. 2001); *Fitzgerald v. Hampton*, 545 F.Supp. 53, 58-60 (D.D.C. 1982).

The Secretary’s contention that the *AHA* decision supports his position is also wrong.

Fees were there awarded for work related to the second preliminary injunction motion because that motion was a necessary response to the rule published in violation of the stipulation entered into after the first preliminary injunction motion was filed. See 938 F.2d at 218-219. That rule publication was the action “analogous to conduct giving rise to litigation,” *id.* at 220 (see *supra* at 6), and the court therefore awarded fees for all the work required in response to that action. That is precisely what plaintiffs are here seeking.

Even the Secretary does not offer a rationale for distinguishing between the work up through the preliminary injunction and thereafter. He could just as easily have claimed that there was no bad faith in his opposing the preliminary injunction. Similarly, plaintiffs could logically claim that there was “renewed” bad faith in the Secretary’s refusal to disavow similar action in the future while simultaneously offering no opposition to the summary judgment motion, in filing a meritless motion to dismiss, and in his overall behavior which led this Court to conclude that the Secretary could not be trusted not to violate the statutes again. See Mem. Op. at 6-8. There is no need or legal reason, however, to engage in that kind of line-drawing between aspects of the case. In *this* context, the entire case is attributable to the Secretary’s bad faith.

The Secretary’s explicit decision not to comply with the statutes and his actions to carry out that decision caused and have permeated this litigation. The fact that he took steps to correct his decision when ordered to (but would not have done so without the Court’s intervention, see *id.* at 5 n. 5) does not mitigate the extent of his bad faith and should not affect the sanction to which he is subject.

II. FEES SHOULD BE AWARDED FOR ALL THE WORKED CLAIMED AND AT THE SUGGESTED RATES.

A. Work on the motion to enforce which did not have to be filed should

be compensated.

The Secretary argues that, if fees are awarded only pursuant to subsection (d) (not substantially justified), plaintiffs should not be compensated for 14 hours of work performed by their attorneys Gottlich and Deford on a motion to enforce which was not filed. He contends that plaintiffs were not a prevailing party on this issue and that their time was not reasonably spent. Def. Opp. at 16-18.

First, since plaintiffs are the prevailing party overall, they are entitled to fees for all work reasonably done in the case. The case is not segmented into discrete parts with each treated as a separate entity for purposes of the prevailing party analysis. *Jean*, 496 U.S. at 160 (“The single finding that the Government’s position lacks substantial justification, like the determination that a claimant is a ‘prevailing party,’ thus operates as a one-time threshold for fee eligibility”); *Hensley v. Eckerhart*, 461 U.S. 424, 433-437 (1983); *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C.Cir. 1993) (“a single decision as to that [prevailing party] element governs eligibility for fees for the entire action”).

Second, their efforts were reasonable in the context of this case. On October 3, 2002, Ms. Gottlich and other advocates attended a public meeting where employees of the Secretary’s Centers for Medicare and Medicaid Services (CMS) described a Medicare Preferred Provider Organization (PPO) demonstration project and stated explicitly that the comparative information on these PPO plans would not be included in the *Medicare & You Handbook* for beneficiaries because there was not sufficient time. Second Gottlich Dec., ¶ 3. Ms. Gottlich relayed this discovery to Mr. Deford, who began to research and draft a motion to enforce. Second Deford Dec., ¶ 3. Since time was of the essence, and since the advocates had been told unequivocally by

CMS employees themselves that the comparative information would not be included, there was no reason to delay. Ms. Gottlich was on the verge of contacting AUSA Blumberg about the prospective motion when he contacted her about a different issue, Second Gottlich Dec., ¶ 5, but there was no reason to believe that CMS' intent differed from what CMS employees had informed advocates.⁶

While the Secretary characterizes the matter as a “misunderstanding,” Def. Opp. at 17, it is just as likely that, when informed that plaintiffs were about to move to enforce, the Secretary suddenly found a way to include the comparative information on the PPO plans in the *Handbook*. He had taken a position of impossibility prior to the issuance of the preliminary injunction, but, when forced, he was able to find a way. The threat of another stinging rebuke might have been sufficient to cause the same reaction.

Plaintiffs' counsels' response to unambiguous information from CMS that it did not intend to include certain required information was reasonable, and those hours should not be discounted.

B. The hourly rates as computed by plaintiffs are correct.

⁶ Given the history of this issue, with the Secretary's secretive and deceptive efforts, and his unwillingness to concede his misbehavior or to renounce a future return to it, see Mem. Op., at 6-8, it is not surprising that plaintiffs' counsel moved immediately to stop an action which appeared to be more of the same and which they had been expressly told was happening.

The Secretary also claims that the hourly rates claimed by plaintiffs under subsection (d) are about \$2.50 higher than they should be and that plaintiffs' methodology for making that calculation is "nonsensical." Def. Opp. at 15-16; see Pl. Opening Mem. at 24-25. Plaintiffs' methodology, however, is premised on the fact that the \$125 base rate is geared to a particular month, March 1996. Consequently, the cost-of-living increase is applied to that month to establish subsequent rates. This is precisely what courts have consistently done,⁷ and the Secretary offers no contrary case law. Plaintiffs' suggested rates under subsection (d) of \$140.38 (2001) and \$143.24 (2002) are correct.

III. RECALCULATION OF THE FEE REQUEST

The Secretary does not dispute that plaintiffs are entitled to fees for their attorneys' time on this motion. See *Jean*, 496 U.S. at 158-166. As detailed in the second declaration of attorney Deford (filed with this Reply), he has worked 19.4 additional hours since the fee application was filed. At \$370 per hour, the additional fees to date under subsection (b) are therefore \$7,178.00. Under subsection (d), at \$143.24 per hour, the additional fees are \$2,778.86.

Consequently, the Court should award fees under 28 U.S.C. § 2412(b) for the Secretary's bad faith in the amount of \$173,922 (\$166,744 plus \$7,178). Under 28 U.S.C. § 2412(d), the Court should award fees for the Secretary's unjustified position in the amount of \$67,719.03

⁷ See, e.g., *Nong v. Reno*, 28 F.Supp.2d 27, 30 (D.D.C. 1998); *National Ass'n of Mfrs. v. U.S. Dept. of Labor*, 962 F.Supp. 191, 198 (D.D.C. 1997) (calculate rate "from the date of the [original] EAJA (October, 1981) to the date on which the legal services were rendered"); *Chen v. Slattery*, 842 F.Supp. 597, 600-601 (D.D.C. 1994).

(\$64,940.17 plus \$2,778.86).⁸

CONCLUSION

For the reasons stated, the Court should find that the Secretary acted in bad faith and award fees in the amount of \$173,922.

Respectfully submitted,

By: _____
VICKI GOTTLICH
D.C. Bar No. 937185
PATRICIA NEMORE
D.C. Bar No. 204446
Center for Medicare Advocacy, Inc.
1101 Vermont Ave., N.W., Suite 1001
Washington, D.C. 20005
(202) 216-0028

GILL DEFORD
D.C. Bar No. 459280
JUDITH STEIN
Center for Medicare Advocacy, Inc.
P.O. Box 350
Willimantic, CT 06226
(860) 456-7790

SALLY HART
Center for Medicare Advocacy, Inc.
100 N. Stone Ave., Suite 305
Tucson, AZ 85701
(520) 327-9547

DATED: January 3, 2003

Attorneys for Plaintiffs

⁸ In the event that the Court holds oral argument on the fee issue, or additional work is otherwise required, plaintiffs reserve the right to supplement the fee request.