United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Secretary of Labor,

Complainant,

v.

Riverdale Mills Corporation,

Respondent.

OSHRC Docket Nos. **19-1566 & 19-2011**

DECISION AND ORDER DENYING RESPONDENT'S APPLICATION UNDER THE EQUAL ACCESS TO JUSTICE ACT

Over six years ago, in September and December of 2019, the United States Occupational Safety and Health Administration ("OSHA") issued three Citations and Notifications of Penalty (Citations) to Respondent, Riverdale Mills Corporation ("Riverdale"), alleging violations of various safety and health standards promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, *et seq*. (the "OSH Act"). Riverdale contested those Citations, bringing the matter before the United States Occupational Safety and Health Review Commission ("Commission").

After extensive motions practice before two Commission judges, a hearing on the merits conducted by this Court, two appeals to two different Circuit Courts of Appeals (one determination of which Respondent took to the Supreme Court), this case is now again before this Court to determine a seemingly modest question: whether Riverdale has demonstrated it is entitled to an award to recover various expenses related to this proceeding under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504.

For the reasons discussed in detail below, the Court determines that Riverdale has not demonstrated it is eligible for any award, and the Secretary has otherwise established her position was substantially justified in this case. The Court therefore **DENIES** Riverdale's EAJA Application in full.

BACKGROUND

Factual Background

The Court has already made extensive findings of fact in this matter in its decision and order on the merits. *See Riverdale Mills Corp.*, Nos. 19-1566 & 19-2011, 2022 WL 3656956, at *2-5 (OSHRCALJ, July 18, 2022), *aff'd* No. 22-1226, 2023 WL 4146272 (D.C. Cir. June 23, 2023). Only a brief recitation of those facts is necessary to understand and resolve the issues raised by Riverdale's EAJA Application.

Riverdale manufactures coated wire mesh at a facility in Northbridge, Massachusetts. *Id.* at *2. The wire mesh is run through a coating line machine, which is propelled by a series of rollers, where it is subjected to various treatments as it moves along the line. *Id.* at *3. At the end of the coating line is a spindle "collection area," where the coated mesh is rolled and cut to specified lengths. *Id.*

On April 3, 2019, two Riverdale employees, "AT" and "NM," noticed the mesh being run through the line was out of alignment and therefore was not collecting properly on the spindle. *Id.* at *4. A third employee, "JR," attempted to correct this problem from a catwalk above the line, pushing his leg through a gap in the rails to push the mesh back into alignment, and thereby coming within 1½ feet of the machine's main roller. *Id.* Meanwhile, AT bypassed a warning sign, opened a gate, entered the area immediately next to the main rollers on the line, and attempted to adjust the mesh using his hand. *Id.* In doing so, AT's arm was pulled into one of the line's rollers, and he suffered extensive injuries as a result. *Id.*

AT's injury led to OSHA conducting several inspections of Riverdale's facility, which ultimately resulted in the issuance of three Citations for violations of OSHA's safety and health standards. *Id.* at *5.

Safety Citation

The first Citation, which the Court will refer to as the "Safety Citation," was issued on September 26, 2019, and alleged several violations of OSHA's safety standards for lockout/tagout ("LOTO") and machine-guarding. As issued, the Safety Citation was an eight-item Citation, with Items 5a to 5d grouped for purposes of penalty. (Safety Citation at 6-16). In her Complaint, the Secretary: 1) amended Item 1 to Item 5e and grouped it with the remainder of Item 5; and 2) withdrew Item 4 and incorporated its language into Items 5a to 5d. (Compl. ¶¶ 5(A) & 5(B)). In a later-filed Notice of Withdrawal, the Secretary also withdrew Items 5d, 7, and 8 of the Safety

Citation. *See* Notice of Withdrawal, OSHRC Docket Nos. 19-1566 & 19-2011 (Aug. 13, 2020). Thus, at the hearing only Items 2, 3, 5a, 5b, 5c, 5e, and 6 of the Safety Citation were at issue.

Health Citations

The second and third Citations, which the Court will refer to collectively as the "Health Citations," were issued on December 13, 2019, and alleged three violations of OSHA's hazardous communication standards. As issued, Citation 1 of the Health Citations was a three-item Citation, and Citation 2 was a single-item Citation. Prior to the hearing, the Secretary withdrew Items 1 and 2 of Citation 1. *See* Notice of Withdrawal, OSHRC Docket Nos. 19-1566 & 19-2011 (Apr. 13, 2021). Thus, at the hearing, only Item 3 of Citation 1 and the single Item from Citation 2 were at issue.

The Safety and Health Citations were initially docketed separately but were eventually consolidated for discovery and hearing. *See* Order of Consolidation, OSHRC Docket Nos. 19-1566 & 19-2011 (Feb. 4, 2020).

Brief Procedural History

Merits Decision

Following an eight-day hearing, and after considering a multitude of testimonial and documentary evidence, this Court affirmed Item 2 of the Safety Citation, both remaining items of the Health Citations (Citation 1, Item 3 and Citation 2, Item 1), and vacated all remaining items of the Safety Citation (Items 3, 5a, 5b, 5c, 5e and 6). *Riverdale Mills Corp.*, 2022 WL 3656956, at *35-36. The parties filed cross-Petitions for Discretionary Review of the Court's decision with the Commission, which declined review. *See* Notice of Final Order, OSHRC Docket Nos. 19-1566 & 19-2011 (Aug. 22, 2022). Riverdale then filed a Petition for Review of the affirmed Citation items in the D.C. Circuit Court of Appeals. The D.C. Circuit upheld the Court's decision for the affirmed items on the merits. *See Riverdale Mills Corp. v. Sec'y of Lab.*, No. 22-1226, 2023 WL 4146272 (D.C. Cir. June 23, 2023). The Supreme Court denied certiorari. *See Riverdale Mills Corp. v. Su*, 144 S. Ct. 425 (2023).

Riverdale's EAJA Application

Thereafter, Riverdale filed an Application with this Court requesting an award of fees and expenses under EAJA. As part of its Application for an EAJA award, Riverdale was required to file a "net worth exhibit" demonstrating that it meets the definition of a "party" under 5 U.S.C. § 504(b)(1)(B) and 29 C.F.R. § 2204.201. *See* 5 U.S.C. § 504(b)(1)(B) (defining "party," in

relevant part, as "any … corporation … the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated …"); 29 C.F.R. §§ 2204.201, 2204.302(a). To this end, Riverdale's Application was accompanied by a Declaration from accountant Ronald Adams with the firm Foxboro Consulting Group, Inc. ("Adams Declaration"). The Adams Declaration indicated it was based on information obtained from Riverdale's "Balance Sheet for December 2019," which Riverdale intended to file under seal. (Adams Decl. Exh. F to Riverdale Appl. ¶ 5).

The Seal Order

Thus, along with its EAJA Application, Riverdale filed a motion pursuant to 29 C.F.R. § 2204.302(b) to file the Comparative Balance Sheet referenced in the Adams Declaration under seal. The Secretary opposed Riverdale's motion. On March 29, 2024, the Court denied Riverdale's motion to file the Balance Sheet under seal ("Seal Order").

Riverdale appealed the Seal Order to the Commission, which, lacking a quorum, administratively denied the petition. Then, in June of 2024, Riverdale appealed the Seal Order to First Circuit Court of Appeals. This Court issued a stay of these proceedings pending the outcome of that appeal. Nearly a year and a half later, in November of 2025, the First Circuit upheld the Court's Seal Order on the merits. *See Riverdale Mills Corp. v. Chavez-Deremer*, No. 24-1575, 2025 WL 3240338 (1st Cir. Nov. 20, 2025).

Riverdale's Supplemental Affidavits

Following the First Circuit's decision, this Court lifted the stay on these proceedings and directed Riverdale to file its net worth exhibit. Following an extension of time, Riverdale eventually filed a two-page Affidavit, again from Mr. Adams ("First Adams Affidavit"). *See* Notice of Filing of Net Worth Exh. A, OSHRC Docket Nos. 19-1566 & 19-2011 (Jan. 23, 2026). Following Riverdale's submission of the First Adams Affidavit, the Secretary filed her Answer. *See* 29 C.F.R. § 2204.402. Thereafter, Riverdale filed its Reply. *See id.* § 2204.403. Accompanying the Reply was a second affidavit from Mr. Adams ("Second Adams Affidavit"), which was intended to cure certain deficiencies raised by the Secretary in her Answer. With the Court's leave, the Secretary filed a Sur-Reply to address the new factual information raised by Riverdale's Reply and the Second Adams Affidavit.

Thus, over two years after Riverdale filed its EAJA Application, this matter is at last cued for the Court's disposition. For the reasons that follow, the Court finds Riverdale has failed to establish its initial eligibility as a "party" for purposes of an EAJA award. Moreover, even if

Riverdale is an eligible party, the Secretary has demonstrated that her position on the vacated Citation items was substantially justified. Accordingly, the Court denies Riverdale's EAJA Application in full.

ANALYSIS

EAJA & Its Purpose

EAJA states, in relevant part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party … fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1).

"Congress enacted EAJA … to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government." *Scarborough v. Principi*, 541 U.S. 401, 406 (2004). However, there is no "assumption that the Government must pay fees each time it loses." *Id.* at 415. Thus, an EAJA applicant like Riverdale must demonstrate that it meets the applicable statutory criteria to be eligible for an award of fees or expenses. *Id.* at 408, 414; *C.J. Hughes Constr., Inc.*, 18 BNA OSHC 1998, 2000 (No. 93-3177, 1999). Moreover, even if Riverdale sufficiently demonstrates that it meets the relevant criteria, EAJA dictates that Riverdale is not entitled to an award if the Secretary demonstrates her position in this case was substantially justified. *See* 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2204.101; *Scarborough*, 541 U.S. at 414-15; *Am. Wrecking Corp. v. Sec'y of Lab.*, 364 F.3d 321, 325 (D.C. Cir. 2004);[1] *Dantran, Inc. v. U.S. Dep't*

[1] Under the OSH Act, an employer may appeal an order of the Commission to the federal court of appeals for the circuit in which the violation allegedly occurred, where the employer has its principal office, or the D.C. Circuit. *See* 29 U.S.C. § 660(a). Because these may represent different circuit courts, the Commission has held "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case -- even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (OSHRC, March 16, 2000) (emphasis added). Here, the violation occurred in Massachusetts, in the First Circuit, where Riverdale also has its principal office. And, indeed, Riverdale appealed the Court's Seal Order to the First Circuit. However, rather than appealing the Court's merits decision to the First Circuit, Riverdale appealed that decision to the D.C. Circuit. Thus, based on the history of this case, the Court cannot conclude with any certainty to which circuit an appeal from Riverdale would be "highly probable." Accordingly, the Court has attempted to address relevant authority from both the First and D.C. Circuits on dispositive issues governing the denial of Riverdale's Application, especially for those issues for which there is no binding authority or other guidance from the Supreme Court.

of Lab., 246 F.3d 36, 41 (1st Cir. 2001); *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996).

Although EAJA contains several statutory definitions that can affect an applicant's eligibility, only two are implicated by Riverdale's Application and the Secretary's Answer. First, the Secretary argues, and the Court agrees, Riverdale has failed to demonstrate its financial eligibility as a "party" under the criteria set forth in 5 U.S.C. § 504(b)(1)(B). (Sec'y's Answer at 9-12). The Secretary further argues, and Riverdale now concedes, Riverdale was not the "prevailing party" for the withdrawn Citation items for which it originally sought an EAJA award. (*Id.* at 13-17). In addition to challenging Riverdale's eligibility, the Secretary argues, and the Court again agrees, her position was substantially justified with regard to all of the Citation items for which Riverdale was the prevailing party. (*Id.* at 17-28).

The Court addresses each of these issues in turn.

Respondent Has Not Demonstrated it is an Eligible "Party"

Definition of an Eligible "Party"

Only an applicant who meets the definition of a "party" is eligible for an award under EAJA. *See C.J. Hughes Constr., Inc.*, 18 BNA OSHC at 1999 n.1. EAJA defines a "party," in relevant part, as "any … corporation … the net worth of which did not exceed $7,000,000 at the time of the adversary adjudication initiated, and which had not more than 500 employees at the time of the adversary adjudication …" 5 U.S.C. § 504(b)(1)(B); *see also* 29 C.F.R. § 2204.201 (same definition). Riverdale, as the applicant, has the burden of demonstrating it meets the definition of party and thus qualifies for an EAJA award. *See* 29 C.F.R. § 2204.301(c) ("The application shall also show that the applicant meets the definition of "party"…); *C.J. Hughes Constr., Inc.*, 18 BNA OSHC at 2000 ("[T]he burden of showing eligibility for an EAJA award is on the applicant.").

To that end, Commission EAJA Rules 301(c) and 302(a), require an EAJA applicant to file a "[n]et worth exhibit." 29 C.F.R. §§ 2204.301(c) & 302(a). Rule 301(c) requires the net worth exhibit to contain "adequate documentation of [the applicant's] net worth." Rule 302(a) elaborates, in relevant part, as follows:

> Each applicant … shall provide with its application a detailed exhibit showing the net worth of the applicant as required by § 2204.301(c) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides

> full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies as a party as defined in § 2204.201.

29 C.F.R. § 2204.302(a) (emphases added).

Contents of Riverdale's Net Worth Exhibits

As the Court previously noted, Riverdale originally submitted the Adams Declaration in support of its eligibility for an EAJA award. (Adams Decl. Exh. F to Riverdale Appl.). In his Declaration, Mr. Adams proceeded on the assumption that this proceeding was initiated on the date the Secretary filed her Complaint for the Safety Citation, i.e., December 12, 2019. (*Id.* ¶¶ 3 & 5). For that date, Mr. Adams averred that "using generally accepted accounting principles to calculate Riverdale Mills Corporation's net assets, Riverdale Mills Corporation's net assets was [sic] less than $7,000,000." (*Id.* ¶ 5). Mr. Adams indicated the details of this calculation could be found in Exhibit 1 to the Declaration, meant to be filed under seal. (*Id.* ¶¶ 5 & 6). Mr. Adams also stated Riverdale "had less than 500 employees in December 2019." (*Id.* ¶ 7).

Following the Court's Seal Order and the subsequent affirmance of that order in the First Circuit, Riverdale filed the First Adams Affidavit.[2] In his First Affidavit, Mr. Adams again lays out his qualifications, adding that he has "prepared more than two hundred business enterprise valuations" in his career. (First Adams Aff. at 1). He further indicates he was retained by Riverdale "to review its financial records for the limited purpose of determining the company's net worth in connection with proceedings before the [Commission]." (*Id.*). He further states "[i]n performing this work, [he] reviewed financial records and information customarily relied upon by valuation and accounting professionals for this purpose, including balance sheets, debt schedules, bank records, and fixed asset information." (*Id.*). The Court notes Riverdale did not submit any of these documents along with the First Adams Affidavit.

Mr. Adams then sets forth a barebones, assets-minus-liabilities analysis of Riverdale's approximate net worth. (*Id.* at 2). According to Mr. Adams, "as of December 31, 2019," Riverdale had Total Assets of $13,037,505 and Total Liabilities of $7,697,933 for a Total Net Worth of

[2] Both a declaration and an affidavit are sworn statements, with the only difference being that an affidavit is sworn before an officer authorized to administer oaths, such as a notary public, while a declaration is not. *Compare Affidavit*, BLACK'S LAW DICTIONARY (12th Ed. 2024), *with Declaration*, BLACK'S LAW DICTIONARY (definition 8); *see also, e.g.*, 37 C.F.R. § 1.68. Neither the Commission's rules nor EAJA itself requires any particular form of documentation to establish an applicant's net worth. *See* 29 C.F.R. § 2204.302(a) (requiring a net worth exhibit to be "in any form convenient to the applicant …"). Thus, the Court does not place any evidentiary distinction on the Adams Declaration as opposed to the Adams Affidavits.

$5,339,572. (*Id.*). Mr. Adams goes on to state: "[B]ased upon the financial records reviewed, [Riverdale's] net worth for the rest of December 2019 and January 2020 did not materially exceed this amount." (*Id.*). Thus, Mr. Adams concludes, Riverdale "had a net worth [of] less than $7 million from December 2019 through January 2020 …." (*Id.*).

In response to the Secretary's argument that the First Adams Affidavit did not address Riverdale's finances for the time period required by EAJA, i.e., "at the time the adversary adjudication was initiated" (5 U.S.C. § 504(b)(1)(B); 29 C.F.R. § 2204.201), Riverdale filed the Second Adams Affidavit along with its Reply. (Second Adams Aff. Exh. A to Riverdale Reply). The Second Affidavit indicates Mr. Adams reviewed the same types of documents previously reviewed in setting forth Riverdale's net worth for December of 2019 to obtain an approximate net worth for September and October 2019. (*Id.* at 2). Mr. Adams goes on to state "[Riverdale's] financial position in September and October 2019 was materially the same as its financial condition as of December 31, 2019 …." (*Id.*). With slightly more detail, Mr. Adams avers that Riverdale's "pro forma net worth (total assets less total liabilities) for those two months was well less than $6,000,000 at all times during that period." (*Id.*). Mr. Adams further notes the Secretary's Answer did not specify any date within the months of September or October, and thus he was "not providing specific dollar amounts" and his "review encompassed both months, not any particular date within those months." (*Id.* at 1-2).

Given the history of this case, the Court will examine the Adams Declaration as well as the First and Second Adams Affidavits in determining whether Riverdale has demonstrated it meets the definition of a "party" under EAJA. Even doing so, however, the Court finds Riverdale's evidence fails to meet the Commission's requirement for a "detailed exhibit" that "provides full disclosure of the applicant's assets and liabilities … sufficient to determine whether the applicant qualifies as a party" for purposes of EAJA. 29 C.F.R. § 2204.302(a). Moreover, the Court declines to exercise its discretion to allow Riverdale to file additional information to cure its deficiency.

Time Period of the Net Worth Exhibits

Under EAJA, it is the applicant's net worth and number of employees "at the time the adversary adjudication was initiated" that governs whether it meets the definition of a "party." 5 U.S.C. § 504(b)(1)(B) (emphasis added); *see also* 29 C.F.R. § 2204.302(a). As previously noted, the Adams Declaration and First Adams Affidavit relate to Riverdale's net worth for December of 2019, apparently based on the assumption that the date the Secretary filed her Complaint for the

Safety Citation case was the relevant date for purposes of determining when this adversary adjudication was initiated. (Adams Decl. Exh. F to Riverdale Appl. ¶¶ 3 & 5; First Adams Aff. Exh. A to Not. of Filing of Net Worth Exh.).

In her Answer, the Secretary argues the Adams Declaration and First Affidavit do not address the relevant time period of Riverdale's net worth under EAJA, which she submits is either the date(s) she issued the Citations or the date(s) Riverdale filed its Notices of Contest. (Sec'y's Answer at 10-12). For the Safety Citations, these dates occurred in late September and early October of 2019. (*Id.* at 11). Thus, in the Second Adams Affidavit, Mr. Adams gave some further information on Riverdale's net worth for September and October of 2019. (Second Adams Aff. Exh. A to Riverdale Reply).

In *Central Brass Mfg. Co.*, 14 BNA OSHC 1904 (Nos. 86-978 & 86-1610, 1990), the Commission held, for purposes of recovering EAJA fees "in connection with" the adversary adjudication under Section 504(a)(1), "[n]otwithstanding the Commission's procedural rule requiring the filing of a complaint, the reality is that the citation initiates the Secretary's action against the employer." *Central Brass*, 14 BNA OSHC at 1906. The Commission went on to emphasize "that, for purposes of the EAJA, the adversary adjudication normally begins with the issuance of the citation." *Id.* Although *Central Brass* interpreted a different section of EAJA, "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). The Court finds no reason this presumption should not govern here and therefore finds the "time the adversary adjudication was initiated" for determining the net worth of a "party" before the Commission is the date the Citations were issued. The Court rejects Riverdale's arguments to the contrary, which do not even address the Commission's clear holding in *Central Brass.* (Riverdale Reply at 4-6).

With the addition of the Second Adams Affidavit, Riverdale has at least cursorily addressed the relevant time period for both the Safety and Health Citations. The Safety Citations were issued on September 26, 2019. The Second Adams Affidavit, when considered together with the First, provides some, albeit minimal, information on Riverdale's net worth for the time period encompassing that date. (Second Adams Aff. Exh. A to Riverdale Reply at 2. ("[Riverdale's] financial position in September and October 2019 was materially the same as its financial condition as of December 31, 2019 ….")). As to the Health Citations, they were issued on

December 13, 2019. Thus, even though the Adams Declaration and First Affidavit were based on Riverdale's incorrect assumption that the Complaint date governed the initiation of this case, both documents coincidentally cover the relevant time period for the Health Citations.

Number of Employees

Of the documents submitted to establish Riverdale's eligibility for an EAJA award, only the Adams Declaration addresses whether Riverdale had "not more than 500 employees at the time the adversary adjudication was initiated …." 5 U.S.C. § 504(b)(1)(B); (Adams Decl. Exh. F to Riverdale Appl. ¶ 7 (stating Riverdale "had less than 500 employees in December 2019.")). As the Court previously detailed, the date this case was initiated under EAJA was the date the Citations were issued (*Central Brass Mfg. Co.*, 14 BNA OSHC at 1906), which for the Safety Citations was late September of 2019 and for the Health Citations was mid-December of 2019. Thus, the Adams Declaration arguably only establishes Riverdale's eligibility based on its number of employees for purposes of the Health Citations. Nevertheless, the Secretary has not challenged Riverdale's EAJA eligibility based on its number of employees. The Court therefore finds sufficient evidence to establish this prong of the definition of "party" for purposes of Riverdale's EAJA Application. *See, e.g.*, *Norager v. United States*, No. 22-135, 2024 WL 3717448, at *3 (Fed. Cl. Aug. 8, 2024) (finding criterion for EAJA eligibility was established where eligibility was uncontested (citing cases)).

Adequacy of Riverdale's Net Worth Exhibits

However, the Secretary *has* challenged the adequacy of the documentation Riverdale submitted to establish its financial eligibility as a "party" under EAJA. (Sec'y's Answer at 9-10; *see also* Sec'y's Opp'n to Riverdale's Mot. for Leave to File Under Seal at 3, OSHRC Docket Nos. 19-1566 & 19-2011 (Jan. 3, 2024) ("Whether [Riverdale] has made a sufficient showing of its EAJA eligibility is likely to be a significant point of contention between the parties.")). In such an instance, the Court must engage in a more thorough examination of the evidence in the record to determine whether Riverdale has met its burden of establishing its eligibility for an EAJA award. *See Haselwander v. McHugh*, 797 F.3d 1, 2 (D.C. Cir. 2015) (examining the record evidence to determine eligibility where the government argued there was "no evidence" to support the applicant's eligibility); *Sosebee v. Astrue*, 494 F.3d 583, 589 (7th Cir. 2007) ("Although his initial [EAJA] application may have been conclusory, when the Commissioner challenged him on this point he identified evidence in the record that supported him."); *Shooting Star Ranch, LLC v.*

United States, 230 F.3d 1176, 1178 (10th Cir. 2000) ("When challenged as to eligibility for an EAJA award, the party seeking such an award must do more than make a bare assertion that it meets the statutory criteria."); *see also, e.g.*, *Zhang v. U.S. Citizenship & Immigr. Servs.*, No. 15-995 (EGS), 2023 WL 2072441, at *4-5 (D.D.C. Feb. 17, 2023) (when the government challenges the eligibility of an EAJA applicant "[t]he Court has a duty to consider [the] facts and draw appropriate inferences."). In doing so, the Court must first determine what evidence in the current record it can consider.

Supporting Documentation

As the Court detailed above, the Adams Declaration was originally meant to be accompanied by a Comparative Balance Sheet, filed under seal. When the Court denied Riverdale's motion to seal, the Balance Sheet was never filed with the Court. Neither the First Adams Affidavit nor the Second purported to be accompanied by any supporting documentation.[3] The Court will thus consider only the information contained in the Adams Declaration and the two Adams Affidavits in determining whether Riverdale has sufficiently demonstrated its financial eligibility for an EAJA award.

A Detailed & Full Disclosure

The Commission's rules require an EAJA applicant to "provide with its application a detailed exhibit showing the net worth of the applicant …." 29 C.F.R. § 2204.302(a) (emphasis added). The exhibit can be "in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies as a party as defined" by the Commission's EAJA Rules and EAJA itself. *Id.* (emphases added).

The Adams Declaration clearly does not satisfy the Commission's requirements for a "detailed exhibit" providing "full disclosure of [Riverdale's] assets and liabilities." *Id*. Any disclosure of assets and liabilities in the Declaration was meant to be provided in the Comparative Balance Sheet, which was never filed after the Court issued its Seal Order. For its part, Riverdale

[3] Curiously, despite the lengths to which Riverdale had gone to avoid submitting its Balance Sheet, Riverdale originally submitted a document purporting to be its "Comparative Balance Sheet as of December 31, 2019" along with the Second Adams Affidavit. The Second Affidavit does not mention the document in any way. Riverdale's counsel later informed the Court that this submission was inadvertent, and the Court subsequently removed the balance sheet from the record. Because this document is no longer part of the record, the Court will not address the Secretary's arguments made in her Sur-Reply concerning alleged discrepancies between the balance sheet submitted to the First Circuit under seal and the document inadvertently filed with this Court. (Sec'y's Sur-Reply at 3-4).

no longer appears to be relying on the Adams Declaration in support of its Application. (Riverdale Reply at 3-4 (arguing only for the sufficiency of the First Adams Affidavit)).

As the Court detailed above, the Second Adams Affidavit was mainly intended to cure any perceived deficiency in the time period addressed by the First Adams Affidavit. Above, the Court found it achieved that limited purpose. Otherwise, the Second Adams Affidavit does not provide any additional insight into any of the financial information contained in the First Affidavit. Thus, whether Riverdale has sufficiently demonstrated its financial eligibility as a party turns on the adequacy of the First Adams Affidavit.

The Court finds the First Adams Affidavit is inadequate. In assessing Riverdale's net worth, Mr. Adams states he "reviewed the financial records and information customarily relied upon by valuation and accounting professionals for [determining a company's net worth], including balance sheets, debt schedules, bank records, and fixed asset information." (First Adams Aff. at 1). However, none of these documents were provided with the First Adams Affidavit. Thus, Riverdale's total assets, total liabilities, and net worth are presented in a conclusory fashion without any insight into how those numbers were calculated. Moreover, as the Secretary points out, the First Adams Affidavit does not describe all the records Mr. Adams reviewed, whether these records were kept in the ordinary course of business, whether the records were audited, or what accounting or valuation principles he used in reaching his calculations. (Sec'y's Answer at 9-10; Sec'y's Sur-Reply at 2-3); *see also Broaddus v. U.S. Army Corps of Eng'rs*, 380 F.3d 162, 166-67 (4th Cir. 2004) (finding that calculations under EAJA should be made according to generally accepted accounting principles or "GAAP" (citing multiple circuit court cases)); *Fabi Constr. Co. v. Sec'y of Lab.*, 541 F.3d 407, 410 (D.C. Cir. 2008) (citing *Broaddus* for purposes of calculating net worth under EAJA); *Young v. Lepone*, 305 F.3d 1, 5 n.1 (1st Cir. 2002) ("The GAAP rules embody the prevailing principles, conventions, and procedures defined by the accounting industry from time to time."); *Wildcat Renovation, LLC*, No. 21-0387, 2023 WL 8599388, at *3 (OSHRCALJ, Oct. 23, 2023) (finding net worth exhibits insufficiently detailed under the Commission's EAJA rules where there was no evidence they were audited or kept in the regular course of business (citing cases)).

The Court therefore finds that the First Adams Affidavit is neither "detailed" nor does it represent a "full disclosure of the applicant's assets and liabilities … sufficient to determine

whether the applicant qualifies as a party."[4] 29 C.F.R. § 2204.302(a); *see also Kuhns v. Bd. of Governors of the Fed. Reserve Sys.*, 930 F.2d 39, 41 (D.C. Cir. 1991) (upholding the Board's finding that EAJA applicant failed to establish financial eligibility where the applicant "did not reveal the basis on which [he] had valued his assets and liabilities" and did not cure that deficiency with additional evidence); *Wildcat Renovation, LLC*, 2023 WL 8599388, at *3 (citing cases).

Citing several cases, Riverdale argues that "[c]ourts have consistently found [financial] eligibility where it is based upon an affidavit of an outside accountant reviewing financial records of the company or other limited evidence." (Riverdale Reply at 2). The Court does not find that the reasoning in any of cases Riverdale has cited would change the outcome here.

In *Broaddus v. U.S. Army Corps. Of Eng'rs*, 380 F.3d 162 (4th Cir. 2004), the accountant's affidavit pointed to the value of specific assets and liabilities in setting forth his calculations of the applicant's net worth. *Broaddus*, 380 F.3d at 168-69. The accountant even ordered the valuation of specific assets to reach his calculation, and those values were included in his affidavit. *Id.* Here, by contrast, Mr. Adams has provided no insight into what assets were included in his valuation of Riverdale's total assets, nor has he pointed to the specific value of any of the assets comprising that number.

In *United States v. 88.88 Acres of Land*, 907 F.2d 106 (9th Cir. 1990), the applicant provided financial statements, balance sheets, *and* an affidavit from an accountant. *88.88 Acres of Land*, 907 F.2d at 108. Riverdale has submitted only an affidavit but none of the documents on which that affidavit relies.

In *Cobell v. Norton*, 407 F.Supp.2d 140 (D.D.C. 2005), a non-binding district court case, the government argued as follows in opposition to the plaintiffs' EAJA application:

> Plaintiffs do not even attempt to satisfy the EAJA eligibility requirement in the Interim Petition. They do not allege, much less show, that the five named Plaintiffs were eligible for EAJA at the time the suit was filed. Defendants do not have information that would suggest the Plaintiffs are ineligible, but the burden to satisfy this requirement is on Plaintiffs. The absence of eligibility information renders the Interim Petition defective.

[4] The Court notes Riverdale clearly had some inkling that additional information was necessary to provide a "detailed" net worth exhibit and provide the Court with "full disclosure" of its assets and liabilities. This is evidenced by its original intention to file its Comparative Balance Sheet along with the Adams Declaration to shed at least some light on the calculations done by Mr. Adams in computing Riverdale's net worth. (Adams Decl. Exh. F to Riverdale Appl. ¶ 5).

Defs.' Opp'n to Pls.' EAJA Pet. for Interim Fees Through Phase 1.0 Proceeding, No. 1:96CV01285, 2004 WL 3710851 (Sept. 7, 2004). Importantly, the government in that case conceded that "[a]n affidavit as to net worth from the party or the party's attorney - essentially someone in a position to know the party's net worth at the commencement of the litigation - ordinarily should be sufficient to meet the applicant's burden …." *Id.* Subsequent to the defendant filing its opposition to the EAJA application, the plaintiffs apparently filed affidavits regarding the net worths of the named plaintiffs, and the court therefore took the government at its word that this was sufficient to establish financial eligibility for purposes of that case. *Cobell*, 407 F.Supp.2d at 148-49.

Finally, in perhaps the closest case cited by Riverdale, *Haselwander v. McHugh*, 797 F.3d 1 (D.C. Cir. 2015), the government argued there was "no evidence" that the EAJA applicant, an individual, was worth less than $2 million dollars. *Id.* at 2. The court nonetheless found the record "adequate" to establish financial eligibility, based on "counsel's uncontested statement to this effect on behalf of his client" and a letter to a Senator stating "My wife and I are just mid-level State of Indiana employees, and we cannot afford to pay for the current very high costs of college educations." *Id.*

The Court does not find that *Haselwander* means that the "limited evidence" presented in that case is necessarily sufficient to establish financial eligibility for an EAJA award, as Riverdale seems to suggest. (Riverdale Reply at 2). Instead, *Haselwander* stands for the far simpler proposition that a reviewing court should account for *all* record evidence in assessing whether the applicant has met its burden to prove financial eligibility. *See Zhang*, 2023 WL 2072441, at *3 ("The D.C. Circuit [in *Haselwander*] did not hold or suggest that such statements would be sufficient in all EAJA cases. Rather, the *Haselwander* court clearly explained that it had considered '[t]he record in th[e] case' and held the '*record* ... adequate to show that Haselwander's net worth is less than $2 million.'" (quoting *Haselwander*, 797 F.3d at 2 (italic emphasis in original)).

Here, rather than arguing there is "no evidence" in the record to support Riverdale's financial eligibility, as the government did in *Haselwander*, the Secretary is recognizing that Riverdale has provided some evidence of its financial eligibility but is challenging the adequacy of that evidence in complying with the Commission's EAJA rules for financial disclosure. The Court is therefore not persuaded that *Haselwander* dictates a different result in this case.

Thus, the Court finds the First Adams Affidavit is insufficiently detailed to meet Riverdale's burden of establishing its financial eligibility for an EAJA award.

The Court Will Not Order Additional Information

The Court recognizes that, under Commission EAJA Rule 302(a), it "may require an applicant to file additional information to determine its eligibility for an award." 29 C.F.R. § 2204.302(a) (emphasis added). The use of the word "may" implies that the rule grants substantial discretion to the Court to exercise this authority. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (use of the word "may" implies "authority, but not the duty" to exercise the grant of power); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016); *United States v. Aponte-Guzman*, 696 F.3d 157, 160-61 (1st Cir. 2012). The Court declines to grant Riverdale an opportunity to submit additional information.

As previously noted, the calculations in the Adams Declaration for Riverdale's net worth were meant to be supplemented, and at least partially explained, by a Comparative Balance Sheet filed under seal with the Court. In Riverdale's own telling, the Balance Sheet was meant to contain "detailed net worth information" including: 1) "the amount of accounts receivable"; 2) "amount of inventory of product on hand"; 3) "the value and depreciation of [Riverdale's] equipment"; 4) "accounts payable"; 5) "available credit"; and 6) "long-term liabilities and debt." (Riverdale's Mot. for Leave to File Under Seal at 2, OSHRC Docket Nos. 19-1566 & 19-2011 (Dec. 20, 2023); Riverdale's Reply to Sec'y's Opp'n to Mot. for Leave to File Under Seal at 4-5, OSHRC Docket Nos. 19-1566 & 19-2011 (Jan. 22, 2024)).

After the Court denied Riverdale's motion to seal and the First Circuit affirmed the Seal Order, Riverdale then filed the First Adams Affidavit. As the Court previously laid out in detail, this Affidavit contains no supporting documentation and only a conclusory explanation as to how Mr. Adams reached his totals for Riverdale's assets, liabilities, and net worth. When the Secretary specifically challenged the adequacy of the First Adams Affidavit in establishing Riverdale's financial eligibility, Riverdale had the opportunity to file additional factual information with its Reply to cure these alleged inadequacies. *See* 29 C.F.R. § 2204.403 (contemplating that an applicant's EAJA reply will be accompanied by "supporting affidavits" to "allege[] facts not already in the record of the proceeding"). Instead, Riverdale filed the Second Adams Affidavit, which only addresses the timing issues raised by the Secretary and does nothing to further illuminate the underlying calculations for Riverdale's net worth.

The Court does not fault Riverdale for failing to disclose the information underlying its net worth made in Adams Declaration, given that it filed a contemporaneous motion to seal that information, which the Commission's rules specifically contemplate. *See* 29 C.F.R. § 2204.302(b). However, the Court finds Riverdale's filing of the First Adams Affidavit (and, by association, the Second Affidavit), which provides no information underlying the calculations for Riverdale's assets and liabilities, and thus net worth, is a clear attempt to circumvent the result of the Court's Seal Order, as affirmed by the First Circuit.

As the Court previously emphasized in its Seal Order, a detailed net worth exhibit is "foundational to Riverdale's case" because it is the "document introduced to prove [EAJA] eligibility" and "allows the [Court] to determine Riverdale's eligibility and the public to assess the propriety of that decision." (Seal Order at 5-6). Riverdale's intent to keep its financial information from the Court and the public is evident based on Riverdale's previous representations as to the detailed information it would include in the Comparative Balance Sheet versus the scant information it ultimately included in the Adams Affidavits. It is thus clear to the Court that Riverdale understood what type of financial information it needed to disclose in a "detailed" net worth exhibit providing "full disclosure of … assets and liabilities" to establish its eligibility for an EAJA award under the Commission's EAJA rules. 29 C.F.R. § 2204.302(a); *see also* note 4, *supra*. Riverdale has instead specifically chosen not to disclose that information, at least not intentionally. *See* note 3, *supra.*

Based on the entirety of the EAJA portion of this proceeding, the Court concludes Riverdale's desire to continue to obscure its financial information for the relevant period of time clearly outweighs any inclination it has to be forthright with the Court in establishing its eligibility for an EAJA award under the Commission's rules. The Court declines to exercise its discretion to allow Riverdale to remedy its deficiencies under these circumstances. *Cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (courts may decline to exercise favorable discretion based on the past behavior of the parties).

Conclusion

For these reasons, the Court finds Riverdale has failed to demonstrate it is an eligible party under EAJA. In failing to so demonstrate, Riverdale has failed to meet a threshold criterion for obtaining an EAJA award. Nonetheless, the Court will address the other issues raised by Riverdale's Application and the Secretary's Answer, including for which items Riverdale was the

"prevailing party" and whether the Secretary was substantially justified in her position on those items. The Court addresses the former issue first.

Respondent is a Prevailing Party for the Vacated Items Only

Under 5 U.S.C. § 504(a)(1), Riverdale must have been the "prevailing party" in all or part of the proceedings before the Commission to be eligible for an EAJA award. *See Joseph Watson*, 21 BNA OSHC 1649, 1650-51 (No. 00-1726, 2006); 29 C.F.R. § 2204.406(a). Although EAJA itself does not define the term "prevailing party," in *Buckhannon Bd & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001) ("*Buckhannon*"), the Supreme Court interpreted the term "prevailing party" from the fee-shifting provisions of two other federal laws, the Fair Housing Amendments Act and the Americans with Disabilities Act. The Court held that to qualify as a "prevailing party" under those statutes' fee-shifting provisions, the party must have obtained some "judicially sanctioned change in the legal relationship of the parties," such as a "judgement on the merits or obtained a court-ordered consent decree." *Id.* at 602-05 (citation modified). In a later case, the Court clarified that a party may be a prevailing party "even if [a] court's final judgment rejects the [opposing party's] claim for a nonmerits reason" so long as the party receives a favorable judgment from the court. *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 431 (2016).

The Supreme Court has highlighted its "approach [is] to interpret the term ['prevailing party'] in a consistent manner" across "various fee-shifting statutes." *Id*. at 422. Thus, both the First Circuit and the DC Circuit have held that the Supreme Court's definition of "prevailing party" applies to the term as used in EAJA. *See Castaneda-Castillo v. Holder*, 723 F.3d 48, 57 (1st Cir. 2013); *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 492 n.1 (D.C. Cir. 2003).

The parties agree that Riverdale is not the prevailing party for those Citation items the Court affirmed on the merits, i.e., Item 2 of the Safety Citation, and Item 3 of Citation 1 and Item 1 of Citation 2 of the Health Citations. (Riverdale Appl. at 5-7); *see also Fabi Constr. Co.*, 541 F.3d at 412. The parties also do not dispute Riverdale *was* the prevailing party for purposes of those Citation items the Court vacated on the merits, i.e., Items 3, 5a, 5b, 5c, 5e, and 6 of the Safety Citation. (Sec'y's Answer at 17). And, although Riverdale originally claimed to be the prevailing party for those Citation items the Secretary withdrew prior to the hearing, it now apparently

concedes it was not the prevailing party for those items, given there was no "judicial imprimatur"[5] with regard to them. (Riverdale Appl. at 5-6; Riverdale Reply at 7); *see also Buckhannon*, 532 U.S. at 605; *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6 (1985) (holding that the Secretary has "unreviewable discretion to withdraw a citation charging an employer with violating" the OSH Act); *Cactus Canyon Quarries, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 820 F.3d 12, 17 (D.C. Cir. 2016) (holding that the Secretary's withdrawal of citations did not make the employer a prevailing party for purposes of EAJA); *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 16 (D.C. Cir. 2010) (Federal Aviation Administration's withdraw of a complaint prior to hearing did not render the applicant a prevailing party where the ALJ's dismissal order was viewed as a dismissal without prejudice); *Adeeva v. Tucker*, 138 F.4th 641, 646-47 (1st Cir. 2025) (court's remand order, which did not "trigger" the remand of the case but simply acknowledged the parties settlement agreement, did not render the EAJA applicant a prevailing party); *Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 23, 26-27 (1st Cir. 2005) (hearing officer's pre-hearing orders issued for purposes of encouraging settlement "did not provide sufficient judicial imprimatur" where the parties ultimately entered into a private settlement).

Riverdale does, however, take issue with the Secretary's assertion that it should not recover *any* fees or expenses related to the withdrawn Citation items. (Riverdale Reply at 7-10). More particularly, Riverdale argues the withdrawn Citation items and those that went to trial involved similar legal theories and defenses and thus work done on the withdrawn items can be compensable despite not having the judicial imprimatur required by *Buckhannon*. (*Id.* at 8-10). In short, Riverdale argues "the Secretary's attempt to isolate individual citation items ignores the reality that this case was litigated as a single, integrated enforcement theory" and therefore requests the Court to award "fees related to its work in this case as a whole and not carve out fees for citation items on which [Riverdale] did not prevail." (*Id.* at 10).

The Court notes Riverdale's desired approach is not endorsed by the D.C. Circuit or the Commission for matters involving violations of the OSH Act. *See Fabi Constr. Co.*, 541 F.3d at 412 (finding an employer was not eligible for fees on those citation items for which it was not the

[5] "Judicial imprimatur" is the term used by the Supreme Court in *Buckhannon*. *Buckhannon*, 532 U.S. at 605. Black's Law Dictionary defines "imprimatur," in relevant part, as a "general grant of approval … or sanction …." *Imprimatur*, BLACK'S LAW DICTIONARY (12th ed. 2024) (definition 2). The Supreme Court invoked this definition in requiring a "*judicially sanctioned* change in the legal relationship of the parties" to qualify as a prevailing party. *Buckhannon*, 532 U.S. at 605 (emphasis added).

prevailing party); *Am. Wrecking Corp.*, 364 F.3d at 328-29 (reducing an EAJA award by two thirds to account only for those fees and expenses associated with defending certain aspects of the safety citations at issue); *C.J. Hughes Constr., Inc.*, 19 BNA OSHC 1737, 1741 (No. 93-3177, 2001) (reducing EAJA award to only cover those items for which the employer otherwise qualified); *Cent. Brass Mfg. Co.*, 14 BNA OSHC at 1906-08 (allocating fees and expenses according to the proportion of items compensable). Although the Court found no similarly on-point authority from the First Circuit, that court has noted the substantial discretion a district court has "to separate wheat from chaff" when awarding fees under EAJA. *See Michel v. Mayorkas*, 68 F.4th 74, 81 (1st Cir. 2023) (quoting *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 340 (1st Cir. 2008) (affirming reduction in EAJA award based only on the attorney's work that was necessary to be the prevailing party). Thus, if the Court found that Riverdale were otherwise entitled to an EAJA award, it would reduce any such award in accordance with these principles. However, because the Court above found Riverdale has not proven its financial eligibility for any award, and because it finds below the Secretary was substantially justified in her position on all of the vacated Citation items, the Court will not delve any further into the exact amount of a hypothetical award to Riverdale.

Based on the above, the Court finds Riverdale is the prevailing party only for purposes of those Citation items vacated in the Court's decision and order, i.e., Items 3, 5a, 5b, 5c, 5e and 6 of the Safety Citation. Riverdale is not a prevailing party for purposes of the withdrawn or affirmed Citation items. The Court therefore turns to the issue of whether the Secretary was substantially justified in pursuing the vacated Citation items.

Substantial Justification

Even though Riverdale has established it was the prevailing party for some of the Citation items, EAJA dictates no award will be granted if the Court "finds that the position of the [Secretary] was substantially justified …." 5 U.S.C. § 504(a)(1). Before analyzing the subject of substantial justification, however, the Court must address a preliminary issue concerning the materials accompanying the parties' EAJA submissions to the Court.

The Administrative Record

To its EAJA Application, Riverdale attached several exhibits: A) the Safety Citation; B) the Court's merits decision; C) the Notice of Withdrawal for the Safety Citation items; D) the Health Citations; E) the Notice of Withdrawal for the Health Citation items; F) the Adams Declaration; G) a Declaration from Travis W. Vance, intended to establish the amount of fees and

expenses Riverdale incurred during this proceeding; H) a police report from the Northbridge, Massachusetts Police Department, made in connection with the injury giving rise to OSHA's initial inspection, and accompanying witness statements made to the police; I) portions of deposition testimony from a Riverdale employee named Adam Minter; J) "The Secretary's Answer and Objections to Respondent's First Set of Interrogatories to Complainant (Safety Case)"; K) portions of deposition testimony from OSHA CSHO Edward Grzybowski; L) portions of deposition testimony from a Riverdale employee named [redacted]; M) "Respondent's Objections and Answers to the Secretary's First Set of Interrogatories"; and N) Riverdale's "Hazard Communication Program," its "Hazard Communication Program Training Test," a copy of an "Emergency Action Plan" of indeterminate origins, and slides from a PowerPoint presentation entitled "HazCom: What You Need to Know." To its Reply, Riverdale attached the Second Adams Affidavit. For her part, the Secretary has attached two exhibits to her Answer: A) portions of deposition testimony from Riverdale employee [redacted]; and B) an OSHA witness statement from a Riverdale employee named [redacted].

In determining whether the Secretary was substantially justified in pursuing the vacated Citation items, EAJA explicitly limits the Court's consideration to "the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1). In implementing this provision, Commission EAJA Rule 405(a) contemplates that the Court may, in some instances, request and consider additional evidence "but only as to issues *other than* whether the agency's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees and expenses)." 29 C.F.R. § 2204.405(a). This rule goes on to emphasize: "Whether or not the position of the Secretary was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." *Id*. Thus, the Court cannot consider any of the exhibits included with Riverdale's Application or Reply or the Secretary's Answer that were not submitted prior to or during the "adversary adjudication for which the fees and other expenses are sought," i.e., the Court's hearing on the merits of the Citations.

Of the exhibits submitted by both parties, Riverdale's Exhibits A through E were filed directly with the Court prior to the hearing and were thus part of the administrative record at the time of the hearing. Pages 1 to 5 and 8-11 of Riverdale's Exhibit H (the police report and

accompanying witness statements) and pages 1 to 4 of Exhibit N (Riverdale's Hazardous Communication program and training test) were submitted as evidence at the hearing. (Hearing Exhs. C-3, C-6, R-80). None of the remaining exhibits accompanying Riverdale's Application were submitted prior to or during the hearing; nor were either of the exhibits accompanying the Secretary's Answer. Thus, the Court cannot consider any of these documents in determining whether the Secretary was substantially justified in pursuing the vacated Citation items. *See* 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2204.405(a); *cf. also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (under the judicial review provision of the Administrative Procedure Act, review of agency decision-making is limited to "the full administrative record that was before the [agency] at the time [it] made [its] decision."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579 (D.C. Cir. 2001) (finding reversible error where the reviewing court failed to review the administrative record before the agency at the time it made its decision and instead relied on the written or oral representations of the parties); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458-59 (1st Cir. 1992) (judicial review of agency action under the APA is limited to the administrative record before the agency absent a showing of "bad faith or improper behavior" from the agency); *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F.Supp.2d 1, 4 (D.D.C. 2006) ("[T]he 'whole record' … include[s] all documents and materials that the agency directly or indirectly considered ... nothing more nor less." (cleaned up)). The Court therefore rejects, for purposes of analyzing substantial justification,[6] any argument from either party that relies exclusively on this out-of-record evidence. *E.g.*, Riverdale Appl. at 11-12 (substantial justification argument relying exclusively on the contents of Riverdale Appl. Exh. J).

Substantial Justification Standard

As the Court previously set forth, EAJA precludes an award to Riverdale if the Court "finds that the position of the agency was substantially justified …." 5 U.S.C. § 504(a)(1). The Supreme Court has interpreted the phrase "substantially justified" to mean "'justified in substance or in the

[6] EAJA and the Commission's rules only limit consideration of additional documentation for purposes of analyzing the Secretary's substantial justification in pursuing the Citations. *See* 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2204.405(a). Thus, the Court may properly consider Riverdale's Exhibit F, the Adams Declaration, and Exhibit G, the Declaration of Travis Vance, for purposes of determining Riverdale's eligibility for an EAJA award and the amount of any such award, respectively. The Court may also consider the First and Second Adams Affidavits in determining financial eligibility. The Court notes that Riverdale did not cite to any of these documents in arguing against the Secretary's substantial justification.

main'—that is, justified to a degree that could satisfy a reasonable person" or to have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting *Foster v. Tourtellotte*, 704 F.2d 1109, 1112 (9th Cir. 1983)). In other words, the Secretary "must show that [she] had a reasonable basis for the facts alleged, that [she] had a reasonable basis in law for the theories [she] advanced, and that the former supported the latter." *Sierra Club v. Sec'y of Army*, 820 F.2d 513, 517 (1st Cir. 1987); *see also Hill v. Gould*, 555 F.3d 1003, 1007 (D.C. Cir. 2009) ("[T]he question is not whether the Secretary had the better arguments. It is enough that the Secretary's interpretation and legal arguments had a reasonable basis in fact and in the text and purpose of the controlling statute and treaties.").

There is no presumption that the Secretary's position was not substantially justified simply because the Court vacated the Citation items. *See Dantran, Inc.*, 246 F.3d at 40; *see also Am. Wrecking Corp.*, 364 F.3d at 325 ("The Secretary need not have won a case on the merits in order for her position to be 'substantially justified.'"). The Secretary only needs to demonstrate that a "reasonable person could think [her position was] correct …." *Pierce*, 487 U.S. at 566 n.2; *see also Dantran, Inc.*, 246 F.3d at 40-41; *Schock v. United States*, 254 F.3d 1, 5-6 (1st Cir. 2001); *Hill*, 555 F.3d at 1006-08.

The Court will first analyze whether the Secretary was justified in her position with regard to the vacated LOTO items (Items 3, 5a, 5b, 5c & 5e) before analyzing the vacated machine guarding item (Item 6).

Lockout/Tagout Items – Items 3, 5a, 5b, 5c & 5e

Items 3, 5a, 5b, 5c and 5e of the Safety Citations all related to various alleged violations of OSHA's LOTO standard.[7] Because the merits of these items all turned on similar questions of law and fact, the Court previously analyzed these items together in its merits decision. *Riverdale Mills Corp.*, 2022 WL 3656956 at *12-23. Accordingly, the parties have discussed these items as a group

[7] OSHA's general industry LOTO standard is found in 29 C.F.R. § 1910.147 and "covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy."

Item 3 alleged a serious violation of Section (c)(7)(i)(A) for employees performing the tasks of an authorized employee on the coating machine without proper training; Item 5a alleged a serious violation of Section (d)(2) for failing to utilize LOTO procedures on the coating machine prior to starting work covered by the subpart; Item 5b alleged a serious violation of Section (d)(3) for failing to move an energy isolating device into the off position to isolate the coating machine from energy sources prior to starting work covered by the subpart; Item 5c alleged a serious violation of Section (d)(4)(i) for failing to affix LOTO devices to each energy isolating device on the coating machine; and Item 5e (formerly Item 1) alleged a serious violation of Section (c)(4)(i) for failing to utilize procedures for the control of energy prior to starting work covered by the section.

in arguing for and against substantial justification. (Sec'y's Answer at 20-24; Riverdale Appl. at 8-12; Riverdale Reply at 11-13). The Court will follow suit.

The Secretary's position turned on the applicability of the LOTO standard to Riverdale's employees' activities of adjusting the wire mesh in the coating machine during normal production operations. *Riverdale Mills Corp.*, 2022 WL 3656956 at *14-23. Generally, the LOTO standard does not apply to normal production operations. *See* 29 C.F.R. § 1910.147(a)(2)(ii). Thus, the Secretary conceded that the LOTO standard did not, of its own accord, apply to the employees' activities while the machine was in normal operation but instead argued the exception to non-applicability under 29 C.F.R. § 1910.147(a)(2)(ii) applied. This exception reads as follows:

> Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if[:]
>
> (A) An employee is required to remove or bypass a guard or other safety device; or
>
> (B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.

29 C.F.R. §§ 1910.147(a)(2)(ii)(A) & (B).

The Secretary argued adjusting the mesh on the coating machine met the definition of "servicing" under Commission caselaw. The Secretary further argued Riverdale employees frequently bypassed a guard or safety device to adjust the mesh with their feet from the catwalk and also entered the main drive area in an attempt to adjust the mesh with their hands which created an "associated danger zone … during a machine operating cycle." (Sec'y's Post-Trial Br. at 6-8). For its part, Riverdale conceded that employees needed to adjust the wire mesh during normal production operations, emphasizing five "approved" methods for doing so. (Riverdale Post-Trial Br. at 12-13). However, it argued that such activities did not meet either exception to the applicability of the LOTO standard under Section (a)(2)(ii): first, because the activity did not qualify as "servicing and/or maintenance" because the employees were adjusting the mesh and not the coating machine itself (*Id.* at 10-11); and second because Riverdale never "required" its employees to either bypass a safety guard or enter a point of operations to adjust the mesh with their hands or feet. (*Id.* at 12-18).

Rejecting the Secretary's arguments, the Court ultimately found the LOTO standard inapplicable. As to whether adjusting the mesh constituted servicing and/or maintenance, the Court noted the example the Secretary had cited from the LOTO standard's preamble, but found it was

distinguishable from the employees' activities on the coating machine. *Riverdale Mills Corp.*, 2022 WL 3656956 at *15. As to whether Riverdale required the adjustment of the mesh with either hands or feet, the Court extensively analyzed multiple witnesses' testimonies before determining the exception under Section (a)(2)(ii) was not met. *Id.* at *21-23. Thus, the Court found the LOTO standard was inapplicable to the normal production operations occurring on the coating machine. *Id.*

Mindful that "[t]he Secretary need not have won a case on the merits in order for her position to be 'substantially justified'" (*Am. Wrecking Corp.*, 364 F.3d at 325), the Court finds the Secretary has shown substantial justification to pursue the applicability of the LOTO standard to Riverdale's operations on the coating machine. The Court first addresses whether the Secretary was substantially justified in treating the adjustment of mesh on the coating machine as servicing and/or maintenance before addressing whether she was substantially justified in arguing Riverdale's employees were "required" to either bypass a guard or enter a zone of danger when adjusting the mesh on the machine.

Adjusting as servicing and/or maintenance

First, the Secretary argues she was substantially justified in her position that the adjustment of the mesh on the coating machine constituted "servicing and/or maintenance" sufficient to trigger the exception under Section (a)(2)(ii). (Sec'y's Answer at 20-22). The Court agrees.

As the Secretary points out, the definition of "servicing and/or maintenance" includes "adjusting" equipment. *See* 29 C.F.R. § 1910.147(b) (definition of "servicing and/or maintenance" includes "[w]orkplace activities such as … adjusting … machines or equipment."). And it was undisputed that Riverdale's employees were required, in some way or another, to adjust the mesh when it became misaligned on the coating machine during normal operations. (Riverdale Post-Trial Br. at 12-13 (admitting the mesh required adjusting but arguing it should have been accomplished by one of five approved methods)). Thus, the Secretary's position that the employees' activity of adjusting the mesh wire met the definition of "servicing" had a reasonable basis in the factual record. *See Hill*, 555 F.3d at 1007 ("It is enough [for purposes of substantial justification] that the Secretary's interpretation and legal arguments had a reasonable basis in fact ….''); *Schock*, 254 F.3d at 5 ("The government need not show that its position was "justified to a high degree"; rather, it must show that its position was "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." (quoting *Pierce,* 487 U.S. at 565)).

As to her legal justification, the Secretary further points out that Section (a)(2)(ii) of the LOTO standard does not clearly state servicing and/or maintenance must be done directly to a machine's component to qualify for the exception. (Sec'y's Answer at 20-21). Thus, the Secretary relied on the standard's preamble and holdings from the Commission which suggest "servicing" need not be done directly to a machine's component in order to meet the exception. (Sec'y's Post-Trial Br. at 3-8); *see also* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644-01, 36646 (Sept. 1, 1989) (to be codified at Pt. 1910 of 29 C.F.R.) (explaining that removing a piece of wood from a jammed table saw would constitute "servicing" during normal operations such that LOTO standard would apply); *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2139-40 (No. 04-475, 2005) (holding that the cleaning of debris under a conveyor belt constituted "servicing" during normal operations); *Otis Elevator Co.*, 24 BNA OSHC 1081, 1083-84 (No. 09-1278, 2013). Although the Court ultimately distinguished this authority, the Court finds the Secretary's position had a "reasonable" basis in the law sufficient to establish substantial justification. *See Pierce,* 487 U.S. at 565 (the government only needs a "reasonable basis both in law and fact" to be substantially justified in its position); *Am. Wrecking Corp.*, 364 F.3d at 327 (finding the Secretary was substantially justified, in part, where Commission precedent reasonably supported her position); *Schock*, 254 F.3d at 7-8 (finding the government's position was reasonable where precedents supported both parties' interpretation of state law).

Riverdale argues the Secretary "knew or should have known" the adjustment of the wire mesh was being done during normal production operations and thus the LOTO standard did not apply. (Riverdale Appl. at 10-11; Riverdale Reply at 12). However, Riverdale's argument fails to account for the exception to non-applicability under Section (a)(2)(ii). As the Court noted in its merits decision, the Secretary conceded that the mesh was being adjusted during normal production operations and thus that Riverdale's employees were not exposed to "unexpected" energization such that the LOTO standard would apply by way of Section (a)(1)(i). *Riverdale Mills Corp.*, 2022 WL 3656956 at *14. However, even if the Secretary knew the LOTO standard did not apply by way of the general application provision, i.e., Section (a)(1)(i), she was still substantially justified in pursuing the exception to that non-applicability provided by the standard itself, i.e., Section (a)(2)(ii). *See Hill*, 555 F.3d at 1007 (for purposes of substantial justification "[i]t is enough that the Secretary's … legal arguments had a reasonable basis … in the text … of the controlling statute ….”); *cf. Brinker v. Guiffrida*, 798 F.2d 661, 667 (3d Cir. 1986) (noting that EAJA is

designed to protect the government's right to seek "novel but credible extensions and interpretations of the law").

The Court therefore finds the Secretary's position that the adjustment of the mesh wire during normal production operations on the wire coating machine constituted "servicing and/or maintenance" was substantially justified.

Meaning of "required"

The Secretary also argues she was substantially justified in her position that the Riverdale employees were "required" to bypass guard or enter point of danger during normal operations sufficient to trigger the exception under Section (a)(2)(ii). (Sec'y's Answer at 22-24). The Court again agrees.

As previously noted, it was undisputed that Riverdale employees needed to adjust the mesh on the coating machine, by one method or another, during normal operations. (Riverdale Post-Trial Br. at 12-13). Multiple witnesses testified it was not uncommon for employees to adjust the mesh while the machine was running, either by using their feet from the catwalk or their hands on the main roller, even if they knew it was against Riverdale's safety policies. *Riverdale Mills Corp.*, 2022 WL 3656956 at *17-20. The crux of the dispute between the parties was whether adjusting the machine in this way was "required," as contemplated by Section (a)(2)(ii).

As the Secretary points out, Section (a)(2)(ii) does not define the term "required." (Sec'y's Answer at 22). In its merits decision, the Court essentially interpreted the term to mean *actively* required by the employer and so vacated the Citation items because none of Riverdale's training or policies actively called for its workers to adjust the mesh by bypassing a guard or entering a zone of danger. *Riverdale Mills Corp.*, 2022 WL 3656956 at *12. However, some Commission caselaw supported the Secretary's interpretation that operational necessities during normal production could *situationally* require a worker to either bypass a guard or enter the zone of danger to continue production and thereby trigger the requirements of LOTO under Section (a)(2)(ii)(A) or (B). *See Burkes Mech. Inc.*, 21 BNA OSHC at 2139 (finding the LOTO standard applied under Section (a)(2)(ii) where the operational realities encountered by the workers required them "to work around and underneath the conveyor because an abnormal amount of debris had accumulated on the bark pit floor such that further accumulation of the debris could have stopped the conveyor from running"); *compare also Require*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1929 (1986) (definition 5: "to impose a compulsion or command upon (as a person) to do something: demand

of (one) that something be done or some action taken"), *with id.* (definition 3a: "to call for as suitable or appropriate in a particular case: need for some end or purpose"). Such operational necessities could trigger LOTO requirements even if the employee's action contravened the employer's established work policies. *See Otis Elevator Co.*, 24 BNA OSHC at 1082 n.2 & 1084 n.4 (finding Section (a)(2)(ii)(B) could apply where the situation called for mechanic to unjam a chain, even if he performed that work in violation of the employer's policies). Thus, even if, as Riverdale argues, the Secretary knew Riverdale did not "require," as a matter of official policy or practice, its employees to bypass a guard or enter the zone of danger to adjust the mesh on the coating machine with their hands or feet, she still took the justifiable position that the operational realities of running the coating machine "required" the employees to act as they did to keep the machine running. In such an instance, the LOTO standard could be found to apply. *Burkes Mech. Inc.*, 21 BNA OSHC at 2139; *Otis Elevator Co.*, 24 BNA OSHC at 1082, 1084 nn.2 & 4. The Court thus finds the Secretary "had a reasonable basis for the facts alleged, that [she] had a reasonable basis in law for the theories [she] advanced, and that the former supported the latter." *Sierra Club*, 820 F.2d at 517.

Riverdale's arguments to the contrary do not address the alternative theory pressed by the Secretary on the meaning of "required" under Section (a)(2)(ii) but merely rehash the argument that Riverdale did not directly "require" employees to bypass a machine guard or enter the zone of danger. (Riverdale Appl. at 10-11; Riverdale Reply at 12-13). The Court ultimately agreed with that argument in vacating the LOTO-related Citation items, but the Court's agreement does not preclude a finding of substantial justification where, as here, a "reasonable person could think [the Secretary's position was] correct …." *Pierce*, 487 U.S. at 566 n.2; *see also Dantran, Inc.*, 246 F.3d at 40 ("That the government lost in the underlying litigation does not create a presumption that its position was not substantially justified."); *Am. Wrecking Corp.*, 364 F.3d at 325 ("The Secretary need not have won a case on the merits in order for her position to be 'substantially justified.'").

The Court therefore finds the Secretary's position was substantially justified with regard to Items 3, 5a, 5b, 5c and 5e of the Safety Citations, precluding an EAJA award for those items. 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2204.405(a).

Machine Guarding Item – Item 6

The Court also finds the Secretary was substantially justified in her position with regard to Item 6 of the Safety Citation. This item alleged a violation of OSHA's machine-guarding standard,

29 C.F.R. § 1910.212(a)(1),[8] premised on Riverdale employees' practice of adjusting the mesh wire from the catwalk using their feet. (Safety Citation at 14). Under Commission precedent, to establish noncompliance with the machine-guarding standard the Secretary was required to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Aerospace Testing Alliance*, No. 16-1167, 2020 WL 5815499, at *3 (OSHRC, Sept. 21, 2020) (quoting *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1073-74 (No. 93-1853, 1997)). The Secretary argued it was reasonably predictable that Riverdale's employees were placed in the zone of danger based on the proximity of the employees' feet to the machine's roller when used to adjust the mesh from the catwalk. (Sec'y's Post-Trial Br. at 22 (citing *S&G Packaging Co., L.L.C.*, No. 98-1107, 2001 WL 881250 (OSHRC, Aug. 2, 2001)); Sec'y's Answer at 25-26).

The Court finds the Secretary's position had a reasonable factual basis in the record, namely JR's testimony that his foot was within 18 inches of the main roller when he used it to adjust the mesh. *Riverdale Mills Corp.*, 2022 WL 3656956, at *24. Testimony from another employee, AM, indicated he had learned the technique from JR and acknowledged a similar proximity of his foot to the roller when using it to adjust the wire mesh. *Id.* at *25. Although the Court ultimately rejected the Secretary's position based on the specific facts presented, the Court noted in doing so that "there is no hard and fast rule for determining exposure in a machine guarding case – rather, exposure must be determined on a case-by-case basis depending on the manner in which the machine functions and the way it is operated." *Id.* (quoting *Dover High Performance Plastics, Inc.*, No. 14-1268, 2020 WL 5880242, at *3 n.5 (OSHRC, Sept. 25, 2020)).

Thus, the Court finds the Secretary had a reasonable basis in both fact and law to pursue Item 6 of the Safety Citation and a reasonable person could think her position was correct. *See Pierce*, 487 U.S. at 566 n.2; *Am. Wrecking Corp.*, 364 F.3d at 327 (finding the Secretary was substantially justified where "there were precedents available suggesting that the Secretary could meet her burden of proof by demonstrating that it was reasonably predictable that employees might be in the zone of danger."); *cf. Shock*, 254 F.3d at 6 ("When the issue is a novel one on which there

[8] This section states:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

is little precedent, courts have been reluctant to find the government's position was not substantially justified.").

In arguing against the substantial justification of this item, Riverdale argues "the Secretary ignored clear evidence that [its] employees were not required to and were trained against bypassing the gate guarding the catwalk above the coating line's main driver rollers or place any part of their body in the machine." (Riverdale Appl. at 12). Riverdale cites only generally to Exhibit D, the Health Citations, and Exhibit H, the police report of the injury leading to OSHA's investigation for this proposition. The Court does not find the Health Citations at all relevant to Riverdale's assertion. As to the police report, the thrust of the report deals with whether AT should (or perhaps should not) have been in the area next to the main rollers prior to his injury. The report only tangentially acknowledges that JR was adjusting the mesh wire with his foot but does not address any employee's view of the propriety of that action. Thus, the Court does not find this citation supports Riverdale's assertion either.

In its Application, Riverdale also argues the Secretary had "no reasonable basis" to support her position that employees would be placed in a zone of danger while adjusting the mesh from the catwalk.[9] (Riverdale Appl. at 13). In its Reply, Riverdale cites various parts of the Court's merits decision wherein the Court found deficiencies in the Secretary's case with regard to Item 6, for example reasonable predictability and access to the zone of danger. (Riverdale Reply at 13-14). Riverdale argues, *inter alia*: the Secretary "ignored clear evidence demonstrating that [Riverdale] employees were never required to bypass the gate guarding the catwalk above the coating line's main drive rollers or place any part of their body into the machine area;" there was an "absence of any reasonable basis to establish employee exposure to the cited hazard;" and the "Secretary failed to show that it was reasonably predictable that employees could have been in the zone of danger …." (*Id.*).

The Court finds these arguments do not refute its conclusion, reached above, that noncompliance with the machine guarding standard is extremely fact-bound, and there was sufficient evidence in the record for the Secretary to take the position that she did. *See Dover High*

[9] Riverdale's arguments on reasonable predictability sometimes relate to both the employees adjusting mesh from the catwalk with their feet as well as employees adjusting the mesh near the main roller with their hands. (Riverdale Appl. at 13 ("[I]t was not reasonably predicable to [Riverdale] that its [employees] would … adjust the mesh by hand and foot."). However, as charged in the Citation, Item 6 only related to "the operator [of the coating machine] periodically plac[ing] a foot through the railing on the catwalk and on to the moving wire mesh in order to straighten it." (Safety Citation at 14).

Performance Plastics, Inc., 2020 WL 5880242, at *3 n.6 ("[T]here is no hard and fast rule for determining exposure in a machine guarding case – rather, exposure must be determined on a case-by-case basis depending on the manner in which the machine functions and the way it is operated."). Instead, Riverdale's arguments merely point out various deficiencies in the Secretary's case that ultimately led to the Court vacating Item 6. Such deficiencies alone do not mean the Secretary's position was not substantially justified. *See Dantran*, 246 F.3d at 40 ("That the government lost in the underlying litigation does not create a presumption that its position was not substantially justified."); *Am. Wrecking Corp.*, 364 F.3d at 325 ("The Secretary need not have won a case on the merits in order for her position to be 'substantially justified.'").

The Court finds the Secretary was substantially justified as to Item 6 of the Safety Citation, precluding an EAJA award for that item. 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2204.405(a).

Compensable Fees & Expenses

Finally, the Secretary argues Riverdale has failed to adequately document or explain many of its claimed expenses and further that it is seeking reimbursement for many expenses that are either ineligible or unreasonable. (Sec'y's Answer at 34-35). Riverdale counters that all of its claimed expenses (save one) are adequately supported, documented, and compensable. (Riverdale Reply at 15-19; *id.* at 19 (Riverdale "is willing to forego recovery of the .2 hours of time for that call, which equates to $25.00 under the EAJA statutory rate.")). The Secretary also argues Riverdale unduly and unreasonably protracted this proceeding, and the Court should reduce or deny any EAJA award on that ground as well. (Sec'y's Answer at 6-7, 32-33); *see also* 5 U.S.C. § 504(a)(3) ("The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy."); 29 C.F.R. § 2204.406(c) (empowering Commission judges to do the same).

Based on the Court's findings above, Riverdale is not entitled to an EAJA award on multiple grounds. The Court briefly recaps those grounds here.

As an initial matter, Riverdale has failed to demonstrate that it is financially eligible for an EAJA award because it failed to provide a detailed and full disclosure of its liabilities and assets. *See* 29 C.F.R. § 2204.302(a). By failing to meet this initial threshold of eligibility, Riverdale is not entitled to an EAJA award for any aspect of this case.

Even if Riverdale had demonstrated financial eligibility, it was only the prevailing party for Items 3, 5a, 5b, 5c, 5e, and 6 of the Safety Citations. For all of those remaining items, the Court found the Secretary was substantially justified in her position to pursue them. The Court's determination on this issue is entitled to significant deference. *See Dantran, Inc.*, 246 F.3d at 41 (reviewing a district court's determination on substantial justification for an abuse of discretion); *Hill*, 555 F.3d at 1006 (same).

For these reasons, the Court does not find it would be an effective use of its resources to wade through the proffered evidence or arguments as to the value of a hypothetical EAJA award that, in the Court's opinion, Riverdale has absolutely no entitlement to. However, the Court makes two general observations on the amount of any potential award, should this matter wend its way back before the Court and require a more detailed determination.

First, Riverdale was only the prevailing party on Items 3, 5a, 5b, 5c, 5e, and 6 of the Safety Citations. Nonetheless, Riverdale argues that "[t]he Secretary's attempt to isolate individual citation items ignores the reality that this case was litigated as a single, integrated enforcement theory" and therefore requests the Court to award "fees related to its work in this case as a whole and not carve out fees for citation items on which [Riverdale] did not prevail," i.e., the withdrawn or affirmed Citation items. (Riverdale Reply at 10). As previously noted, this is not the approach the Court would take in determining the amount of any EAJA award; instead, in accordance with governing precedent, the Court would reduce the award to reflect only those Citation items for which Riverdale was the prevailing party. *See Fabi Constr. Co.*, 541 F.3d at 412; *Am. Wrecking Corp.*, 364 F.3d at 328; *Michel*, 68 F.4th at 81; *C.J. Hughes Constr., Inc.*, 19 BNA OSHC at 1741; *Cent. Brass Mfg. Co.*, 14 BNA OSHC at 1906-08.

Second, the Secretary has requested that any award to Riverdale be reduced in accordance with 5 U.S.C. § 504(a)(3) and Commission EAJA Rule 406(c), which state that the Court "may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." The Secretary points to eight motions, which she argues unduly and unreasonably protracted the final resolution of this case. (Sec'y's Answer at 6-7). Although the Court might not fully deny Riverdale's Application on this ground, the Court would be inclined to exercise its "substantial discretion" to reduce any EAJA award to Riverdale for having unduly and unreasonably protracted this case based on at least some of the examples

provided by the Secretary. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *see also Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 336 (1st Cir. 1997) ("We review fee awards deferentially, according substantial respect to the trial court's informed discretion."); *but see, e.g.*, *Quimba Software, Inc. v. United States*, 140 Fed. Cl. 624, 630 (2018) (declining to reduce an award simply because the claimant's motions were denied where they "reasonably obtained information and advanced their position through these denied motions."); *Butler v. Shalala*, No. 92 C 145, 1995 WL 314595, at *3 (N.D. Ill. May 22, 1995) (declining to reduce an award where the claimant was reasonably exercising a right).

FINDINGS & CONCLUSIONS OF EAJA ELIGIBILITY

For the reasons stated above, Riverdale has failed to demonstrate its financial eligibility for an EAJA award. For those Citation items for which Riverdale was the prevailing party, the Secretary has demonstrated she was substantially justified in her position.

The foregoing decision constitutes the findings and conclusions of Riverdale's EAJA eligibility in accordance with 29 C.F.R. §§ 2204.406 and 2200.90.

ORDER

Accordingly, Riverdale's Application brought under the Equal Access to Justice Act is **DENIED IN FULL.**

SO ORDERED.

/s/
Judge Sharon D. Calhoun
Administrative Law Judge

Date: May 5, 2026
Washington, D.C.