No. 09-2421

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

THOUVENOT, WADE & MOERCHEN, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

# REPLY BRIEF FOR THE UNITED STATES

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## INTRODUCTION

TWM's brief recites – at length – the facts it deems favorable to its position but fails to reckon with, and in many cases even to acknowledge, the evidence supportive of the government's position. Because TWM chooses to ignore the evidence that supports the government's theory, it cannot – and does not – mount an argument that is responsive to this Court's three-part test for determining whether the United States' position in this litigation was substantially justified. Similarly, TWM's brief repeatedly fails to come to grips with, and often even to acknowledge, the arguments the government advanced in its opening brief – both as to the "substantially justified" issue and the "incurred" issue.

## ARGUMENT

## I

## THE DISTRICT COURT ERRED IN RULING THAT THE UNITED STATES WAS NOT "SUBSTANTIALLY JUSTIFIED" IN SEEKING TO HOLD TWM LIABLE FOR ITS PARTICIPATION IN THE INACCESSIBLE DESIGN AND CONSTRUCTION OF APPLEGATE APARTMENTS

As explained in our opening brief, Op. Br. 16,[1] under this Court's precedents the government's position is substantially justified under the Equal Access to Justice Act if: "(1) it had a reasonable basis in truth for the facts alleged; (2) it had a reasonable basis in law for the theory propounded; and (3) there was a reasonable connection between the facts alleged and the theory propounded." *Tchemkou* v. *Mukasey*, 517 F.3d 506, 509 (7th Cir. 2008) (citation omitted). The United States' position in this case clearly satisfies this Court's test.

### *A. The Government's Position Was "Substantially Justified" Within The Meaning Of The Equal Access To Justice Act*

1. The United States asserted facts, supported by testimony and trial exhibits, that have a "reasonable basis in truth." See *Tchemkou*, 517 F.3d at 509. In its brief, TWM discusses only the evidence it deems to be in its favor. TWM's

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[1] "TWM Br. __" refers by page number to TWM's brief as appellee. "Op. Br. __" refers by page number to the United States' opening brief as appellant. "Doc. __" indicates the docket entry number of documents filed in the district court. "__ Tr. __" refers, by date and page number, to the transcript of proceedings before the district court. "App. B" refers to Appendix B to the United States' opening brief as appellant. "Ex. __" refers by number to the United States' trial exhibits. "TWM Ex. __" refers by number to TWM's trial exhibits.

statement of facts, TWM Br. 3-16, and its argument, TWM Br. 20-24, simply ignore most of the facts upon which the government's case was based.

At trial, the government presented evidence that: TWM's site engineering plans created an inaccessible condition – the elevation change between the parking lot and ground floor – that the plans failed to ameliorate, 5/28/08 Tr. 78-79, 148, 152, 172, Ex. 46; the plans were marked "for construction," 5/28/08 Tr. 75, Ex. 46; the plans had, at one point, included a ramp that was later deleted, 5/29/08 Tr. 171; TWM's plans were the only site engineering plans prepared, 5/28/08 Tr. 80-81, 5/29/08 Tr. 100; TWM was listed as the site engineer on building permit applications, 5/28/08 Tr. 144-146; TWM's plans were used to build Applegate Apartments, 5/28/08 Tr. 79, 94, 144, 148; TWM never suggested that its plans should not be used, 5/28/08 Tr. 79-80, 172-175, 5/29/08 Tr. 204; TWM was instrumental in obtaining building permits, even to the point of creating a revised grading plan to address one of the Village of Swansea's concerns, 5/27/08 Tr. 41, 5/28/08 Tr. 46, 82-83, 85-86, 140-143, 5/29/08 Tr. 174-177; TWM went on site to "stake" – that is, to locate the corners and set the finish floor levels of – the first six buildings, 5/28/08 Tr. 89-91, 154-155, 180; and TWM knew nothing would be done to make its below-grade design accessible and that the project would violate federal disability law, but nonetheless advocated for Village approval of Applegate Apartments, 5/29/08 Tr. 103-104, 172, 196-202, 206-210, 214-215, Ex.

41.[2] This evidence, if credited by the jury, was clearly sufficient to support a finding that TWM violated the Fair Housing Act, as the district court repeatedly held. See Doc. 112 (denying TWM's motion for summary judgment); 5/29/08 Tr. 123 (denying TWM's first motion for a directed verdict); 5/29/08 Tr. 247-248[3] (denying TWM's second motion for a directed verdict).

TWM's brief fails to establish that any of the government's evidence lacked a reasonable basis in truth. TWM's brief does acknowledge that TWM's plans were marked "for construction," TWM Br. 7, and that TWM staked the buildings at Applegate, TWM Br. 16. TWM argues, as it did at trial, that the plans submitted to the Village and marked "for construction" were nonetheless "concept" plans that were not sealed[4] and not actually intended to be used for

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[2] TWM attempts to characterize the government's case as solely dependant on the testimony of its expert witness. See TWM Br. 22, 24. In fact, as the above record citations make plain, the government established each of the propositions listed above through the testimony of fact witnesses – not its expert.

[3] TWM excerpts, TWM Br. 14-16, a portion of the colloquy leading up to this ruling in which the district court closely questioned the government's attorney. The court ultimately ruled, however, that the outcome of the case would depend on the jury's resolution of "credibility issues." 5/29/08 Tr. 247.

[4] TWM's brief repeatedly points to the fact that the plans submitted to the Village were not affixed with its professional seal. But, as the United States pointed out in its opening brief, Op. Br. 9-10 n.5, the district court agreed with the United States that, even for purposes of state law, the lack of a seal did not preclude the plans from being used; rather, a seal only protects the designer from liability for damages resulting from deviations from the plans by the builder. TWM's brief fails to respond to this argument. Certainly, a designer cannot insulate itself from liability under the Fair Housing Act simply by deciding not to seal its design plans.

construction,[5] TWM Br. 7, and that staking does not count as construction,[6] TWM Br. 16. But TWM does not allege that the government lacked a reasonable basis in truth for this evidence. Rather, TWM admits that the evidence is true – that the plans were marked for construction and that it did stake the buildings – and then argues about what this evidence means. Accordingly, because TWM either ignores the government's evidence or acknowledges its truth, TWM has failed even to present a proper argument that the evidence upon which the United States relies lacks "a reasonable basis in truth." See *Tchemkou*, 517 F.3d at 509.

Without directly challenging the veracity of the government's evidence, TWM does, however, attempt to contradict the government's claim that its plans were in fact used to build Applegate. See p. 3, *supra*; Op. Br. 6. TWM incorrectly asserts that Dan Sheils, Applegate's owner, "did not use or rely on any of TWM's documents" in building Applegate. TWM Br. 23. The record, however, supports the government's claim that Sheils did use TWM's plans for construction. See 5/28/08 Tr. 79-80 (Sheils testifying that he built the finish floor levels of Applegate Apartments as close as he could to the levels indicated on TWM's plans

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[5] Indeed, the United States presented evidence that when TWM intended a plan to be a concept plan, it indicated that intention by calling the document a "Concept Plan" and marking it "Issued for Review," rather than "Issued for Construction." 5/28/08 Tr. 146-147.

[6] The United States presented evidence that "staking" involves actually showing the excavators where to set the floor levels of the buildings. 5/28/08 Tr. 90-91. As explained, p. 3, *supra*; Op. Br. 5-6, 17, below-ground floor levels were the principal features that made the Applegate Apartment buildings inaccessible to persons with disabilities.

and that TWM never told him not to use its plans in building); 5/28/08 Tr. 94 (Sheils testifying that he followed TWM's grading plan to grade the site); 5/28/08 Tr. 144 (Sheils testifying again that he "relied on" TWM's grading plan to grade the site); 5/28/08 Tr. 148 (Sheils testifying that he used TWM's plans to set the floor levels of the apartment buildings).[7] Moreover, the district judge ruled at the close of the government's case that "[w]e have evidence that the jury could believe that throughout [Applegate's] construction, [TWM's] plans were used by everyone." 5/29/08 Tr. 123.

TWM makes many other inaccurate assertions about the evidence, including the following:

(a) TWM claims that Marsha Maller, one of its employees, testified that TWM did not set the floor levels for Applegate Apartments, but instead merely included in its plans the floor levels Sheils provided. TWM Br. 9 (citing 5/29/08 Tr. 150). The record citation TWM provides does not in any way support this claim. TWM then misleadingly states, in the next sentence of its brief:

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[7] Considered in isolation, the only transcript page TWM cites might seem to support its assertion that Sheils did not rely on its plans. See TWM Br. 23 (citing 5/28/08 Tr. 139). Sheils testified that he did not use TWM's plans to "build the buildings," 5/28/08 Tr. 139, and in a sense that is true. TWM's plans were not architectural plans that specify how the buildings themselves are to be built. But – as his testimony makes clear – Sheils did use TWM's plans to set the floor levels of the buildings and to grade the land around the buildings. See 5/28/08 Tr. 79, 94, 144, 148. Therefore, the government's evidence, if credited by the jury, showed that TWM's plans were used to create an inaccessible condition – the elevation change between the parking lot and ground floor – that the plans failed to ameliorate.

"According to Mr. Sheils, this [that is, the reason TWM included floor levels provided by Sheils] is because * * * the project was just a concept." TWM Br. 9 (citing 5/28/08 Tr. 99). In fact, Sheils repeatedly testified that TWM set the apartment building floor levels. 5/28/08 Tr. 78-80, 148, 152. In the testimony TWM cites, 5/28/08 Tr. 99, Sheils is not discussing the TWM plans that were marked "for construction" and submitted to the Village, but an earlier plan, which the United States freely acknowledged was a concept plan. See 5/28/08 Tr. 147.

(b) TWM similarly makes the misleading claim that "Mr. Sheils never submitted any drawings prepared by TWM to the Village of Swansea for code compliance review to issue building permits." TWM Br. 11. On the very transcript page TWM cites, Sheils testified that the only reason he did not submit TWM's plans to the Village official responsible for code compliance is that he "thought [the official] had them" – presumably because they had already been submitted for purposes of zoning approval. 5/28/08 Tr. 119. In the next sentence of its brief, TWM makes the false assertion that "TWM was not asked by Mr. Sheils, nor did they have any role in resubmitting plans to the Village of Swansea for the approval of building permits." TWM Br. 11. In support of this assertion, TWM cites Sheils' negative response to a confusing cross-examination question about whether TWM had a role "in resubmitting" plans for building approval. TWM Br. 11 (citing 5/28/08 Tr. 123). In fact, Sheils repeatedly testified that he did ask TWM to change the grading plan to respond to the Village's concern that the land around the apartments had to be built up higher for the apartments to be

classified as two-story buildings. 5/28/08 Tr. 82-83, 120, 140-143. Indeed, the revised grading plan that TWM prepared is in evidence. 5/28/08 Tr. 143; Ex. 158.

(c) TWM falsely asserts, TWM Br. 21-22, that "[t]he only 'engineering plans'" it prepared were "for the sewer lines, water lines and other underground 'subdivision improvements.'" And TWM incorrectly represents, TWM Br. 14, 21-23, that it was as to these features, and not the elevation change between the parking lot and the floor levels of the apartment buildings, that the plans were marked "for construction." But TWM's own evidence clearly shows that its site improvement plans that were marked "for construction" and sealed contain a grading plan. TWM Ex. 23. Indeed, TWM contends, TWM Br. 22, these same site improvement plans were the plans that TWM included in the submission to the Village Planning Commission – which indisputably contain a grading plan that shows apartment buildings sunk below ground level. When TWM-employee Lyndon Joost used TWM's plans to represent Applegate before the Village Planning Commission, he stated that Sheils would start construction on Applegate as soon as possible. Ex. 47 at TWM1176. This suggests that TWM's plans were not merely conceptual but rather were – as the plans themselves state – ready to be used "for construction." Moreover, TWM's plans were also used during the building permit process. In fact, TWM revised its grading plan to respond to a concern the Village raised during the building permit process and later issued this revised plan "for construction." 5/27/08 Tr. 41; 5/28/08 Tr. 46, 82-83, 85-86, 140-143; 5/29/08 Tr. 174-177; Ex. 158.

(d) TWM asserts that "Sheils did not follow any of the proposed grades on any concept drawings prepared by TWM when he constructed the site." TWM Br. 23 (citing 5/28/08 Tr. 143-144). The very transcript pages TWM cites reveal, however, that Sheils did rely on TWM's plans. See 5/28/08 Tr. 144 (Sheils agreeing that he had "relied on TWM's plan showing the regrading around the back" of buildings 1 and 2); see also 5/28/08 Tr. 148 (Sheils stating he used TWM's plans to set the floor levels of the buildings).

(e) Finally, TWM asserts, without citation to the record, that "testimony clearly established that" TWM was not the site engineer. TWM Br. 24. On the contrary, testimony – as well as documents admitted into evidence – established that TWM was the only site engineer for the project. TWM was listed as the site engineer on building permit applications. 5/28/08 Tr. 144-146. TWM created the only plans for Applegate that show grading and elevation levels. 5/28/08 Tr. 78-81, 148, 152; 5/29/08 Tr. 100; Ex. 46. TWM created a revised grading plan. 5/27/08 Tr. 41; 5/28/08 Tr. 46, 82-83, 85-86, 140-143. And TWM physically staked the buildings at Applegate. 5/28/08 Tr. 89-91, 154-155, 180. Indeed, the architect on the project testified that TWM produced the site engineering plans for Applegate. 5/28/08 Tr. 184. TWM never claims, nor could it, that some other engineering firm was the site engineer for Applegate.

2. The United States also had a reasonable basis in law for the theory it propounded. See *Tchemkou*, 517 F.3d at 509. TWM incorrectly asserts, TWM Br. 25-26, that the United States ignored the part of the *Baltimore Neighborhoods,*

*Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661 (D. Md. 1998), legal standard that makes clear that only "wrongful participants" in inaccessible design and construction are liable under the Fair Housing Act. In fact, the United States' Brief as Appellant and its briefs in the district court clearly acknowledge this requirement. See Op. Br. 19 (citing *Barker* v. *Niles Bolton Assocs., Inc.*, 316 F. App'x 933, 942 (11th Cir. 2009), for the proposition that the *Baltimore Neighborhoods* standard is "careful to distinguish between liability based solely on participation in a joint project (which it did not suggest) versus liability based on participation in actual wrongdoing"); Doc. 95 at 11 (citing *Baltimore Neighborhoods* for the proposition that only "[w]rongful participants" in the design and construction process are liable). Moreover, the district court expressly adopted the United States' legal theory and rejected TWM's; therefore, it clearly did not base its attorney's fees award on a determination that the government advocated an unreasonable legal theory. See Doc. 112 at 18.

*B. The District Court Failed To Apply This Court's Three-Part Test For Determining Whether The Government's Position Is Substantially Justified*

TWM's brief does not offer a meaningful response to the government's argument that the district court failed to properly *apply* this Court's three-part test for determining whether the government's position is substantially justified. TWM Br. 26-27. TWM points out that the district court articulated a – very abbreviated – version of the three-part test and cited this Court's decision in *Conrad* v. *Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006). What the district court utterly failed to do was

actually apply the test. The district court never concluded that the United States' evidence lacked a reasonable basis in truth. App. B at 5-8. Indeed, it failed to address most of the United States' evidence at all. App. B at 7. The district court also did not conclude that the United States' legal theory was unreasonable, or that the facts alleged lacked a reasonable connection to that theory. App. B at 5-8.

### *C. The District Court's Conclusion That The United States' Position Was Not Substantially Justified Is Inconsistent With Its Own Reasoning In Prior Rulings*

The district court's reasoning in its summary judgment and directed verdict rulings is very relevant to – and ultimately inconsistent with – its attorney's fees award. TWM wrongly asserts – based on a flawed interpretation of *United States* v. *Hallmark Construction Co.*, 200 F.3d 1076 (7th Cir. 2000) – that these prior rulings are "irrelevant" to the issue whether the government's position was substantially justified. TWM Br. 29.

*Hallmark* does not, however, state or even suggest that denial of a motion for summary judgment or a motion for a directed verdict is irrelevant to a determination of whether the government's position is substantially justified. Instead, *Hallmark* merely indicates that the denial of a defendant's motion for summary judgment does not necessarily mean that the government's position was substantially justified. This was particularly true in light of the facts in *Hallmark*, where the district court had failed to offer detailed reasoning in support of its conclusion that the government's position was substantially justified, and that conclusion appeared to be at odds with the district court's merits decision that

strongly favored the defendant against the government. See 200 F.3d at 1079-1081. The United States' opening brief clearly states that the government does not rely on the mere fact that the district court denied TWM's motion for summary judgment. Op. Br. 26.

What the United States does rely on – among other arguments – is the district court's consistent reasoning in support of its earlier rulings in the case. Far from being irrelevant, this reasoning bears directly on the issue of substantial justification. See Op. Br. 22-24. Particularly relevant is the district court's statement that "a jury * * * could clearly believe [based on the government's evidence] that TWM was involved in both the design and the construction [of Applegate Apartments] and given the Fair Housing Act, could believe that they are culpable." 5/29/08 Tr. 123. TWM ignores this statement, as well as the district court's similar reasoning in support of its denials of TWM's motion for summary judgment and motions for directed verdict.

TWM also ignores this Court's holding in *Wilfong* v. *United States*, 991 F.2d 359, 369 (7th Cir. 1993), that when "the government's evidence, if credited by the trier of fact, [is] sufficient to support a verdict in its favor, there necessarily [is] a reasonable basis in fact for the government's position." See Op. Br. 24-25. The district court determined both at the close of the government's case, 5/29/08 Tr. 123, and at the close of the evidence, 5/29/08 Tr. 247-248, that the evidence, if credited by the jury, "was sufficient to support a verdict in [the government's] favor." *Wilfong*, 991 F.2d at 369. Accordingly, its determination that the

government's position was not substantially justified is, under *Wilfong*, an abuse of discretion. See *ibid.*[8]

TWM tries to distinguish *Wilfong* by claiming that the verdict in this case, unlike in *Wilfong*, did not depend on the jury's credibility determinations. TWM Br. 28. But the jury's verdict plainly depended on its credibility determinations: The jury had to decide whether to believe that all the plans TWM produced over the course of Applegate's development were simply concept drawings not intended to be used for construction, or whether to believe – based on the numerous facts set out above, pp. 3-4, *supra* – that TWM was involved in designing and constructing the principal feature of Applegate Apartments that made it inaccessible. Moreover, TWM's assertion that the jury's verdict did not depend on credibility determinations is inconsistent with the district court's repeated contrary rulings. Both in its denial of TWM's motion for summary judgment and in its denial of TWM's motion for directed verdict at the close of the evidence, the district court said that resolution of the case would depend on the jury's determination of witness credibility. Doc. 112 at 19; 5/29/08 Tr. 247.

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[8] TWM is correct that this Court's decision in *Wilfong* articulates several other criticisms of the district court's reasoning in that case. TWM Br. 28 (citing *Wilfong*, 991 F.2d at 365-367). But those criticisms do not cabin *Wilfong*'s holding.

## II

## ATTORNEY'S FEES THAT TWM'S INSURER WAS OBLIGATED TO PAY AND DID PAY WERE NOT "INCURRED BY" TWM UNDER EAJA[9]

A. TWM's brief does not respond at all or fails to offer a meaningful response to most of the government's arguments that TWM has not – for purposes of 28 U.S.C. 2412(d)(1)(A) – "incurred" the fees owed and paid by its insurer.

1. TWM does not attempt to argue that the language of Section 2412(d)(1)(A) supports an award of attorney's fees owed and paid by its insurer. See Op. Br. 27-31 (arguing based on the plain language of Section 2412(d)(1)(A) that TWM has not incurred attorney's fees beyond those it actually paid as part of its deductible). Instead, TWM urges this Court to simply look past the statute's "bare words." TWM Br. 32 (citing *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962)). The Supreme Court and this Court have repeatedly stated, however, that statutes must be enforced according to their terms. See, *e.g.*, *Jimenez* v. *Quarterman*, 129 S. Ct. 681, 685 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.") (citations omitted); *United States* v. *Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) ("Statutory interpretation begins with the plain language of the statute. We assume that the purpose of the statute is communicated by the ordinary meaning of the words

[9] If this Court concludes – as it should – that the district court erred in determining that the position of the United States was not substantially justified, it need not resolve this issue.

Congress used; therefore, absent any clear indication of a contrary purpose, the plain language is conclusive.") (citations and internal quotation marks omitted).

2. TWM also fails to address the United States' argument that an award of attorney's fees that will simply be passed on – pursuant to the terms of the insurance contract – to USSIC, TWM's insurer, undermines EAJA's express eligibility requirements. See Op. Br. 31-33.

3. Nor does TWM address the United States' arguments, Op. Br. 29-30, that an insured does not incur attorney's fees by paying insurance premiums. TWM mentions the district court's ruling – which follows *Ed A. Wilson, Inc.* v. *General Services Administration*, 126 F.3d 1406 (Fed. Cir. 1997) – that TWM "incurred" fees by paying its insurance premiums. But TWM offers no response to the government's arguments that this interpretation of the statute is wrong. See Op. Br. 29-30.

B. TWM's primary argument is that an insured party should be allowed to recover attorney's fees its insurer paid because otherwise the insurer will raise premiums and this will deter insured parties from litigating against the government. TWM Br. 32-35. But here again TWM's brief fails to respond to the United States' arguments, Op. Br. at 34-35, that: (1) the alleged threat of increased premiums is wholly speculative; (2) Congress did not address – either in the statute itself or legislative history – any potential deterrent effect of increased insurance premiums; and (3) the purpose of liability insurance militates against a facile assumption that a threat of increased insurance premiums would actually deter challenges to

unreasonable government action. Indeed, TWM fails to assert that it has actually been threatened with increased insurance premiums if it is unable to recover – and then pass on to USSIC – the attorney's fees USSIC paid. And no record evidence indicates that it has been so threatened.

In support of its insurance premiums deterrence argument, TWM cites *United States* v. *Claro*, No. 07-20732, 2009 WL 2461855 (5th Cir. Aug. 12, 2009), a case decided after the United States filed its opening brief in this case. TWM describes *Claro* as if it held that a potential deterrent effect of increased insurance premiums justifies a grant of attorney's fees under EAJA. TWM Br. 32-33. That is not what *Claro* held. *Claro* ruled that EAJA's "incurred" requirement – as incorporated by the Hyde Amendment – *prevented* an award of attorney's fees for paralegal work done by a criminal defendant's wife. *Id.* at *12, *15. *Claro* recognized and applied "the general rule" that "fees are 'incurred' when the litigant has a legal obligation to pay them." *Id.* at *12 (citation omitted). *Claro* also noted that other courts have recognized two types of exceptions to the general rule: (1) cases involving *pro bono* representation and (2) a limited number of "residual situations" that present policy reasons that further the goals of EAJA. *Id.* at *13-*14. *Claro* described the Federal Circuit's decision in *Wilson* as the example of the second type of exception to the general rule that has been recognized. *Ibid.* The Fifth Circuit did not say in *Claro* that it agrees with *Wilson*.

TWM attempts, TWM Br. 33-34, to distinguish *S.E.C.* v. *Comserv Corp.*, 908 F.2d 1407 (8th Cir. 1990), on the ground that, in that case, the prevailing

party's attorney's fees were paid by its employer's insurer rather than his own insurer – and therefore the deterrent effect of potentially increased premiums was not a factor. *Comserv* clearly states, however, that where a prevailing party is "protected by private agreement * * * from the burden of attorney's fees," fee-shifting is not necessary "to overcome the deterrent [effect] of attorney's fees." *Id.* at 1415. Indeed, *Comserv* said that fee-shifting in such a case would be "pointless." *Ibid.* *Comserv* does not in any way support the notion that attorney's fees should be allowed in order to mitigate a highly speculative potential deterrent effect of increased insurance premiums. TWM is indisputably "protected by private agreement," *id.* at 1415, with USSIC from the burden of having to pay attorney's fees above $50,000.

C. TWM also argues that fees should be awarded because, if they are not, insurance companies will have a "perverse incentive" to settle cases even when the litigant does "not want to settle." TWM Br. 35. But this is the nature of liability insurance. When a company chooses to purchase liability insurance it decides that the benefit of not having to pay for attorneys should the need for litigation arise is worth the cost of the premiums and – depending on the specific insurance contract – the loss of ability to direct and control the litigation. Moreover, in the mine run of cases a liability insurance company covers the cost of litigation for its insured knowing that it will not be reimbursed. As the Eighth Circuit said in *Comserv*, this is just one of a liability insurance company's normal "costs of doing business" and

EAJA "was not written to compensate" insurance companies for these costs. 908 F.2d at 1416.

## CONCLUSION

For the reasons set forth in this reply brief and in the United States' opening brief, this Court should reverse the district court's award of attorney's fees because the government's position was "substantially justified." Alternatively, the Court should reduce the award to $43,662.98, the amount of fees TWM "incurred."

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Wordperfect X4. It contains 4658 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by first-class mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

_____

NATHANIEL S. POLLOCK
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## CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, two paper copies and one electronic copy in CD format of the foregoing "Reply Brief For The United States" were served by first-class mail on the following counsel of record:

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