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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 In re Application of
13 GERARD MGNDICHIAN
14 For Return of Property.

) CASE NO. CV 02-09580 MMM (SHx)
)
) ORDER GRANTING MGNDICHIAN’S
) MOTION FOR ATTORNEYS’ FEES AND
) COSTS PURSUANT TO THE EQUAL
) ACCESS TO JUSTICE ACT
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18 The present case concerns the administrative forfeiture of several motorcycles originally
19 belonging to petitioner. Petitioner filed a motion for return of the property. While Judge Hupp
20 of this court denied that relief, he declared that the administrative forfeiture proceedings were a
21 nullity, equitably tolled the time within which the Bureau of Alcohol, Tobacco and Firearms
22 (“ATF) could commence such proceedings, and authorized ATF to commence proper
23 administrative forfeiture proceedings within sixty days of the date of his order. Petitioner has now
24 moved for attorneys’ fees and costs pursuant to the Equal Access to Justice Act.
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26 **I. FACTUAL AND PROCEDURAL BACKGROUND**

27 On May 19, 2000, the Bureau of Alcohol, Tobacco and Firearms seized the subject
28 motorcycles during a search of Gerald Mgndichian’s (“Petitioner”) motorcycle shop at 10792

1 Lower Azusa Avenue, El Monte, California. Petitioner was arrested the same day and charged
2 with conspiracy to violate 18 U.S.C. §§ 371, 511, and 2321. ATF Special Agent William Queen
3 identified the motorcycles as having been stolen by members of the Mongol criminal motorcycle
4 gang, having vehicle identification numbers that had been removed, and/or having been altered
5 with aftermarket parts. Given the value of the motorcycles and the circumstances of their seizure,
6 the ATF deemed them eligible for administrative forfeiture.

7 Pursuant to 26 U.S.C. § 7325(2) and 27 C.F.R. § 72.22, the ATF was required to publish
8 notice of the commencement of administrative forfeiture proceedings. It did so, and served
9 written notice by mail on petitioner on August 22, 2000. The notice letters stated that a claim
10 and cost bond had to be filed by September 21, 2000 (within thirty days of the date of first
11 publication of the notice), that the bond had to be in the form of a certified cashier's check or
12 other acceptable surety payable to ATF, and that, if petitioner lacked the financial means to post
13 a bond, he could file a sworn affidavit setting forth the factual basis for his request that the bond
14 requirement be waived.

15 Petitioner's claim, accompanied by an unsworn bond waiver request, was received on
16 September 19, 2000. On March 30, 2001, ATF advised petitioner that his claim was insufficient,
17 because he had failed to provide evidence of his inability to post a bond as instructed in the notice
18 letters. The March 30 letter requested that petitioner provide a copy of his 1999 federal income
19 tax return, that he complete an Application to Proceed in Forma Pauperis and that he sign an
20 Authorization to Furnish Financial Information. It stated that the documents had to be received
21 by ATF within thirty days of petitioner's receipt of the letter to avoid summary forfeiture.
22 Petitioner timely submitted the additional financial documentation on April 27, 2001.

23 On or about December 4, 2001, ATF Special Agent John Ciccone telephoned petitioner
24 to arrange for ATF auditor John DePasquale to review petitioner's financial documentation.
25 During the course of the conversation, petitioner told Ciccone that he had sent his attorney a
26 check for the cost bond because his attorney was going on vacation. On December 18, 2001,
27 ATF sent petitioner and his attorneys a letter stating that his in forma pauperis application had
28 been denied, and that petitioner had fifteen days from receipt of the letter to submit a cost bond

1 in order to avoid summary forfeiture. Petitioner signed a return receipt for the letter on
2 December 21, 2001. The deadline for filing a cost bond was therefore January 5, 2002. On
3 January 7, 2002, two days after the deadline, petitioner’s attorney mailed a personal check to
4 ATF. ATF did not receive the check until January 9, 2002. On January 11, 2002, it advised
5 petitioner’s attorney that he had missed the deadline for filing a cost bond, and that a personal
6 check was not acceptable collateral for a cost bond under 27 C.F.R. § 72.25(a). The subject
7 motorcycles were deemed abandoned to administrative forfeiture.

8 On December 17, 2002, petitioner filed a motion for return of property. The motion was
9 referred to Judge Harry L. Hupp for decision. After full briefing, Judge Hupp denied petitioner’s
10 motion for return of property. He found, however, that “the administrative forfeiture proceedings
11 were a nullity,” and that the “just result . . . is not to order the motorcycles returned at this point,
12 but to allow ATF within 60 days correctly to notice an administrative forfeiture proceeding, to
13 allow petitioner to file his claim and a bond which satisfies ATF, [and] to allow the United States
14 to correctly start a judicial foreclosure action, which petitioner may defend.” Administrative
15 forfeiture proceedings against the subject motorcycles were recommenced on March 20, 2003.

16 On June 2, 2003, petitioner filed the instant motion for attorneys’ fees and costs pursuant
17 to the Equal Access to Justice Act (“EAJA”). The government filed opposition on June 30, 2003.
18 Having reviewed the briefs and evidence presented by the parties, the court finds that petitioner
19 is entitled to recover attorneys’ fees and costs incurred in connection with the prosecution of his
20 motion for return of property.

21 22 **II. DISCUSSION**

23 **A. Legal Standard For Attorneys’ Fees Under 28 U.S.C. § 2412**

24 Section 2412(d)(1)(A) provides:

25 “Except as otherwise specifically provided by statute, a court shall award to a
26 prevailing party other than the United States fees and other expenses, in addition
27 to any costs awarded pursuant to subsection (a), incurred by that party in any civil
28 action (other than cases sounding in tort), including proceedings for judicial review

1 of agency action, brought by or against the United States in any court having
2 jurisdiction of that action, unless the court finds that the position of the United
3 States was substantially justified or that special circumstances make an award
4 unjust.” 28 U.S.C. § 2412(d)(1)(A).¹

5 The prerequisites for a fee award under § 2412(d)(1)(A) are: (1) the claimant must be a
6 “prevailing party”; (2) the government’s position must not have been “substantially justified”;
7 (3) there must be no “special circumstances [that make] make an award unjust”; and (4) a fee
8 application must be submitted to the court within thirty days of final judgment in the action and
9 be supported by an itemized statement. *Commissioner, Immigration and Naturalization Service*
10 *v. Jean*, 496 U.S. 154, 158 (1990); *Krecioch v. United States*, 316 F.3d 684, 687 (7th Cir. 2003)
11 (“To be eligible for a fee award under the EAJA, Krecioch must show: (1) that he was a
12 ‘prevailing party’; (2) that the Government’s position was not ‘substantially justified’; (3) that no
13 ‘special circumstances make an award unjust’; and (4) that any fee application be submitted to the
14 court within 30 days of final judgment in the action and be supported by an itemized statement”);
15 *Perales v. Casillas*, 950 F.2d 1066, 1072 (5th Cir. 1992) (“Eligibility for a fee award under the
16 EAJA requires, at a minimum, that the claimant be a ‘prevailing party’; that the Government’s
17 position was not ‘substantially justified’; that no ‘special circumstances make an award unjust’;
18 and that any fee application be submitted to the court within 30 days of final judgment and be
19 supported by an itemized statement”).

20 “The party seeking fees has the burden of establishing its eligibility.” *Love v. Reilly*, 924
21 F.2d 1492, 1494 (9th Cir. 1991). A plaintiff may satisfy the second and third prongs of the test,
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23
24 ¹The EAJA fee provision has been applied to motions for return of property such as that
25 petitioner brought here. See, e.g., *United States v. Marolf*, 277 F.3d 1156, 1164 (9th Cir. 2002)
26 (holding that EAJA fees should be awarded in connection with a Rule 41(e) motion for the return
27 of property filed after the government administratively forfeited property without notice and the
28 statute of limitations on a judicial forfeiture action had run); *Purcell v. United States*, 908 F.2d
434, 437-38 (9th Cir. 1990) (holding that EAJA fees could be sought in connection with a
successful pre-indictment Rule 41(e) motion for the return of seized property and remanding to
the district court to determine if the government’s position was substantially justified).

1 however, simply by alleging that the government’s position was not substantially justified and that
2 no special circumstances exist that make an award unjust. The government then has the burden
3 of proving that its actions were substantially justified in law and in fact and/or that special
4 circumstances make awarding fees unjust. *Id.* at 1495 (“The burden of proving the special
5 circumstances or substantial justification exception to the mandatory award of fees under the
6 EAJA rests with the government”); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484,
7 498 (9th Cir. 1987) (“the government bears the burden of showing that its position was
8 substantially justified”).

9 **B. Whether Petitioner Is Entitled To Attorneys’ Fees And Costs Under 28 U.S.C.**
10 **§ 2412**

11 **1. “Prevailing Party”**

12 A plaintiff or petitioner is deemed the “prevailing party” if, as a result of a judgment or
13 consent decree entered in the legal action he or she brought, there is a “material alteration of the
14 legal relationship of the parties.” *Buckhannon Board and Care Home, Inc. v. West Virginia*
15 *Department of Health and Human Resources*, 532 U.S. 598, 604 (2001); *Miles v. State of*
16 *California*, 320 F.3d 986, 989 (9th Cir.2003) (“The Supreme Court has squarely held that there
17 is a ‘prevailing party’ when there has been a ‘material alteration of the legal relationship of the
18 parties,’” quoting *Buckhannon, supra*, 532 U.S. at 604); *id.* at 989, n. 3 (“The Court specifically
19 identified two instances in which a plaintiff can be considered a ‘prevailing party’: (1) an
20 enforceable judgment on the merits; or (2) an enforceable court-ordered consent decree”).

21 Voluntary action by the defendant that is not compelled by a judgment or consent decree
22 does not constitute a “material alteration” in the parties’ legal relationship sufficient to support
23 a fee award under *Buckhannon*. *Buckhannon, supra*, 532 U.S. at 605 (“A defendant’s voluntary
24 change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the
25 lawsuit, lacks the necessary judicial imprimatur on the change”); *Watson v. County of Riverside*,
26 300 F.3d 1092, 1096 (9th Cir. 2002) (“*Buckhannon* holds that to be considered a prevailing party,
27 one must have obtained a ‘judicial imprimatur’ that alters the legal relationship of the parties, such
28 as a judgment on the merits or a court-ordered consent decree; it is not enough merely to have

1 been a ‘catalyst’ in causing a voluntary change in the defendant’s conduct”).

2 The Ninth Circuit has applied the *Buckhannon* rule to applications for fees and costs under
3 the EAJA. *United States v. Campbell*, 291 F.3d 1169, 1172 (9th Cir. 2002) (“In *Perez-Arellano*
4 *v. Smith*, we adopted the Supreme Court’s standard in *Buckhannon*, ruling that a ‘prevailing party’
5 under the Equal Access to Justice Act (EAJA) ‘must be one who has gained by judgment or
6 consent decree a “material alteration of the legal relationship of the parties,”’ quoting
7 *Perez-Arellano v. Smith*, 279 F.3d 791, 793 (9th Cir. 2002) (“It might be argued that the Supreme
8 Court’s *Buckhannon* decision should be viewed as binding precedent only with respect to the
9 statutes there in issue, the FHAA and the ADA, each of which provides attorney’s fees for a
10 ‘prevailing party’ who makes a claim under it. . . . However, under the circumstances presented
11 here, we discern no reason to interpret the EAJA inconsistently with the Supreme Court’s
12 interpretation of ‘prevailing party’ in the FHAA and the ADA as explained in *Buckhannon*. We
13 therefore hold that a ‘prevailing party’ under the EAJA must be one who has gained by judgment
14 or consent decree a ‘material alteration of the legal relationship of the parties’”).

15 Here, the government argues that movant cannot be deemed the “prevailing party” under
16 *Buckhannon* because there was no final judgment entered in this case and because there was no
17 “material alteration” in the parties’ legal relationship. The court evaluates each argument in turn.

18 **a. Whether Judge Hupp’s Order Constitutes A Final Judgment²**

19 The government first contends that petitioner cannot be deemed the prevailing party
20 because no final judgment has been entered in this case. Rule 58 of the Federal Rules of Civil
21 Procedure, titled “Entry of Judgment,” provides in pertinent part as follows:

22 “Every judgment shall be set forth on a separate document. A judgment is
23 effective only when so set forth and when entered as provided in Rule 79(a).”

24 FED.R.CIV.PROC. 58.

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26 ²The court accepts and considers part of the record on this motion the Supplemental
27 Declaration of Michele C. Marchand, with attached exhibits, which was submitted on the day of
28 the hearing. It further grants petitioner’s two *ex parte* applications for leave to file a rejoinder
to Marchand’s declaration, and considers the substance of those pleadings as well.

1 Rule 79(a) sets forth the requirements for entry of items in the civil docket. The relevant portion
2 states as follows:

3 “All papers filed with the clerk, all process issued and returns made thereon, all
4 appearances, orders, verdicts, and judgments shall be entered chronologically in the
5 civil docket on the folio assigned to the action and shall be marked with its file
6 number. These entries shall be brief but shall show the nature of each paper filed
7 or writ issued and the substance of each order or judgment of the court and of the
8 returns showing execution of process. The entry of an order or judgment shall
9 show the date the entry is made.” FED.R.CIV.PROC. 79(a).

10 “The two rules go hand in hand: Rule 58 tells the parties what types of documents constitute
11 judgment, and Rule 79(a) tells the parties how the clerk must enter those documents on the civil
12 docket. Only when both rules are satisfied is there an ‘entry of judgment.’” *Radio Television*
13 *Espanola S.A. v. New World Entertainment, Ltd.*, 183 F.3d 922, 930 (9th Cir. 1999). See also
14 FED.R.CIV.PROC. 58 (“A judgment is effective only when so set forth [according to Rule 58] and
15 when entered as provided in Rule 79(a)”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d
16 979, 996 (9th Cir.2000) (Paez, J., dissenting) (“The lack of a final written judgment entered by
17 the clerk of the district court is not a technicality. A final written judgment is an indication to the
18 parties and to this court that the district court considers its task completed,” quoting *Wood v.*
19 *Coast Frame Supply, Inc.*, 779 F.2d 1441, 1442-43 (9th Cir. 1986)).

20 Local Rule 58 further defines the term “entry of judgment” for purposes of proceedings
21 in this district. It provides, in relevant part, that

22 “[n]otation in the civil docket of entry of a memorandum of decision, an opinion
23 of the Court, or a minute order of the Clerk shall not constitute entry of judgment
24 pursuant to F.R.Civ.P. 58 and 79(a) unless specifically ordered by the judge.” CA
25 CD L. R. 58-6.

26 “The Local Rule is therefore a clarification of Rule 58 and furthers the separate document
27 requirement by stating that memorandums of decision, opinions, and minute orders will not satisfy
28 the requirements of Rule 58, even when entered into the civil docket.” *Radio Television, supra*,

1 183 F.3d at 930. The local rule creates an exception, however, validated by the Ninth Circuit,
2 which allows Central District judge to designate an order or opinion as the entry of judgment in
3 a case by specifically and affirmatively ordering that the “notation in the civil docket” of the order
4 shall “constitute entry of judgment pursuant to F.R.Civ.P. 58 and 79(a).” *Radio Television*,
5 *supra*, 183 F.3d at 930 (“The local rule provides an exception, whereby a Central District judge
6 may use such documents to constitute entry of judgment under Rule 58 if the judge specifically
7 and affirmatively orders that ‘notation in the civil docket’ of such a document shall ‘constitute
8 entry of judgment pursuant to F.R.Civ.P. 58 and 79(a).’ Said another way, the clerk’s act of
9 entering a minute order – even a minute order that would satisfy the separate document
10 requirement – can not effect an entry of judgment unless the district court judge specifically orders
11 it to be so”).

12 Applying these rules to the instant case, the court finds that Judge Hupp’s order was a final
13 judgment. Judge Hupp’s order stated: “This is a final order disposing of this action; accordingly,
14 this minute order is signed by the court.” Judge Hupp affixed his signature below this statement.³
15 Although Judge Hupp could specifically have used the words “entry of judgment,” and cited the
16 federal and local rules, the intent of his order is clear. Judge Hupp intended to enter a final order
17 and judgment in the case. Therefore, it cannot be said that “nothing was done by the court . . .
18 which can be said to constitute entry of judgment.” *Wood, supra*, 779 F.2d at 1442 (quoting *Pure*
19 *Oil Co. v. Boyne*, 370 F.2d 121, 122-23 (5th Cir. 1966)).⁴ Accordingly, the court finds that
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21 ³See March 10, 2003 Order at 5 (“This is a final order disposing of this action”).

22 ⁴The government cites a recent order by Judge George H. King denying attorneys’ fees in
23 *In re Seizure of \$84,028.00 in U.S. Currency*, CV 02-7417 GHK (JTLx), as evidence that no final
24 judgment has been entered in this case. The *In re Seizure of \$84,028.00* case is distinguishable.
25 There, Judge King found that an order entered by Judge Hupp allowing the government to
26 renounce forfeiture proceedings did not constitute the “entry of judgment” under Local Rule 58-6.
27 (See Supplemental Declaration of Michele C. Marchand (“Supp. Marchand Decl.”), Ex. 37 at
28 2.) Judge Hupp’s order in *In re Seizure of \$84,028.00*, however, did not state that it was final
or that it “disposed of the action.” (See Petitioner’s Rejoinder to Respondent’s Response to
Movant’s Reply, Ex. 40 at 3.) Unlike this case, therefore, Judge Hupp did not demonstrate any
intention to issue a final judgment *In re Seizure of \$84,028.00*.

1 Judge Hupp's order constituted a final judgment for purposes of the instant motion.⁵

2 **b. Whether Judge Hupp's Order Effected A "Material Alteration"**
3 **In The Parties' Legal Relationship**

4 The government next argues that Judge Hupp's order did not effect a "material alteration"
5 in the parties' legal relationship. It asserts that, although petitioner sought the return of his
6 motorcycles, Judge Hupp did not order the motorcycles returned. Rather, he allowed the
7 government to re-initiate administrative forfeiture proceedings, and give notice of the new
8 proceedings. Since petitioner did not obtain the relief he sought in filing the motion, the
9 government contends that the court cannot find there was a "material alteration" in the parties'
10 legal relationship. The court disagrees.

11 Although Judge Hupp denied petitioner's motion for an order directing the return of the
12 motorcycles, he declared that the ATF's administrative forfeiture of the property was void. To
13 retain possession of the motorcycles, therefore, the ATF was required to renotice administrative
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15 ⁵Even if it were to find that Judge Hupp's order did not constitute the "entry of judgment,"
16 the court would enter judgment *nunc pro tunc* effective March 10, 2003. Federal courts have
17 generally held that when a judgment is not properly entered, a court may issue a *nunc pro tunc*
18 judgment retroactive to the date of the original order. See, e.g., *United States v. Sumner*, 226
19 F.3d 1005, 1009-10 (9th Cir. 2000) ("'*Nunc pro tunc* amendments are permitted primarily so that
20 errors in the record may be corrected. The power to amend *nunc pro tunc* is a limited one, and
21 may be used only where necessary to correct a clear mistake and prevent injustice.' It does not
22 imply the ability to alter the substance of that which actually transpired or to backdate events to
23 serve some other purpose. Rather, its use is limited to making the record reflect what the district
24 court actually intended to do at an earlier date, but which it did not sufficiently express or did not
25 accomplish due to some error or inadvertence," quoting *Fierro v. Reno*, 217 F.3d 1, 5 (1st Cir.
26 2000) ("The core notion, in Massachusetts as in many other jurisdictions, is that a *nunc pro tunc*
27 order is appropriate primarily to correct the record at a later date to make the record reflect what
28 the court or other body actually intended to do at an earlier date but did not sufficiently express
or did not get around to doing through some error or inadvertence. Thus, a clerical mistake in
a judgment might be corrected *nunc pro tunc* when discovered later. . ."). Entry of such a
judgment would be appropriate since Judge Hupp's March 10, 2003, order clearly indicated his
intent that it constitute a final order terminating the action, and there was at most a clerical error
in complying with the separate document rule. Furthermore, the court notes that, even if it was
not one when entered, Judge Hupp's order has now become a final judgment by operation of Rule
58(b)(2)(B).

1 forfeiture proceedings, affording petitioner another opportunity to file a claim, post a cost bond
2 and compel the initiation of a judicial forfeiture action. The order clearly altered the parties' legal
3 relationship in a material way, since, prior to entry of the order, ATF took the position that the
4 administrative forfeiture was valid, and that petitioner had no right to contest it in a judicial
5 proceeding. While petitioner did not obtain all of the relief he sought because Judge Hupp did
6 not order return of the motorcycles, he did secure a significant legal victory because Judge Hupp's
7 order gave him the opportunity to contest a forfeiture that would otherwise have been final and
8 incontestible. See *Buckhannon, supra*, 532 U.S. at 603 ("This view that a 'prevailing party' is
9 one who has been awarded *some* relief by the court can be distilled from our prior cases"
10 (emphasis added)); *United States v. Real Property Known as 22249 Dolorosa Street, Woodland*
11 *Hills, California*, 190 F.3d 977, 981-82 (9th Cir. 1999) ("While the EAJA contains no applicable
12 definition of 'prevailing party,' we consider claimants "prevailing parties for attorney's fees
13 purposes if they succeed on any significant issue in litigation which achieves some of the benefit
14 the parties sought in bringing suit." . . . The government argues that claimants are not prevailing
15 parties because, viewing the civil forfeiture action as a whole, they ultimately prevailed as to only
16 28.7% of the total value of the defendant properties in the original complaint, . . . There is no
17 requirement that success be measured by comparison of the value of the respective properties.
18 Forfeiture of the Dolorosa property was a 'significant issue' even if its monetary value was less
19 than that of the property forfeited," quoting *National Wildlife Federation v. Federal Energy*
20 *Regulatory Commission*, 870 F.2d 542, 544 (9th Cir. 1989) and *Hensley v. Eckerhart*, 461 U.S.
21 424, 433 (1983)).

22 The government does not dispute that Judge Hupp's order granted petitioner at least some
23 of the relief he sought. Rather, it cites three recent orders by judges of this court that it contends
24 support its argument that the parties' legal relationship was not materially altered. The
25 government's reliance on these cases is misplaced. Two of the orders denying requests for
26 attorneys' fees were decided pursuant to the Civil Asset Forfeiture Reform Act of 2000
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1 (“CAFRA”).⁶ As Judge Hupp noted at the hearing on petitioner’s motion for return of property,
2 the seizure in this case took place on May 19, 2000, and is not subject to CAFRA, which applies
3 only to seizures on or after August 23, 2000. CAFRA contains an attorneys’ fees provision, and
4 it was this provision, rather than the EAJA, that the two orders interpreted and addressed.
5 Moreover, the factual circumstances of the cases are distinct from in the instant action. In each
6 case, after effecting an administrative forfeiture, the government failed to initiate a judicial
7 forfeiture action within the time period prescribed by CAFRA, and thereafter returned the
8 property to the claimant. Here, prior to the entry of Judge Hupp’s order, the government took
9 the position that petitioner’s motorcycles had been administratively forfeited, and that he had no
10 recourse. The orders are thus of little, if any, value in deciding the instant case.

11 The government cites a third case, however, that is factually more apposite. In *In re*
12 *Seizure of \$84,028.00 in U.S. Currency by the Inglewood Police Department*, CV 02-7417 GHK
13 (JTLx), Judge King concluded that an order entered by Judge Hupp, which allowed the
14 government to renote forfeiture proceedings, did not materially alter the parties’ legal
15 relationship.⁷ Unlike the present case, however, the government in *In re Seizure of \$84,028.00*
16 had not administratively forfeited the property at issue prior to the time Judge Hupp ruled on the
17 motion for return of property.⁸ As such, once Judge Hupp denied the movant’s motion for return
18 of property, movant was in the same position he was in when he moved the court to return his
19 property. Here, by contrast, the government had already declared forfeit the property at issue and
20 took the position that petitioner could not secure its return. Accordingly, the analysis set forth
21 in Judge King’s order addresses a fact situation that is distinct from that presented by this case.

22 The government proffers no other authority in support of its argument that there was no
23 material alteration in the parties’ legal relationship. Because Judge Hupp’s order the
24 government’s administrative forfeiture a “nullity,” it effected a material alteration in the parties’
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26 ⁶Supp. Marchand Decl., Exs. 38 and 39.

27 ⁷Supp. Marchand Decl., Ex. 37 at 2.

28 ⁸Declaration of Steven Welk, ¶ 3.

1 legal relationship. Following entry of Judge Hupp’s order, the government had either to return
2 the motorcycles to petitioner or re-notice administrative forfeiture proceedings, affording
3 petitioner another opportunity to file a claim, post a cost bond, and compel the initiation of
4 judicial forfeiture proceedings. This clearly altered the parties’ legal relationship since, prior to
5 that time, the government took the position that the administrative forfeiture was valid, and that
6 petitioner had no right to contest the forfeiture in a judicial proceeding. Since there was both a
7 material alteration in the parties’ legal relationship and a final judgment, the court finds that
8 petitioner was the prevailing party for purposes of the EAJA.⁹

9 **2. “Substantially Justified”**

10 The court must thus examine whether the government’s position was substantially justified.
11 In making this determination, the court must consider the totality of circumstances both prior to
12 and during litigation. *Abela v. Gustafson*, 888 F.2d 1258, 1264 (9th Cir. 1989). See also *Marolf*,
13 *supra*, 277 F.3d at 1161 (“Thus we must focus on two questions: first, whether the government
14 was substantially justified in taking its original action; and, second, whether the government was
15 substantially justified in defending the validity of the action in court.’ . . . To prevail here, the
16 government must establish that it was substantially justified on the whole, considering, first, the
17 taking of the Asmara through administrative forfeiture without notice, and, second, continuing
18 to pursue the forfeiture notwithstanding defective notice and expiration of the limitations period”);
19 *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) (“In analyzing the reasonableness of the
20 government’s position under the “totality of the circumstances” test, we must look both to the
21 position asserted by the government in the trial court as well as the nature of the underlying
22 government action at issue,” quoting *League of Women Voters of California v. FCC*, 798 F.2d
23 1255, 1258 (9th Cir. 1986)). In *Kali*, the court noted that “[t]he inquiry into the nature of the

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25 ⁹Following Judge Hupp’s decision, the government terminated forfeiture proceedings, and
26 transferred the motorcycles to state authorities. Two of the vehicles have been ordered returned
27 by the state court; a hearing with respect to the two remaining motorcycles was scheduled for July
28 10, 2003. (See Petitioner’s Reply to Opposition to Motion for Award of Attorneys’ Fees and
Costs, Exs. 31, 32; Declaration of Paul Gabbert in Support of Petitioner’s Reply to Opposition
to Motion for Award of Attorneys’ Fees and Costs (“Gabbert Reply Decl.”), ¶ 3.)

1 underlying government action will by definition concern only the merits of that action,” while
2 “[t]he inquiry into the government’s position at trial will encompass” the merits of the underlying
3 action “to the extent . . . the government chooses to defend” it, as well as “extraneous
4 circumstances bearing upon the reasonableness of the government’s decision to” litigate. *Kali*,
5 *supra*, 854 F.2d at 332.

6 To be substantially justified, “the government’s position must have a reasonable basis in
7 law and fact.” *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998) (citing *Pierce v.*
8 *Underwood*, 487 U.S. 552, 565 (1988)). “[A] position can be justified even though it is not
9 correct, and . . . it can be substantially (i.e., for the most part) justified if a reasonable person
10 could think it correct, that is, if it has a reasonable basis in law and fact.” *Pierce, supra*, 487
11 U.S. at 566, n. 2. “The government’s position must be “substantially justified” at “each stage
12 of the proceedings.” *Corbin, supra*, 149 F.3d at 1052 (quoting *Williams v. Bowen*, 966 F.2d
13 1259, 1261 (9th Cir. 1991)).

14 “That the government lost does not raise a presumption that its position was not
15 substantially justified.” *Kunzman, supra*, 817 F.2d at 498. Additionally, that an agency acted
16 contrary to law does not necessarily mean that it lacked substantial justification for the position
17 it took. *Kali v. Bowen*, 854 F.2d 329, 333 (9th Cir. 1988).

18 In the present case, petitioner seeks fees for the period from October 2002, when present
19 counsel was retained, to the present. This encompasses a brief period of negotiation and litigation
20 of this action commencing in December 2002. Petitioner argues that the government’s refusal to
21 rescind the administrative forfeiture, and its defense of this action were not substantially justified
22 given the numerous errors made by the government in the forfeiture process. The court agrees.
23 Judge Hupp found that the ATF made the following clear errors in attempting to forfeit the
24 motorcycles administratively: (1) the agency’s notice incorrectly stated that the basis for the
25 forfeiture was violation of 49 U.S.C. § 11, a statute that had been repealed six years earlier; (2)
26 the ATF erroneously referred the matter to the United States Attorney for the Southern District
27 of California, despite the fact that the seizure took place in the Central District; (3) in October
28 2000, ATF sent a notice to petitioner implying, but not stating, that judicial forfeiture proceedings

1 would be commenced; (4) following this notice, and an inexplicable delay of almost six months,
2 ATF advised petitioner on March 30, 2001, that it would not waive the filing of a cost bond
3 because he had not adequately demonstrated inability to post a bond; (5) after another inexplicable
4 delay, ATF informed petitioner that his request for a waiver of the cost bond requirement had
5 been denied, and that he had fifteen days to post the bond or administrative forfeiture would take
6 place; and (6) there was no legal authority for the imposition of this fifteen day time limit.
7 Particularly in light of the Ninth Circuit’s decision in *Marolf*, which held that giving
8 constitutionally defective notice to a claimant voids an administrative forfeiture (*United States v.*
9 *Marolf*, 173 F.3d 1213, 1216 (9th Cir. 1999) (“We therefore affirm the district court’s ruling that
10 a constitutionally deficient notice of forfeiture renders such a forfeiture void”)), these errors
11 demonstrate that the government did not have a substantial justification for defending the case.

12 The government argues that because Judge Hupp found that it acted in good faith “to
13 position the case for a court forfeiture action,” it necessarily had substantial justification for
14 defending against petitioner’s action as it did. The court cannot agree. The court does not take
15 issue with Judge Hupp’s finding that the parties acted in good faith. Good faith alone, however,
16 does not demonstrate that the government’s decision to deny petitioner’s claim and litigate the case
17 was substantially justified. *Taylor v. United States*, 815 F.2d 249, 254 (3d Cir. 1987) (Becker,
18 J., concurring) (“ . . . we are not denying attorney’s fees because of the government’s good faith.
19 Good faith or laudatory motives are not a defense to an EAJA claim”); *Truckers United for Safety*
20 *v. Mead*, 201 F.Supp.2d 52, 56 (D.D.C. 2002) (“ . . . the Government’s arguments that its ‘good
21 faith belief’ equates to substantial justification of its actions and that the decisions of other courts
22 provide substantial justification are without merit”), rev’d. on other grounds, 329 F.3d 891 (D.C.
23 Cir. 2003). Cf. *Pierce, supra*, 487 U.S. at 563 (“to be ‘substantially justified’ means, of course,
24 more than merely undeserving of sanctions for frivolousness”).

25 Moreover, even if good faith alone were sufficient to support a finding that the
26 government’s position was substantially justified, Judge Hupp’s good faith analysis was expressly
27 limited to the time period prior to filing of the instant litigation. Judge Hupp’s ruling depended,
28 in part, on his conclusion that the government could have taken corrective action had the defects

1 in the original notice of forfeiture been brought to its attention.¹⁰ It follows that, once petitioner
2 brought the errors to the government's attention in October 2002, the government should have
3 renoticed the proceedings and given petitioner another opportunity to file a claim and cost bond.
4 The government did not do so, however. Rather than acknowledging its errors, and renoticing
5 the forfeiture proceedings, the government chose to assert that the motorcycles had been
6 administratively forfeited, and to defend against petitioner's Rule 41(g) motion. The government
7 offers no explanation for these decisions, and does not attempt to demonstrate that they were
8 substantially justified. Therefore, even if good faith were sufficient to demonstrate substantial
9 justification, the court cannot find that the government acted in good faith by deciding to defend
10 against petitioner's Rule 41(g) motion. See *United States v. \$12,248 U.S. Currency*, 957 F.2d
11 1513, 1518 (9th Cir. 1991) (affirming an EAJA fee award because, despite an earlier
12 determination of probable cause, the government's poor investigation of claimant's case and
13 unreasonable delay in pursuing the forfeiture action demonstrated that the government's position
14 was not substantially justified).

15 In sum, after carefully examining the merits of the government's case and the totality of
16 the circumstances surrounding the case, therefore, the court finds that the government's decision
17 to litigate this case was not substantially justified.

18 3. "Special Circumstances"

19 The court may also decline to award petitioner attorneys' fees if it finds that "special
20 circumstances make an award unjust." See 28 U.S.C. § 2412(d)(1)(A). The Ninth Circuit has
21 held that special circumstances are present where the government makes an argument for "a novel
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23 ¹⁰The government argues that it was legally and factually justified in deciding to assert that
24 the errors in the notice were immaterial and did not violate due process because Judge Hupp found
25 that the ATF agent who sent the administrative forfeiture notices did not understand forfeiture law
26 and made mistakes. (See Government's Opposition to Motion for Attorneys' Fees and Costs at
27 8-9.) Judge Hupp's finding, of course, focused on the actions of a non-lawyer government agent.
28 The decision of the United States Attorney's Office to ignore known defects in notice –
appreciating, as it must have, the import of the Ninth Circuit's decision in *Marolf* – and to defend
against petitioner's action is a far different type of "mistake" than the one on which Judge Hupp
relied.

1 but credible extension or interpretation of the law” (*Hoang Ha v. Schweiker*, 707 F.2d 1104, 1106
2 (9th Cir. 1983)), where its action concerns an issue on which “reasonable minds could differ”
3 (*League of Women Voters, supra*, 798 F.2d at 1260), or where it involves an “important and
4 doubtful question” (*Minor v. United States*, 797 F.2d 738, 739 (9th Cir. 1986)).¹¹ The
5 government does not argue that “special circumstances” make an award of fees unjust in this case.
6 Accordingly, the court need not address the issue.

7 **4. Conclusion Regarding Entitlement To Fees**

8 Because petitioner prevailed on a significant issue in the litigation, i.e., the validity of
9 ATF’s administrative forfeiture, because ATF’s decision to assert in litigation that the forfeiture
10 was valid was not substantially justified, and because petitioner’s fee application was timely filed,
11 petitioner is entitled to recover attorneys’ fees under the EAJA. The court thus turns to the
12 amount of the fee award.

13 **C. The Amount Of Fees**

14 In *Pierce, supra*, 487 U.S. at 552, the Supreme Court observed that
15 “the EAJA provides that attorney’s fees ‘shall be based upon prevailing market
16 rates for the kind and quality of the services furnished,’ but ‘shall not be awarded
17 in excess of [\$125] per hour unless the court determines that an increase in the cost
18 of living or a special factor, such as the limited availability of qualified attorneys
19 for the proceedings involved, justifies a higher fee.’” *Id.* at 571 (citing 28 U.S.C.
20 § 2412(d)(2)(A)).¹²

21 Addressing the statutory reference to “a special factor,” the Court held that “the ‘special factor’
22 formulation suggests Congress thought that [\$125] an hour was generally quite enough public
23 reimbursement for lawyers’ fees. . . .” *Id.* at 572. Thus, special factors cannot be “of broad and
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26 ¹¹These three cases were cited in *United States v. Gavilan Joint Community College Dist.*,
849 F.2d 1246, 1249 (9th Cir. 1988).

27 ¹²At the time *Pierce* was decided, the cap set by 28 U.S.C. § 2412(d)(2)(A)(ii) was \$75
28 per hour.

1 general application. . . . The ‘novelty and difficulty of issues,’ ‘the undesirability of the case,’
2 and ‘the work and ability of counsel,’ and ‘the results obtained’ are factors applicable to a broad
3 spectrum of litigation; they are little more than routine reasons why market rates are what they
4 are.” *Id.* at 573. Similarly, “local or national market” rates, the “general legal competence”
5 of counsel, and customary fees and awards are not special factors. See *id.* at 572-73. Instead,
6 the Court stated, the statute’s reference to “the limited availability of qualified attorneys for the
7 proceedings involved” means “attorneys having some distinctive knowledge or specialized skill
8 needful for the litigation in question,” e.g., attorneys who have “an identifiable practice specialty
9 such as patent law, or knowledge of foreign law or language.” *Id.* at 573.

10 Petitioner proffers a number of reasons why the court should award fees greater than that
11 statutory rate. First, he asserts that “in Los Angeles, in 2003, the prevailing market rates are
12 from \$250-\$500 per hour. Accordingly, at a minimum, the statutory rate should be increased to
13 \$250 and \$350, respectively, based on prevailing market conditions.”¹³ As noted, *Pierce* rejected
14 just such a “local market rate” argument. *Id.* at 572 (“To the contrary, the ‘special factor’
15 formulation suggests Congress thought that [\$125] an hour was generally quite enough public
16 reimbursement for lawyers’ fees, whatever the local or national market might be”).

17 Petitioner next argues that the time and labor required, the time limitations imposed, and
18 the nature and length of his professional relationship with counsel weigh in favor of an upward
19 adjustment of the fee amount. *Pierce* expressly held that the court may not rely on factors
20 applicable to a broad spectrum of litigation as justification for increasing the statutory rate. *Id.*
21 at 573. The circumstances cited by petitioner are clearly broad and general in application and do
22 not justify an increase in the hourly fee rate.

23 Finally, petitioner argues that the skill and expertise required of counsel in the instant
24 forfeiture case justify an upward adjustment of the fee rate. As noted, *Pierce* held that an
25 attorney’s “distinctive knowledge or specialized skill” may justify an increase in rate. *Id.* The
26 Ninth Circuit has stated that three requirements must be met before higher fees can be awarded
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28 ¹³Motion for Attorneys’ Fees at 18-19.

1 on this basis: “First, the attorney must possess distinctive knowledge and skills developed through
2 a practice specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly,
3 those skills must not be available elsewhere at the statutory rate.” *Real Property Known as 22249*
4 *Dolorosa Street, Woodland Hills, Cal., supra*, 190 F.3d at 984 (citing *Love v. Reilly*, 924 F.2d
5 1492, 1496 (9th Cir. 1991)). The *Dolorosa Street* court assumed, without deciding, that
6 “expertise in defending civil forfeiture actions qualifies as a practice specialty requiring distinctive
7 knowledge and skills.” *Id.* at 984.¹⁴ It concluded, however, that claimants had not demonstrated
8 that the action was other than a “routine civil forfeiture case” and thus that it did not require
9 specialized skills. *Id.* The court also held that claimants had not shown that “no suitable counsel
10 would have taken on claimants’ case at the statutory rate.” *Id.* at 985. Accordingly, it denied
11 claimants’ request that fees be awarded at greater than the statutory rate.

12 The court concludes that expertise in civil forfeiture actions qualifies as a practice specialty
13 requiring distinctive knowledge and skills. Certainly, petitioner has presented evidence that his
14 attorneys specialize in the area, and that, as a result of their specialization, they possess
15 knowledge, skill and expertise in civil forfeiture law.¹⁵ Compare *United States v. Eleven*
16 *Vehicles*, 937 F.Supp. 1143, 1155 (E.D. Pa. 1996) (declining to increase fees in a forfeiture
17 action above the statutory rate because “unlike the attorneys with ‘distinctive knowledge’ or
18 ‘specialized skill’ mentioned in *Pierce*, Mr. Ivy has acknowledged that he ‘had no knowledge of
19 or experience in civil in rem forfeiture law until early October 1992, when [he] began work on
20 this case’”).

21 The question is whether petitioner has presented sufficient evidence that his attorneys’
22 expertise and skills were required in the instant litigation and that the necessary expertise was not

24 ¹⁴A court in this district has concluded that “[f]orfeiture actions are unique and require
25 specialized knowledge of criminal law and procedure, civil procedure, forfeiture law, and tax
26 law.” See Order Granting Claimant’s Motion for Attorneys Fees, in *U.S. v. \$27,000 in U.S.*
Currency, CV 00-8876 ABC (Ex).

27 ¹⁵Declaration of Paul Gabbert in Support of Motion for Attorneys Fees (“Gabbert Motion
28 Decl.”), ¶ 6; Declaration of Mark Bernheim in Support of Motion for Attorneys Fees (“Bernheim
Motion Decl.”), ¶ 1.

1 available at the statutory rate. Petitioner’s lawyers assert that this was “the single most difficult
2 application for return of property [among the hundreds] that [they] have prepared.”¹⁶ While the
3 court cannot judge the accuracy of this statement, it does find, based on its own experience
4 handling civil forfeiture actions, that this was anything but a “routine civil forfeiture case.”
5 *Dolorosa Street, supra*, 190 F.3d at 984. Expertise in the forfeiture area was clearly needed to
6 unravel the procedural history of the ATF’s administrative forfeiture, and to determine that the
7 ATF was relying on a repealed statute as the basis for forfeiture, and asserting time limits for the
8 filing of a cost bond that had no statutory or regulatory basis. Petitioner has also proffered
9 evidence that the skills his lawyers brought to bear on the litigation are not generally available in
10 the Los Angeles area at the statutory EAJA rate.¹⁷ The government has adduced no contrary
11 evidence, and the record is thus undisputed in this regard. Applying the standard set forth in
12 *Pierce* and *Dolorosa Street*, therefore, the court concludes that petitioner is entitled to an award
13 of fees above the statutory rate.

14 Gabbert declares that his standard billing rate in federal forfeiture cases is \$350 to \$400,¹⁸
15 while Bernheim declares that his rate varies from \$150 to \$250 per hour.¹⁹ The government once
16 again proffers no contrary evidence. Accordingly, the court finds that petitioner may properly

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18 ¹⁶Gabbert Motion Decl., ¶ 9; Bernheim Decl., ¶¶ 3, 6.

19 ¹⁷Gabbert Motion Decl., ¶ 7 (“During my approximately 26 years of practice in this
20 District, I have not known any competent attorneys who have defended civil in rem forfeiture
21 cases in the district court at the statutory EAJA rates of \$75.00 and \$125.00 an hour, respectively.
22 Based on my training and experience, I believe that there are only a handful of attorneys in the
23 Central District of California who consistently take and defend these highly specialized civil in
24 rem forfeiture cases. To my knowledge, competent representation in this highly specialized area
25 is not available at the present EAJA adjusted statutory rate of \$146.306 per hour”); *id.*, ¶ 9 (“.
26 . . . it is my opinion that there is a shortage of attorneys in Los Angeles who are qualified to assist
private citizens in obtaining the return of property subject to federal civil forfeiture for claimed
violations of federal statutes”). See Declaration of Eric Honig, ¶ 5 (“My rate for federal civil
forfeiture defense is \$250-\$350 per hour”); Declaration of Janet Sherman, ¶ 5 (“My hourly rate
for federal civil forfeiture litigation is \$300 per hour”).

27 ¹⁸Gabbert Motion Decl., ¶ 3.

28 ¹⁹Bernheim Motion Decl., ¶ 4.

1 recover attorneys' fees at \$350 per hour for work done by Gabbert and \$150 per hour for work
2 done by Bernheim.

3 The final step is to multiply the fee by the number of hours expended on the case.
4 Petitioner has presented evidence that his attorneys, Paul Gabbert and Mark Bernheim, spent
5 102.5 and 103.1 hours respectively litigating the case.²⁰ After reviewing the billing summaries
6 submitted, the court finds the hours recorded to be reasonable. The government does not argue
7 to the contrary. Accordingly, petitioner is awarded a total of \$51,350 in attorneys' fees,
8 comprised of \$35,875 for work done by Gabbert and \$15,465 for work done by Bernheim.

9 **D. The Amount Of Costs**

10 Petitioner also requests that the court tax certain costs to the government. As noted, the
11 EAJA allows for the recovery of both fees and costs. The statute states, in relevant part, that "a
12 court shall award to a prevailing party other than the United States fees and other expenses. . .
13 ." 28 U.S.C. § 2412(d)(1)(A). Petitioner seeks \$1,034.51 for filing fees, Westlaw charges,
14 transcripts, photocopies, faxes, messenger service and postage. These amounts are reasonable
15 and recoverable. *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988) ("[W]e reject the
16 government's argument that telephone, reasonable travel, postage, and computerized research
17 expenses are not compensable under the EAJA"); *Aston v. Secretary of Health and Human*
18 *Services*, 808 F.2d 9, 12 (2d Cir. 1986) (affirming an award of telephone, postage, travel and
19 photocopying expenses); *International Woodworkers of America v. Donovan*, 792 F.2d 762, 767
20 (9th Cir. 1985) (expenses routinely billed to a client – telephone, air courier, attorney travel – are
21 recoverable under the EAJA); *United States v. Hitachi America, Ltd.*, 101 F.Supp.2d 830, 833,
22 838 (C.I.T. 2000) (awarding costs under the EAJA, *inter alia*, for deposition, pretrial and trial
23 transcripts).

24 Petitioner also seeks \$3,960 for paralegal services (39.6 hours at \$100 per hour). The
25 court also finds that this amount is properly allowed under the EAJA. *Krecioch, supra*, 316 F.3d

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27 ²⁰Gabbert Motion Decl., ¶ 11; Declaration of Paul Gabbert in Support of Reply ("Gabbert
28 Reply Decl."), ¶ 2; Bernheim Motion Decl., ¶ 8; Declaration of Mark Bernheim in Support of
Reply ("Bernheim Reply Decl."), ¶ 2.

1 at 687 (“Fees for work done by paralegals can be awarded under the fee-shifting provision of the
2 EAJA,” citing *Hirschey v. F.E.R.C.*, 777 F.2d 1, 6 (D.C. Cir. 1985)); *Cook v. Brown*, 68 F.3d
3 447, 453 (Fed. Cir. 1995) (“The Supreme Court, and lower courts, have approved the inclusion
4 of fees for paralegals, law clerks, and law students, in fee awards under EAJA or analogous
5 fee-shifting statutes, on the theory that their work contributed to their supervising attorney’s work
6 product, was traditionally done and billed by attorneys, and could be done effectively by
7 nonattorneys under supervision for a lower rate, thereby lowering overall litigation costs”). Thus,
8 petitioner is entitled to recover total costs of \$4,994.51.

9
10 **III. CONCLUSION**

11 For the foregoing reasons, the court grants petitioner’s motion for attorneys’ fees pursuant
12 to the EAJA. Petitioner is awarded attorneys’ fees in the sum of \$51,350 and costs in the amount
13 of \$4,994.51, for a total award of \$56,344.51. The government is directed to pay this sum to
14 petitioner on or before **November 20, 2003**.

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16 DATED: October 21, 2003

17 _____
18 MARGARET M. MORROW
19 UNITED STATES DISTRICT JUDGE
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