UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. No. 13-55266
	)	U.S.D.C. No. 10cv2378-LAB
Plaintiff and Appellee,	)	
	)	APPELLANT'S REPLY
v.	)	BRIEF
	)	
$28,000.00 IN U.S. CURRENCY,	)	
	)	
Defendant.	)	
	)	
ROBERT MOSER,	)	
	)	
Claimant and Appellant.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
District Judge Larry Alan Burns

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In his opening brief, Mr. Moser explained the district court erred in cutting his requested fee by approximately 70%. He argued the court erroneously calculated the lodestar figure – both the reasonable number of hours and rate – and improperly reduced that presumptively reasonable amount to arrive at the final fee. AOB:35-51. Thus, he asked this Court to vacate the fee order and refer the matter "to the Appellate Commissioner to calculate the amount of an appropriate fee award." AOB:56 (citation omitted).

The government has chosen to ignore the majority of Mr. Moser's arguments. It glosses over the actual issues on appeal, while focusing on (and misrepresenting) Mr. Moser's fee agreement. It repeatedly claims Mr. Moser and Mr. Barnett had "a contingency fee agreement," which it argues should result in a reduced fee award. GB:18, 19, 20, 25, 30. The government is wrong, both on the facts and the law.

As to the facts, the fee agreement was not what the government claims. It had two distinct fee components, to account for different, potential litigation scenarios. There was a standard contingency aspect, under which Mr. Barnett was entitled 33 1/3% of the seized currency's value. ER:282 But there was also a non-percentage-based clause: "[s]hould an attorney fee award be received pursuant to

the Civil Asset Forfeiture Reform Act (CAFRA) or the Equal Access to Justice Act (EAJA), *attorney shall be entitled to the greater of that fee or contingency fee set forth above*." ER:282.

The government ignores this second clause, but this case demonstrates why the two-tiered agreement was both practical and necessary. If the government had capitulated relatively quickly, as the district court found it should have, ER:308, the contingency provision would have provided adequate compensation for Mr. Barnett's limited work. Specifically, at his reasonable rate ($500/hour), the contingency amount ($9,333.33) would be sufficient payment for approximately 19 hours of work.

Mr. Moser and Mr. Barnett understood, however, that the government might – in the district court's words – "obstinately oppose[] the claim." ER:308. Thus, the fee agreement also contemplated a scenario in which there was no quick settlement. If the case required protracted litigation, the fee agreement provided that Mr. Moser would assign to Mr. Barnett his entitlement to recover statutory attorney's fee under CAFRA. ER:282. This statutory-fee provision was necessary to ensure Mr. Barnett would receive reasonable compensation, if the government's litigation tactics made the case difficult and time consuming.

This is precisely what occurred. ER:309 ("[t]he government continued to

oppose Moser at every turn"). The government's tactics forced Mr. Barnett to spend over 100 hours in order to prevail. ER:244-25. If his maximum potential fee had been the percentage-based 33 1/3% ($ 9,333.33), a highly experienced attorney like Mr. Barnett simply could not have afforded to take the case (or any other civil forfeiture case concerning a relatively small sum). This is why the agreement specified that Mr. Barnett could seek adequate compensation under CAFRA.

Accordingly, the government is incorrect in repeatedly mischaracterizing "Attorney Barnett's contingency Fee Agreement." GB:30. The agreement imagined by the government did not exist.

But even if it did, the government's reliance on that agreement would be misplaced. The law is clear: a "fee agreement does not act as a cap on the amount of statutory attorney fees awarded." *United States v. $186,416.00 in United States Currency*, 642 F.3d 753, 755 (9th Cir. 2011). Rather, under CAFRA, attorney's fees must be calculated using "the lodestar method." *Id.* ("under CAFRA [we] conclude that the lodestar method should be used in calculating fees[.]"). Thus, the government is also wrong in suggesting that a contingency fee agreement should limit the prevailing party's ability to recover attorney's fees. GB:19-20.

Try as it might, the government cannot escape the fact that the lodestar

method controls and that the district court's application of that method was fundamentally flawed. The fee order should be vacated.

ARGUMENT

A. Standard of review.

The parties agree this Court reviews "an award of attorney's fees for an abuse of discretion." *Morales v. City of San Rafael*, 96 F.3d 359, 362 (9th Cir. 1996); AOB:31; GB:23. The government, however, neglects to mention that "[a]ny elements of legal analysis which figure in the district court's decision are [] subject to de novo review. Thus, [this Court] will overturn a district court's fee award if it is based on an inaccurate view of the law." *Id.* Here, as discussed in Mr. Moser's opening brief, AOB:32, "[t]he principal issues . . . are legal in nature and therefore reviewed de novo." *Harris v. Maricopa County Superior Court*, 631 F.3d 963, 970 (9th Cir. 2011).

B. Because the government did not argue that either the number of hours or rate proposed by Mr. Moser was unreasonable, the district court erred in failing to use those uncontested numbers to calculate the lodestar figure.

During the district court fee litigation, the government failed to contest Mr. Moser's lodestar calculation. Rather, its only claim was that the retainer agreement, not the lodestar method, should be the basis for the fee award. *See generally*, ER:273-75. In the face of Mr. Moser's detailed evidence supporting his

proposed calculation, the government offered nothing.

Thus, it failed to meet its burden of rebuttal: "[t]he party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the . . . facts asserted by the prevailing party in its submitted affidavits." *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (internal quotations omitted, ellipses in original); s*ee also McGrath v. County of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995) (the opposing party "'did not meet [its] . . . rebuttal burden of providing specific evidence that plaintiffs' hours were duplicative or inefficient.'").

Mr. Moser argued in his opening brief that, because the government – the party that would pay the fee – never challenged any aspect of the lodestar figure, and thus failed to carry its burden of rebuttal, the district court erred in failing accept Mr. Moser's uncontested lodestar calculation, which was amply supported by the evidence. AOB:33; *see Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) ("declin[ing] to consider petitioner's [] argument that the hours charged by respondent's counsel were unreasonable," because she "failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged."); *Velez v. Wynne*, 220 Fed. App'x. 512, 516 (9th Cir. 2007) ("the district court erred by not finding [the moving party's] evidence sufficient to carry

her burden of demonstrating the prevailing market rate. Since [the moving party's] evidence established the prevailing market rate, *it was unnecessary for the district court to engage in its own review*[.]") (emphasis added).

The government has not responded to this argument. Thus, it has conceded the point. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (holding that an argument not addressed in an answering brief is waived); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (where appellees fail to raise an argument in their answering brief, "they have waived it"). As this Court recently explained, "[t]he government must accept the consequences of its litigation strategies, as must any defendant." *Aguilar-Turcios v. Holder*, --- F.3d ---, 2014 U.S. App. LEXIS 1244, *19 n.11 (9th Cir. Jan. 23, 2014). The fee order should be vacated.

C. The district court erred in calculating the lodestar figure

Beyond the waiver issue, the fee order cannot stand because the district court erred in both aspects of the lodestar calculation. It improperly determined "the number of hours the prevailing party reasonably expended on the litigation" and the "reasonable hourly rate." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202

(9th Cir. 2013).[1]

1. The district court erred in determining the reasonable number of hours expended by Mr. Barnett.

As to the amount of hours, "a reasonable number of hours equals the number of hours . . . which could reasonably have been billed to a private client." *Gonzalez*, 729 F.3d at 1202. And "to determine whether attorneys for the prevailing party could have reasonably billed the hours they claim to their private clients, the district court should begin with the billing records the prevailing party has submitted." *Id.* Mr. Moser submitted billing records detailing the 127.50 hours – separated by date, task, and amount of time – Mr. Barnett spent litigating the case, which was then voluntarily reduced to 101.55 hours. ER:244-45. The district court erred in further slashing this amount by approximately 40% to "no more than 60 hours." ER:310.

a. *The district court reduction of Mr. Barnett's hours was based on flawed reasoning.*

The district court never doubted the time claimed by Mr. Barnett was actually spent. Rather, it cut his hours based on the mistaken belief he should have won the case more quickly. ER:309-10. As noted in Mr. Moser's opening brief,

1 Throughout his opening brief, Mr. Moser relied heavily on this Court's recent decision in *Gonzalez*. AOB:30, 35, 40, 41, 43, 44, 47, 48, 49, 56. The case is relevant to virtually all of the issues raised in this appeal. The government has no response, failing even to cite the case.

AOB:37, this belief was both unrealistic and directly conflicted with the court's findings that Mr. Barnett was forced to undertake additional work as a result of the government's overly aggressive litigation tactics. ER:308 ("The government . . . obstinately opposed Moser's claim"); ER:309 ("[A]fter the case began, *the government's unnecessarily aggressive posture forced Moser to choose whether to expend effort to continue litigating or cut his losses and forfeit the $28,000*") (emphasis added); ER:309 ("[T]he government's obstinacy and aggressive litigation may have required Barnett to undertake tasks that would otherwise have been unnecessary[.]").

Given that Mr. Barnett had to "undertake tasks that would otherwise have been unnecessary," only because of the government's "unnecessarily aggressive posture," the district court should not have faulted him for doing so. ER:309 ("it appears Barnett gave the government's litigation work more respect than it deserved."). In other words, the district court erred in punishing Mr. Barnett for having to litigate against an overzealous federal government, and doing so in a responsible and comprehensive manner. *See Camacho*, 523 F.3d at 979 (as to fee awards, this Court "review[s] the adequacy of the district court's own articulated reasoning.").

The government's answering brief makes no mention of this issue. Nowhere

in its lengthy statement of facts or its argument does the government take responsibility for the fact its "unnecessarily aggressive posture" and "specious" arguments were the proximate cause of this lengthy litigation. ER:308-09. Instead, the government latches onto the district court's unreasonable conclusion that the hours were too many, while disregarding its own blameworthiness.

The government, moreover, does not actually offer an argument in support of the district court's conclusion. GB:26. It merely parrots back snippets from the court's fee order with no corresponding analysis. GB:26. While the government asserts, "[r]eviewing and evaluating attorney fee applications is a routine duty for the district courts," it provides no authority. GB:26. Nor is the comment relevant.

The question is not whether "evaluating attorney fee applications is [] routine." GB:26. It is whether the district court, *in this particular case*, erred in reducing Mr. Barnett's hours for work he was compelled to do only because of the "the government's obstinacy and aggressive litigation." ER:309. Plainly, the answer is yes. *See Padgett v. Loventhal*, 706 F.3d 1205, 1209 (9th Cir. 2013) ("where attorney work proves beneficial to a successful claim, district courts should generally award these fees in full[.]"). The government offers no reasoned reply. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 486 (9th Cir. 2010) ("bare assertion[s] . . . will not preserve a legal argument that is

never made").

b. *The district court failed to follow the proper method in reducing the number of hours*.

The district court also erred in the method by which it cut Mr. Barnett's hours. As discussed in Mr. Moser's opening brief, AOB:40, *Gonzalez* explained there are only "two methods" a district court can use to reduce hours under the lodestar method. 729 F.3d at 1203. "First, the court may conduct an 'hour-by-hour analysis of the fee request,' and exclude those hours for which it would be unreasonable to compensate the prevailing party." *Id.* (citation omitted). "Second, 'when faced with a massive fee application the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of [excluding non-compensable hours] from a fee application.'" *Id.*

In this case, Mr. Moser did not submit a "massive fee application." *Id.*[2] There was no finding from the district court that he did. Thus, the district court was not permitted to make "across-the-board" cuts. *Id.* It was required to "conduct an 'hour-by-hour analysis of the fee request.'" *Id.* But such an analysis is nowhere to be found. This too was error: "district courts must show their work

2 In *Gonzalez*, an application requesting more than $1,000,000 in fees was deemed "massive." *Id*. at 1201, 1203.

when calculating attorney's fees." *Padgett*, 706 F.3d at 1208.

The government responds by inventing a purported proposition of law. Citing *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992), the government claims: "A district court has the authority to make bold, across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from an attorney fee application." GB:27. But *Gates* says no such thing.

Rather, consistent with *Gonzalez* and the rest of this Court's precedent, it actually states: "*when faced with a massive fee application* the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure 'as a practical means of trimming the fat from a fee application.'" *Gates*, 987 F.2d at 1399. The government does not claim that Mr. Moser's fee $50,000 application was "massive," and thus its reliance on *Gates* is wholly misplaced.

The government is also misguided in implying the district court undertook the requisite hour-by-hour analysis. It cites a single example: "The court characterized Attorney Barnett's investment of 6.75 hours drafting a reply to the United States' response and opposition to Moser's motion for summary judgment as excessive." GB:26-27 (citing ER:309-10). The problem for the government is

that this is the *only* specific example ever given by the district court. As Mr. Moser explained in his opening brief, the district court identified only 6.75 hours that were even potentially unreasonable – and some percentage of this time must have been reasonably spent – yet it cut over 40 hours, without any hour-by-hour analysis. AOB:48; ER:310. This was improper.

D'Emanuele v. Montgomery Ward & Co., 904 F.2d 1379, 1386 (9th Cir. 1990) proves the point. There, "the district court did not [state] the reasons for reducing the hours claimed to be reasonable by [the prevailing party's] attorney to 525 hours. *Even if we subtract all of the hours mentioned by the district court . . . we are left with an hourly figure significantly higher than the number of hours calculated by the court*." *Id.* (emphasis added). This Court vacated the fee award, holding, "[i]n determining a reasonable number of hours 'the district court should make a more detailed analysis of the time records presented.'" *Id.* A detailed approach was "especially" warranted "in light of the extensive time records submitted by [the prevailing party's] counsel, and the lack of any rebuttal evidence provided by [the other party]." *Id.*

D'Emanuele's reasoning and conclusion are equally applicable to this case. Indeed, "if [this Court] subtract[ed] all of the hours mentioned by the district court . . . [it would be] left with an hourly figure significantly higher than the number of

hours calculated by the [district] court." *Id.* Again, the government has no response, failing even to cite *D'Emanuele*, despite the Mr. Moser's lengthy discussion of the case in his opening brief. AOB:41-42.

2. The district court erred in calculating the reasonable hourly rate.

The district court also erred in the second aspect of the lodestar calculus, determining the hourly rate. Mr. Moser met his burden "to produce satisfactory evidence -- in addition to the attorney's own affidavit[] -- that the requested rate[] [was] in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 895 n.11; *see also Gonzalez*, 729 F.3d at 1205-06. He submitted a declaration from Mr. Barnett, describing his extensive experience and opinion that $500 per hour was reasonable. ER:238. In addition, and critically, he provided declarations from five, highly experienced litigators and forfeiture specialists further establishing that the requested rate was reasonable for an attorney

Mr. Barnett's caliber practicing in San Diego. ER:248-68.[3]

In response, the government submitted nothing. Indeed, neither before the district court nor this Court has the government proffered a shred of evidence suggesting $500 per hour is not reasonable for Mr. Barnett.

Nevertheless, the district court reduced the hourly rate by $200 (a 40% reduction). ER:305. In doing so, as described in Mr. Moser's opening brief, the court committed at least three errors: (1) it failed to focus on the reasonable rate for an attorney of Mr. Barnett's expertise, looking instead to the nature of the litigation; (2) it imposed a reduction because Mr. Barnett was a sole practitioner who performed all of the legal work himself; and (3) it relied on its own unspecified knowledge of prevailing rates, rather than the actual evidence. AOB:43-51.

a. *The district court improperly calculated a rate based on what it believed the case was worth*.

The government apparently agrees that, instead of determining a reasonable

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3 Mr. Moser also supported the requested rate by reference to other "judicial fee awards," ER:257., citing: *United States v. 4,432 Mastercases of Cigarettes*, 322 F. Supp. 2d 1075 (C.D. Ca. 2004) (hourly rate of $400 was reasonable for experienced counsel under 28 U.S.C. § 2465(b)(l)); and *United States v. Real Property Located at 475 Martin Lane*, CV 04-2788-ABC (PLAx) (C.D. Ca. 2008) (February 12, 2008 order awarding fees under § 2465(b)(l) at a rate of $500/hr.). *See also United States of America v. $17,700.00 U.S. Currency*, 08-cv-04518-ABC-JC (C.D. Ca. 2008) (December 19, 2008 order awarding fees under § 2465(b)(1) at $550/hour).

rate based on the experience, skill, and reputation of Mr. Barnett, the court analogized the case to a criminal proceeding and focused on what the reasonable rate for an unknown criminal defense lawyer might be. ER:309; GB:24 ("The district court pointed out that the litigation involved and motion practice it reviewed involved far more criminal procedure than asset forfeiture law."). But the government sees no error. This is incorrect.

Although Mr. Moser ultimately prevailed on a Fourth Amendment issue, this was not a criminal matter. As detailed in the opening brief, yet ignored by the government (and the district court), only 24.2 hours out of 101.55 hours requested (25.5%) were spent on quasi-criminal issues, like the suppression motion. ER:243-45. The rest was dedicated to civil-litigation matters, such as discovery issues, depositions, and defending against the government's motion to strike. ER:244-45. Accordingly, both the district court and the government are misguided in relying on the fact that "the CJA rate for appointed counsel in non-capital cases in this District is $125." ER:305. That rate is irrelevant. *Cf. Blum*, 465 U.S. at 894-95 ("[district courts] 'must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return.'") (citations omitted).

The district court should have focused on Mr. Barnett's value as a highly

skilled forfeiture specialist. *See id*. But it did not. And the government repeats the error.

With no reference to the record, it asks: "'If a very specialized and skilled practitioner is called upon to execute a rather routine and straight-forward task, should the practitioner be compensated based upon his elevated levels of skill and expertise, or based upon the task accomplished?'" GB:25. The government does not provide an answer, but this Court has: "the established standard when determining a reasonable hourly rate is the 'rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.'" *Camacho*, 523 F.3d at 979.

Here, the "community" is Southern California or San Diego, the "work" was a civil-forfeiture case aggressively litigated by the United States government, and five "attorneys of comparable skill, experience, and reputation," to Mr. Barnett declared that $500 per hour was reasonable for such work in this community.

ER:248-68.[4] In failing to base its rate determination on this evidence – rather than its own opinion about what rates should be – the district court erred. "This alone requires [this Court] to vacate the fee award." *Gonzalez*, 729 F.3d at 1206.

b. *The district court erred in reducing the hourly rate because Mr. Barnett was a sole practitioner.*

As discussed in Mr. Moser's opening brief, the district court also improperly reduced Mr. Barnett's rate because he was a sole practitioner. AOB:47-48. The court concluded that, "[i]f Barnett had delegated work as is typical in larger law offices and firms, his requested rate of $500 per hour might be reasonable," but "[b]ecause Barnett did all the legal work here, a reasonable rate is lower." ER:306. This reasoning is unreasonable.

Once again, the government offers no response. It does not even address the issue. Its silence is telling.

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4 For instance, Mr. Honig declared that that "[m]ore than three-quarters of [his] cases involve civil asset *forfeiture proceedings* before federal law enforcement agencies and in the federal courts." ER:255 (emphasis added). And that his "2011-2012 hourly rates for cases related to *federal civil forfeitures* are $600-650 per hour." ER:257 (emphasis added). Mr. Gabbert also identified himself as a forfeiture specialist who has "come to know the general range of hourly rates being charged by attorneys dealing with federal civil litigation, including federal civil forfeiture defense." ER:238. His "hourly rate for *federal civil forfeiture* defense is $650 per hour." ER:261 (emphasis added). Ms. Sherman was equally specific: "My hourly rate for *federal civil forfeiture litigation* is $400-$550 per hour." ER:267 (emphasis added).

This Court has explained that "district courts must "make a finding as to the reasonable hourly rate for each [] attorney[]," as an individual. *Gonzalez*, 729 F.3d at 1206. The court cannot punish a lawyer simply because he or she happens to be a sole practitioner. Thus, this Court should vacate the fee award and order an hourly rate supported by the evidence in this case -- i.e., $500 per hour.[5]

D. The district court erred in further reducing the lodestar figure.

The district court further erred in reducing the fee award under the *Kerr* factors.[6] The government's response largely disregards the applicable law. GB:28-30. But that law is well-established: there is a "strong presumption that the lodestar figure -- the product of reasonable hours times a reasonable rate --

5 Even if district court's law-firm analogy was appropriate – which it was not – its conclusion was misguided. Recently, the Wall Street Journal reported that, in 2013, "for the first time, the average rate for associates with one to four years of experience rose to $500 an hour[.]." Jennifer Smith, "On Sale: The $1,150-Per-Hour Lawyer," *Wall Street Journal*, April 9, 2013, *available at* http://on.wsj.com/1eXFlDS. In this context, given his decades of experience, Mr. Barnett's rate is certainly reasonable.

6. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). The relevant factors are: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Morales v. City of San Rafael*, 96 F.3d 359, 363 n.8 (9th Cir. 1996).

represents a 'reasonable fee[.]'" *Blanchard*, 489 U.S. at 95; *see also Morales*, 96 F.3d at 363 n.8 ("[t]here is a strong presumption that the lodestar figure represents a reasonable fee."). Thus, only "in rare cases, [may] a district court [] make upward or downward adjustments to the presumptively reasonable lodestar on the basis of those factors set out in *Kerr*[.]" *Camacho*, 523 F.3d at 982; *see also Cunningham v. County of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1998) (adjustments to the lodestar figure are permitted "only in . . . exceptional cases.").

The government does not explain how or why this is one the "rare" or "exceptional" cases in which the "presumptively reasonable" lodestar figure can be adjusted. *Id.* Indeed, its brief does not address the issue. This should be outcome-determinative in Mr. Moser's favor. *See United States v. Valenzuela-Espinoza*, 697 F.3d 742, 745 (9th Cir. 2012) ("the government did not raise this argument in its initial briefing before this court, and its 'failure to brief the issue results in waiver.'"); *United States v. Ewing*, 638 F.3d 1226, 1230 (9th Cir. 2011) ("[Government's] failure to brief the issue results in waiver.").

Moreover, on the merits, this case is not rare or exceptional. Nor is there a contrary finding. The district court, therefore, erred in failing to abide the "strong presumption that the lodestar figure represente[d] a reasonable fee." *Morales*, 96 F.3d at 363 n.8. But even if the presumption had been overcome – which it was

not – the reduction would be erroneous. AOB:51-56.

The government's only answer is that the fee agreement supported the district court's reduction. GB:30. But this is incorrect. First, the district court committed legal error in relying on the fee agreement as a basis to reduce the lodestar amount. Second, the court wholly misinterpreted the fee agreement.

As set forth in Mr. Moser's opening brief, AOB:53-55, in decreasing the lodestar amount under the *Kerr* factors, the district court may consider *only* those factors "that are not subsumed within the initial calculation of the lodestar." *D'Emanuele*, 904 F.2d at 1379; *Camacho*, 523 F.3d at 982. This Court has determined that "many of the *Kerr* factors have been [] subsumed in the lodestar determination as a matter of law" and thus "may not act as independent bases for adjustments of the lodestar." *Cunningham*, 879 F.2d at 487.

One such subsumed factor is "the contingent nature of the fee agreement." *Morales*, 96 F.3d at 364 n.9 (emphasis added, citations omitted). Thus, while a fee "agreement can be considered when determining a reasonable fee under the lodestar approach," *$186,416.00 in United States Currency*, 642 F.3d at 755, it is not a proper, independent basis for reducing the lodestar figure once it has been calculated. *See Morales*, 96 F.3d at 364 n.9. Here, as the government tacitly concedes, this is what happened. GB:30; ER:311-12. Accordingly, in basing its

Kerr reduction on a subsumed factor, the district court erred: "any reliance on factors that have been held to be subsumed in the lodestar determination will be considered an abuse of the trial court's discretion." *Cunningham*, 879 F.2d at 487.

Additionally, even if the court could have relied on the fee agreement to reduce the lodestar figure, it misread that agreement. The district court erroneously believed that Mr. Barnett was "willing to undertake the representation for no more than $9,333.33 plus costs." ER:311. But as discussed above and in the opening brief, this is wrong. The fee agreement provided that Mr. Barnett would be "entitled to the *greater* of" the contingency fee amount or the statutory fees under CAFRA. ER:282. In this case, as a result of the "the government's obstinacy and aggressive litigation," ER:309, the statutory fees are greater. Mr. Barnett should be entitled to recover them in full.

E. The government's "made whole" argument is without merit.

Finally, with no citations to case law or the record, the government argues that a reduced fee was proper because Mr. Moser has been made "whole." GB:31-32. This argument should be rejected. It is wrong on the facts and the law.

As a threshold matter, it is first important to note that the government never argued to the district court that the lodestar amount should be reduced because Mr. Moser had been made whole. Thus, the argument is "waived." *Trigueros v.*

Adams, 658 F.3d 983, 988 (9th Cir. 2011) ("Ordinarily, arguments not raised before the district court are waived on appeal."). In any event, it has no merit.

According to the government, "[w]hen the district court entered its Order Granting in Part Motion for Attorney's Fees, Moser was made whole" because "[t]he Defendant $28,000 in U.S. Currency was returned to him [and] Moser was no longer in debt to Attorney Barnett." GB:31. It further opines that, once Mr. Moser was off the hook, the government had no obligation under the CAFRA to "pay claimant's counsel what other practitioners charge." GB:31.

Binding case law is to the contrary. To calculate attorney fees under CAFRA, the district court must use "the lodestar method." *$186,416.00 in U.S. Currency*, 642 F.3d at 755. As the government well knows, under that method, it is obligated to pay a fee based largely on the cost of "'similar services by lawyers of reasonably comparable skill, experience and reputation'" to the prevailing party's attorney. *Gonzalez*, 726 F.3d at 1206 (quoting *Blum*, 465 U.S. at 895 n.11.). In other words, it must "pay claimant's counsel what other practitioners [would] charge." GB:31.

Moreover, the entire premise of the government's "made-whole" argument is nonsensical. The fee agreement was drafted with express reference to a fee award under CAFRA. ER:282. The parties understood that Mr. Barnett would not

bill Mr. Moser directly for his fees, *because he could recover them from the government*. If Mr. Barnett could not expect to obtain his reasonable fee from the government – if he could not rely on CAFRA's fee-shifting provision – that burden would have fallen to Mr. Moser; he would have incurred the fee directly. The fee award, therefore, would not have made him whole. Rather, he would have been left in debt to Mr. Barnett for the thousands of dollars not covered by the district court's award.

Because Mr. Moser and Mr. Barnett incorporated CAFRA into the fee agreement, however, Mr. Moser does not now bear that burden. But as a result of the district court's errors, his attorney has been left holding the bag. Instead of recovering his reasonable fee, as he expected, Mr. Barnett was paid a small fraction of that amount for his hard work and success. This is unfair and bad policy.

The government chose to bring this case, not Mr. Moser or Mr. Barnett. The government chose to "oppose Moser at every turn" and take an "unnecessarily aggressive posture." ER:309. The government chose to make "specious" arguments and not settle the case. ER:308. Thus, as a matter of basic fairness, the government should bear the risk of its decision to drive up litigations costs, not Mr. Moser or his counsel. ER:309.

Indeed, unless private counsel can rely on the proper application of the lodestar method to receive adequate compensation, the fee burden will surely shift back to individual plaintiffs, who may not be able to afford to fight the federal government. The other possibility is that competent attorneys will simply stop taking forfeiture cases involving similar sums, thus denying legal representation to those in need and defeating Congress's intent "to encourage private enforcement of the law." *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003). These results are to be avoided. This Court should vacate the fee award.

CONCLUSION

The district court erred in calculating lodestar figure and in further reducing the fee award. The fee order should be vacated and the matter referred to "the Appellate Commissioner to calculate the amount of an appropriate fee award." *$186,416.00 in U.S. Currency*, 642 F.3d at 754. Such award should include the

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time dedicated to the district court litigation, as well as this appeal.[7]

Dated: January 29, 2014

Respectfully submitted,

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7. In his open brief, Mr. Moser explained that fees for this appeal were especially warranted given his a good-faith effort to settle the case with the government. AOB:56. Because the government has not refuted or even addressed this point, it should be deemed conceded.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, RICHARD M BARNETT hereby certify:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,478 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), said word count produced by Word 2000.

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2000 in 14-point Times New Roman font.

Dated: January 29, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2014 I have caused service of APPELLANT'S REPLY BRIEF by electronically filing the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Devin J. Burstein*
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