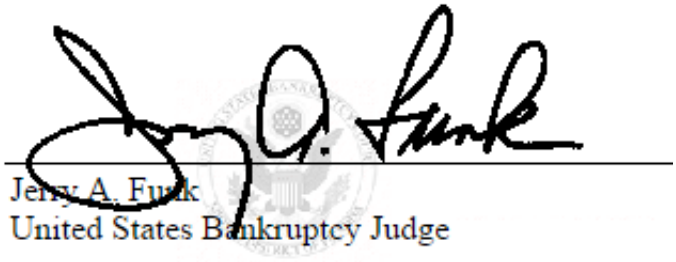
ORDERED.

Dated: June 13, 2019



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

JASON ROY COLLINS,

Debtor.
_____/

Chapter 7
Case No. 3:18-bk-0630-JAF

ORDER DENYING DEBTOR'S FEE APPLICATION BROUGHT PURSUANT TO 28 U.S.C. § 2412

This case is before the Court on the Fee Application brought pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), by Debtor JASON ROY COLLINS (the "Fee Application"). (Doc. 119). The Chapter 7 Trustee (the "Panel Trustee") filed a response in opposition (Doc. 123); Debtor filed a reply (Doc. 124). Following this, the U.S. Trustee also filed a response in opposition. For the reasons set forth below, the Court denies Debtor's Fee Application.

Background

In March 2018, Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. (Doc. 1). Pursuant to his role as the panel trustee in this case, the Panel Trustee filed an Objection to Debtor's Amended Claim of Exemptions (Doc. 95) (the "Objection") and a Motion for Turnover

of Property (Doc. 41) (the "Motion"); (collectively, the "Contested Matter"). A trial on the Contested Matter was held in November 13, 2018. The Court entered a final judgment overruling the Panel Trustee's Objection and denying the Motion. (Doc. 113). Debtor then filed the Fee Application, which requests fees, costs, and expenses under 28 U.S.C. § 2412(d), the Equal Access to Justice Act (the "EAJA").[1] (Doc. 119).

The Fee Application seeks fees against the U.S. Trustee. The Court ordered the Panel Trustee to respond and permitted Debtor to reply. (Doc. 120). Following Debtor's reply, the U.S. Trustee sought authority to respond (Doc. 126), which the Court granted (Doc. 127). The U.S. Trustee then filed a response. Both the Panel Trustee and U.S. Trustee contend panel trustees are not subject to the EAJA and that the U.S. Trustee had no involvement in the Contested Matter. (Docs. 123 & 129).

Analysis

The Court must deny the Fee Application for two independent reasons. First, there is no legal basis to apply the EAJA to a panel trustee. Second, even if the EAJA applied to a panel trustee, the positions taken by the Panel Trustee in the Contested Matter were "substantially justified." Each reason is addressed below.

A. Applicability of the EAJA to a panel trustee.

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." Ardestani v.

[1] Debtor asks the Court to submit proposed findings of facts and conclusions of law so that the district court may enter judgment awarding fees/costs. Presumably, this request is based on old law that held that bankruptcy courts lacked jurisdiction to issue money judgments (including fee awards) against the United States. Congress, however, has since granted bankruptcy courts that authority. See Gower v. Farmers Home Admin. (In re Davis), 899 F.2d 1136, 1140 (11th Cir. 1990) (holding that a bankruptcy court lacks jurisdiction to award fees against the federal government under the EAJA), superseded by statute, 11 U.S.C. § 106(a)(3)-(4), as recognized in Alvarez v. Royal Atl. Developers, Inc., 854 F. Supp. 2d 1219, 1226 (S.D. Fla. 2011). The Court has jurisdiction to render a final judgment under the EAJA. 11 U.S.C. §§ 105(a), 106(a)(3)-(4); In re Terrill, 2006 WL 2385236 (Bankr. N.D. Tex. July 27, 2006).

I.N.S., 502 U.S. 129, 137 (1991); Ibrahim v. U.S. Dep't of Homeland Sec., 912 F.3d 1147, 1167 (9th Cir. 2019). Because "[t]he EAJA is a waiver of sovereign immunity[,] [it] must be strictly construed." Levernier Const., Inc. v. United States, 947 F.2d 497, 502 (Fed. Cir. 1991).

The EAJA applies in any "civil action (other than cases sounding in tort) . . . brought by or against the United States . . . ." 28 U.S.C. § 2412(d)(1)(A). For purposes of § 2412(d), the term "United States" "includes any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. § 2412(d)(2)(C). The question presented here is whether a panel trustee is an "official of the United States acting in his or her official capacity" for purposes of the EAJA. The statute's plain language controls unless there is an ambiguity. Kehoe v. Fid. Fed. Bank & Trust, 421 F.3d 1209, 1212 (11th Cir. 2005).

The Court acknowledges that the Office of the U.S. Trustee is, in general, subject to the EAJA. See, e.g., In re Terrill, 2006 WL 2385236 (Bankr. N.D. Tex. July 27, 2006). However, it is not clear that the EAJA applies to a panel trustee. Debtor argues that panel trustees act under the aegis of the U.S. Trustee and are, therefore, officials of the United States. In essence, Debtor applies an agent-principal theory to the relationship between panel trustees and U.S. Trustees.

The Panel Trustee relies on Brandon v. Sherwood (In re Sann), 546 B.R. 850, 858 (Bankr. D. Mont. 2016), which is a directly on-point opinion that held a panel trustee "is not the United States nor any agency or official of the United States acting in her official capacity," for purposes of the EAJA.[2] The Sann court contrasted the EAJA with the federal-officer removal statute (28 U.S.C. § 1442) and reasoned that the EAJA lacks the "acting under" language found in the federal-

[2] As Debtor points out, this particular holding may be considered dicta because it was not necessary to reach the result in that case. However, this is of no consequence since the opinion is nonbinding in any event.

officer removal statute. Thus, the court concluded the EAJA is not as encompassing as the federal-officer removal statute and the EAJA's limited scope does not include panel trustees.

Here, Debtor is correct that a panel trustee is appointed by and operates under the "watchdog"[3] supervision of the U.S. Trustee. See generally In re Castillo, 297 F.3d 940, 950 (9th Cir. 2002). The glaring omission, however, is that the U.S. Trustee did not play any role in the Contested Matter. Further, although the Panel Trustee was acting under color of federal law (i.e., Title 11) when acting as trustee of the bankruptcy estate, the Panel Trustee does not act on behalf of the federal government in so doing.

On this point, the U.S. Trustee points to an instructive opinion in which the U.S. Supreme Court determined that, despite the constitutional prohibition on states taxing the federal government directly, whatever "tax immunity" a bankruptcy estate once enjoyed has now eroded under the modern Bankruptcy Code. California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 849 (1989). The question presented was whether states could tax purchases made during a bankruptcy liquidation sale. The Court held that the federal constitution permits states to tax such transactions and, in reaching this conclusion, the Court stated:

> Nor is the bankruptcy trustee [i.e., panel trustee] so closely connected to the Federal Government that the two "cannot realistically be viewed as separate entities." The bankruptcy trustee is "the representative of the estate [ ]," not "an arm of the Government," and the tax on the estate is an administrative expense of the debtor, not of the Federal Government.

Id. at 849-50.

[3] See, e.g., H.R. Rep. No. 95-595 at 88 (1977) ("The proposed United States Trustees will be the repository of many of the administrative functions now performed by bankruptcy judges, and will serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena. . . . When a liquidation case is commenced under Chapter 7, the United States Trustee will immediately designate a member of the panel to serve as interim trustee in the case. . . . If a panel member serves in the case, the United States Trustee will be available to give advice in the administration of the case and to supervise the private trustee's performance.").

While the above language does not speak directly to the present issue, the opinion draws a clear distinction between panel trustees and the federal government. In light of this, it cannot be said that a panel trustee generally acts on behalf of the United States.

The Court holds that the EAJA does not apply to a panel trustee because a panel trustee is private individual who does not act on behalf of the United States in carrying out his/her duties as trustee of the bankruptcy estate. If Congress intends for the EAJA to apply to panel trustees, Congress is empowered to say so explicitly. See, e.g., 11 U.S.C. § 523(d) (providing a similar fee-shifting scheme to creditors who unsuccessfully challenge the dischargeability of a debt).

B. Substantial justification.

Finally, even assuming the EAJA applies to panel trustees, the Panel Trustee's positions were "substantially justified" as contemplated under the EAJA. 28 U.S.C. § 2412(d)(1)(A). To receive an award under the EAJA, it must be shown that: (1) the claimant was a "prevailing party;" (2) the Government's position was not "substantially justified;" (3) no "special circumstances make an award unjust;" and (4) the fee application was submitted to the court within thirty days of final judgment with a supporting itemized statement. I.N.S. v. Jean, 496 U.S. 154, 158 (1990).

The determination of whether a position was substantially justified is subject to the sound discretion of the trial court. Pierce v. Underwood, 487 U.S. 552, 563 (1988). "The government bears the burden of showing that its position was substantially justified." Monroe v. Comm'r of Soc. Sec. Admin., 569 F. App'x 833, 834 (11th Cir. 2014).

A position is substantially justified, under the EAJA, so long as the position is "justified in substance or in the main" and there is a "reasonable basis both in law and fact" to support the position. Pierce, 487 U.S. at 565. The level of reasonableness required is that which would "satisfy

a reasonable person." Id. The "position can be justified even though it is not correct." Kurapati v. U.S. Citizenship & Immigration Services, 700 F. App'x 974, 976 (11th Cir. 2017).

Here, the Objection and Motion had a reasonable basis in law and fact. The Panel Trustee primarily asked the Court to recede from its prior holding, made in a 1996 opinion, concerning a pure question of law with which other courts have disagreed. The Panel Trustee cited case law directly supporting his contentions and explicitly acknowledged this Court's prior case law contrary to his position. As of now, there is no binding case law on the legal issue. The legal issue remains an "unsettled" question concerning the interplay of federal bankruptcy law, Florida property law, and Florida law on execution. Thus, the legal position taken by the Panel Trustee surpassed the minimum level of reasonableness required under the EAJA. See Kurapati, 700 F. App'x at 976 (holding that, at the time the position was asserted, "the issue was sufficiently unsettled to justify the Government's position"). As to the secondary fact issues, although the Court did not find in accordance with the Panel Trustee's asserted evidentiary inferences, the factual arguments were supported by sufficient evidence to create a triable fact-question. The key fact issues centered on the credibility of the Debtor and his wife, and the Court found their testimony credible.

In sum, the Panel Trustee's positions asserted in the Contested Matter were reasonable under the circumstances and were "substantially justified" as contemplated under § 2412(d)(1)(A). That is, even assuming the EAJA applied to the Panel Trustee, the Court is precluded from awarding fees/costs in favor of Debtor.

Accordingly, the Court hereby ORDERS that Debtor's Fee Application is DENIED.