

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 20-12991 & 20-13363

D.C. Docket No. 1:14cv-22739-JLK

U.S. COMMODITIES FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

versus

ROBERT ESCOBIO,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(August 31, 2021)

Before WILSON, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

Robert Escobio appeals the district court's denial of his motion for attorneys' fees and other expenses. On appeal, he argues that the U.S. Commodities Futures Trade Commission's ("CFTC") position in the district court contempt proceedings was without substantial justification, entitling him to the fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) and (B). He also argues that the district court had jurisdiction to rule on his entitlement to district court fees pending the appeal of his claim to appellate fees and expenses, that he was entitled to a special factor allowing for an adjustment to the hourly rates of his counsel, and that his current appellate attorneys' fees and expenses should be awarded.

Because we write for the parties and because of the previous appeals to this court,¹ we assume familiarity with the facts and set out only those necessary for the resolution of this appeal. The attorneys' fees and costs that Escobio seeks in this action stem from his successful appeal of the CFTC-initiated orders holding him in civil contempt and ordering his incarceration for failure to pay a civil restitution judgment and he also seeks attorneys' fees and costs from the underlying action in the district court. In that underlying action, the district court reasoned that the civil

¹*U.S. Commodity Futures Trading Comm'n v. Escobio*, 946 F.3d 1242, 1248 (11th Cir. 2020); *U.S. Commodity Futures Trading Commission v. Escobio*, 833 Fed.Appx. 768 (11th Cir. 2020); *U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 894 F.3d 1313 (11th Cir. 2018).

penalties against Escobio were a money judgment, over which it had no authority to coerce payment, but that restitution was an equitable remedy that could be enforced by the civil contempt power rather than the remedies provided by the Federal Debt Collection Procedures Act (“FDCPA”). On appeal this Court held, among other things, that the restitution order constituted a money judgment, precluding the district court from using its civil contempt power under the Commodities Exchange Act (“CEA”).

Escobio sought attorneys’ fees and costs incurred in the appeal but this Court referred the application to the district court. On remand, the district court denied the application, ruling that the CFTC’s position on appeal was substantially justified, noting *inter alia* that both the magistrate judge and the district court judge had agreed with the position and this Court had devoted a lengthy opinion to deciding the issue, demonstrating its complexity and lack of clarity. After Escobio filed his appeal of that decision, he filed an application for attorneys’ fees and costs for the district court proceedings; the district court denied this application because it found it lacked jurisdiction due to Escobio’s appeal of the earlier application involving the same issue. Escobio appealed that decision and the two appeals were consolidated by this Court.

Escobio argues that the CFTC’s position on appeal was precluded by established precedent in this Court as well as the express terms of the Federal Debt

Collections Procedures Act (“FDCPA”). He further argues that the CFTC’s arguments on jurisdiction and mootness contravened established precedent.

The EAJA provides,

a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(B). A position of the United States is substantially justified if it is “justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550 (1988) (internal quotation marks omitted). The “position can be justified even though it is not correct;” “it can be substantially . . . justified if a reasonable person could think it correct.” *Id.* at 566 n.2, 108 S. Ct. at 2550 n.2. The outcome of the underlying litigation is not dispositive as to whether the government’s position was substantially justified. *Id.* at 569, 108 S. Ct. at 2552. “Though a district court victory may be evidence that the Government’s position was justified, the court considering an attorney’s fees application must independently analyze the Government’s position.” *Porter v. Heckler*, 780 F.2d 920, 922 (11th Cir. 1986) “When the government follows the express dictates of a given statute, and there is no reason to believe that such a course is otherwise unauthorized, its position, for the purposes of the EAJA, cannot

lack substantial justification.” *United States v. Certain Real Estate Prop. Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1562 (11th Cir. 1988) (citation omitted).

“The government bears the burden of showing that its position was substantially justified.” *Stratton v. Bowen*, 827 F.2d 1447, 1450 (11th Cir. 1987). We review the district court’s decision whether to award attorneys’ fees under the EAJA, as well as the determination as to whether the government’s position was substantially justified, for an abuse of discretion. *Id.*

The district court did not abuse its discretion when it found the CFTC’s position was substantially justified. Although this Court held that the restitution award was a money judgment that could not be enforced through the district court’s power of contempt, the CEA specifically labelled the restitution as an equitable remedy. *See* 7 U.S.C. § 13a-1(d)(3)(A). As such, it was reasonable for the CFTC to argue that the power of civil contempt was still available, especially when the FDCPA’s Rule of Construction advised that nothing in the Act’s outlined procedures “shall be construed to supersede or modify” the authority of a court “to exercise the power of contempt under any Federal law.” 28 U.S.C. § 3003. The CEA was amended in 2010 and added restitution measured by customer loss as an equitable remedy. Previously, this Court had held that restitution measured by customer loss was not an equitable remedy. *CFTC v. Wilshire Inv. Mgmt. Corp.*,

531 F.3d 1339, 1344 (11th Cir. 2008). It was at least reasonable for the CFTC to reason that Congress knew of that case when it labelled customer loss restitution as equitable and intended for such restitution to be equitable so that it could be enforced via means available for equitable remedies, such as civil contempt. Although we ultimately determined this was incorrect, it was a matter of first impression that we deemed worthy of a published opinion to resolve.

Similarly, although we decided against the CFTC on the mootness and jurisdictional issues on appeal, neither were unreasonable so as to justify the award of attorneys' fees and costs. The CFTC relied on our *RES-GA Cobblestone, LLC v. Blake Construction & Development, LLC*, 718 F.3d 1308, 1314 (11th Cir. 2013), where the appeal was dismissed as moot because the appellant complied with the district court's order and purged himself of contempt. At the time of the appeal, Escobio had done that. Turning to the jurisdictional argument, the CFTC relied on *SEC v. Kirkland*, 533 F.3d 1323, 1325 (11th Cir. 2008), where we held that "a fine or penalty that the party in contempt can avoid by complying with the [district court's] earlier order is interlocutory and not appealable." While we determined that this was not applicable, it was not an unreasonable reading of our precedent.

We need not decide if the district court erred when it determined that it did not have jurisdiction over Escobio's application for fees and costs incurred in the district court because he raises the same challenges to the CFTC's arguments that

we have already herein rejected. In light of our decision, we need not reach the remaining issues on appeal.

AFFIRMED.