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8 Rights Organization; Bruce Price; Franklin D. Rochelle;
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9 William Blazinski

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION
14

15 VIETNAM VETERANS OF AMERICA, *et al.*,
16 Plaintiffs,
17 v.
18 CENTRAL INTELLIGENCE AGENCY, *et al.*,
19 Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' UNOPPOSED
ADMINISTRATIVE MOTION
TO ACCEPT BILL OF COSTS
UNDER 28 U.S.C. § 2412 AND
VACATE CLERK'S NOTICE OF
DEFICIENCY**

Judge Claudia Wilken

Complaint filed January 7, 2009

1 Pursuant to Civil Local Rule 7-11, Plaintiffs Vietnam Veterans of America, Swords to
2 Plowshares, Bruce Price, Franklin D. Rochelle, Eric P. Muth, David C. Dufrane, Tim Michael
3 Josephs, and William Blazinski (“Plaintiffs”) bring this motion for administrative relief to accept
4 Plaintiffs’ bill of costs filed on July 18, 2017 (*see* ECF No. 604), as timely under the Equal
5 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412.

6 Plaintiffs’ request for costs under the EAJA was timely. However, the clerk’s notice of
7 deficiency dated August 3, 2017, denied Plaintiffs’ bill of costs as untimely under Civil Local
8 Rule 54-1 and directed Plaintiffs to file a motion for administrative relief by August 17, 2017.
9 (ECF No. 605.) Out of an abundance of caution, and as directed by the clerk’s notice, Plaintiffs
10 are filing this motion. Plaintiffs are not seeking any immediate review or taxation of costs by the
11 clerk or the Court, because the issue has already been stayed by stipulation and order of this Court
12 pending ongoing settlement discussions. (*See* ECF No. 602.) However, Plaintiffs are filing this
13 administrative motion to ensure the bill of costs is not excluded from any later review of
14 Plaintiffs’ motion for fees and costs under the EAJA.

15 **I. FACTUAL AND PROCEDURAL BACKGROUND**

16 The Court issued an Amended Judgment in Plaintiffs’ favor on April 19, 2017. (ECF
17 No. 598.) The judgment became final and non-appealable on June 19, 2017. Fed. R. App. P.
18 4(a)(1)(B). Within 30 days of that date, on July 18, 2017, Plaintiffs filed a motion for fees and
19 costs under the EAJA. (ECF No. 603.) In support of their motion, Plaintiffs filed declarations, a
20 spreadsheet detailing attorneys’ fees, and a bill of costs detailing expenses incurred during the
21 litigation. (*See* ECF Nos. 603-1 to 604-26.) The bill of costs is cited throughout the motion and
22 attorney declaration. (ECF No. 603 at 6, 26-27; ECF No. 603-1 ¶¶ 45-47) The bill of costs cites
23 the EAJA and goes beyond the costs permitted under the local rules and statutes that would
24 otherwise govern. (ECF No. 604 (citing 28 U.S.C. § 2412).)

25 Per a stipulation filed before the fee motion on July 12, 2017, the parties agreed to
26 continue settlement negotiations and requested that the Court stay litigation of the motion for fees
27 and costs until conclusion of the agreed-upon stay period. (ECF No. 601.) On July 17, 2017, the
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1 Court ordered a stay on any further briefing after the opening motion. (*See* ECF No. 602.)

2 On August 3, 2017, the clerk filed a notice of deficiency. (ECF No. 605.) It states that
3 Plaintiffs’ “[b]ill of costs is untimely and deemed waived under Civil L.R. 54-1(a) and (c). A
4 motion for administrative relief (Civ. L.R. 7-11) seeking leave of court to file a late bill of costs
5 must be filed no later than August 17, 2017.” (ECF No. 605.) On August 9, 2017, Plaintiffs’
6 counsel called the clerk’s office in an attempt to clarify the deadline and avoid burdening the
7 Court, but those efforts were unsuccessful. (Declaration of James R. Hancock (“Hancock Decl.”)
8 ¶ 2.) As required by the local rules, Plaintiffs’ counsel contacted counsel for Defendants
9 regarding this motion on August 16, 2017, and defense counsel confirmed they do not oppose the
10 motion and agree the stipulation entered by the Court is still in effect. (*See id.* ¶ 4.)

11 **II. ARGUMENT**

12 **A. Plaintiffs’ Bill of Costs Was Timely.**

13 Plaintiffs respectfully disagree with the clerk’s determination that Plaintiffs’ bill of costs
14 was “untimely and waived under Civil L.R. 54-1(a) and (c).” (*See* ECF No. 605.) Plaintiffs
15 acknowledge that the cited local rule sets a 14-day deadline to file a bill of costs. However, the
16 rule’s commentary explains that it does not apply where the relevant statute establishes a different
17 timeline. In fact, the commentary uses the EAJA as an example of such a statute. “The 14-day
18 time period set by this rule is inapplicable where the statute authorizing costs establishes a
19 different time deadline, (*e.g.*, 28 U.S.C. § 2412(d)(1)(B) setting 30 days from final judgment as
20 time limit to file for fees under Equal Access to Justice Act).” Civ. L.R. 54-1 at commentary.
21 Accordingly, the normal 14-day deadline “is inapplicable” here. *See id.*

22 The applicable deadline is the EAJA, which establishes a 30-day time period that only
23 begins to run after the time to appeal has expired. According to Civil Local Rule 54-1, the EAJA
24 sets “30 days from final judgment” as the time limit. *Id.* According to the EAJA, “‘final
25 judgment’ means a judgment that is final and not appealable.” 28 U.S.C. § 2412(d)(2)(G). The
26 Northern District of California, the Ninth Circuit, and the Supreme Court have consistently
27 interpreted EAJA’s 30-day deadline to run only after the time to appeal has expired. “The thirty-
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1 day time limit for an EAJA application begins to run when the judgment becomes ‘final and not
 2 appealable,’ i.e., the expiration of the 60-day appeal period.” *Duong v. Astrue*, No. CV 07-2147
 3 HRL, 2009 WL 890459, at *1 (N.D. Cal. Apr. 1, 2009) (citations omitted); *see also Shalala v.*
 4 *Schaefer*, 509 U.S. 292, 302 (1993); *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991); *Al-Harbi v.*
 5 *I.N.S.*, 284 F.3d 1080, 1082-84 (9th Cir. 2002) (quoting *Myers v. Sullivan*, 916 F.2d 659, 669
 6 (11th Cir. 1990) (“we agree with the other circuits and ‘construe[] the Act’s definition of “final
 7 judgment” as designating the date on which a party’s case has met its final demise, such that there
 8 is no longer any possibility that the district court’s judgment is open to attack.’”); *Nat. Res. Def.*
 9 *Council, Inc. v. Dep’t of Energy*, No. C-04-04448 SC, 2007 WL 2349288, at *2 (N.D. Cal. Aug.
 10 15, 2007) (“The thirty-day period for filing an application to recover costs or attorneys’ fees
 11 under the EAJA does not begin to run until the time for the Government to file a notice of appeal
 12 has expired.”) (citations omitted). Local rules do not change that result. In *Murphy v. Colvin*, the
 13 court rejected the argument that Local Rule 54-5(a)’s deadline applies to EAJA as “specious at
 14 best.” *Murphy v. Colvin*, No. 4:14-CV-03784-YGR, 2016 WL 1410279, at *1 n.3 (N.D. Cal.
 15 Apr. 11, 2016) (granting motion filed 90 days after judgment under EAJA).

16 This District’s Local Rules explicitly recognize that the EAJA
 17 dictates its own timeliness rules for motions for attorney’s fees. *See*
 18 Civ.L.R. 54-1 (with commentary, stating “[t]he 14-day time period
 19 set by this rule is inapplicable where the statute authorizing costs
 20 establishes a different time deadline, (e.g. 28 U.S.C.
 21 § 2412(d)(1)(B) setting 30 days from final judgment as time limit to
 22 file for fees under [the EAJA]”). Courts in this District similarly
 recognize that, regardless of the 14-day time set by the Local Rule,
 a motion for attorney’s fees under the EAJA must be brought within
 30 days of when the Court’s order granting summary judgment
 became final. *See, e.g., Reynolds v. Colvin*, 2016 WL 269863, at *2
 (N.D. Cal. Jan. 21, 2016). Plaintiff’s motion is timely.

23 2016 WL 1410279 at n.3. The same deadline applies whether Plaintiffs seek fees or costs. *See,*
 24 *e.g., Long v. Colvin*, No. 13-CV-05716-SI, 2015 WL 3902160, at *1 (N.D. Cal. June 24, 2015)
 25 (awarding fees and costs for EAJA motion “timely filed” 87 days after judgment); *Johnson v.*
 26 *Astrue*, No. C-07-2387 EMC, 2008 WL 3984599, at *1 (N.D. Cal. Aug. 27, 2008) (same); *In re*
 27 *Application of Mgndichian*, 312 F. Supp. 2d 1250, 1266 (C.D. Cal. 2003) (same, but 84 days after
 28

1 judgment), *amended on other grounds*, 2003 WL 23358199 (C.D. Cal. Dec. 3, 2003).

2 In its recent order to stay further briefing on Plaintiffs' fee petition, this Court agreed:

3 A party seeking attorneys' fees and other expenses must file a fee
4 application within "thirty days of final judgment in the action."
5 28 U.S.C. § 2412(d)(1)(B). "Final judgment" for purposes of EAJA
6 is defined as a "judgment that is final and not appealable." *Id.*
7 § 2412(d)(2)(G). *Id.*; see *Bianchi v. Perry*, 154 F.3d 1023, 1024 (9th
8 Cir. 1998). The Court issued an Amended Judgment in this matter
9 on April 19, 2017. ECF No. 598. Defendant's 60-day period to
10 appeal this judgment expired on June 29, 2017. Thus, Plaintiffs'
11 application for attorneys' fees under EAJA is due on July 19, 2017.
12 See 28 U.S.C. § 2412(d)(1)(B).

13 (ECF No. 602 at 2 ¶¶ 1-2.) Defendants agreed too; this language in the stipulation was initially
14 drafted by defense counsel and agreed to by both parties. (Hancock Decl. ¶ 3.)

15 Plaintiffs' request for costs was timely under 28 U.S.C. § 2412, Civil Local Rule 54-1,
16 this Court's prior order, and binding precedent. Accordingly, the Court should vacate the clerk's
17 notice of August 3, 2017, and accept the bill of costs as timely. However, apart from accepting
18 the bill of costs as timely, no further action is needed from the clerk or the Court at this time to
19 tax costs or consider Plaintiffs' motion, pursuant to the order to stay. (See ECF No. 602 at 3 ¶ 5.)

20 **B. Even If Plaintiffs' Bill of Costs Were Untimely Under the Local Rules, That**
21 **Would Not Preclude Recovery Under the EAJA.**

22 Even if Plaintiffs' bill of costs were untimely under the local rules, Plaintiffs respectfully
23 request that all the items in the bill of costs be considered in full along with Plaintiffs' motion.

24 Under the EAJA, a judgment for costs to the prevailing party includes such things as filing
25 fees, service fees, court reporter's fees, and photocopying costs. See 28 U.S.C. § 2412(a)(1)
26 (citing 28 U.S.C. § 1920 (listing costs)). But "the expenses enumerated in Section 2412(d)(2)(A)
27 are set forth as examples, not as an exclusive list." *Int'l Woodworkers of Am., AFL-CIO, Local 3-*
28 *98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985). In addition, costs ordinarily billed to the client
are recoverable under the EAJA, such as expert witness fees, docket fees, transcripts, witness
fees, document productions, online research, travel expenses (including lodging, meals, travel,
mileage, parking), postage, service fees, courier fees, telephone, fax, and printing/copying/word

1 processing costs. *See id.*¹ In other words, the EAJA provides for a broader set of costs than the
2 local rules and 28 U.S.C. § 1920, and Plaintiffs’ bill of costs and motion seek that broader set.

3 In *Harris v. Marhoefer*, the Ninth Circuit Court of Appeals rejected the argument that
4 plaintiff’s bill of costs was untimely because it was filed after the local rules’ deadline. 24 F.3d
5 16, 19-20 (9th Cir. 1993). The local rule “does not bar the expenses in question” because plaintiff
6 moved under a specific statute that awards all “out-of-pocket expenses that ‘would normally be
7 charged to a fee paying client,’” rather than only the costs permitted by 28 U.S.C. § 1920. *Id.*
8 (citing 42 U.S.C. § 1988) (additional citations omitted). In *Poole v. Rourke*, the court reached the
9 same result under the EAJA. 779 F. Supp. 1546 (E.D. Cal. 1991). The plaintiff filed his bill of
10 costs after the deadline set by the Eastern District of California’s Local Rule 292(b). *Id.* Even so,
11 the court waived application of the local rule “in the interests of justice” because the “plaintiff
12 could have recovered these ‘costs’ under EAJA had he instead classified them as ‘expenses.’” *Id.*
13 at 1572 n.21. Accordingly, the court awarded all costs from the bill of costs in ruling on
14 plaintiff’s motion for fees. *Id.* at 1573. Lastly, in *Ibrahim v. Department of Homeland Security*,
15 the clerk taxed some but not all of the costs in plaintiff’s bill of costs. *See* 2014 WL 5073582, *5-
16 9 (N.D. Cal. 2014), *affirmed in part and reversed in part on other grounds*, 835 F.3d 1048 (9th
17 Cir. 2016). Later, the court permitted the plaintiff to seek all unrecovered costs as “expenses”
18 under a motion for fees and costs under the EAJA. *Id.* at *6-9.

19 Similarly, even if Plaintiffs’ bill of costs was untimely, good cause exists for the Court to
20 consider the itemized expenses as part of Plaintiffs’ motion for fees and costs under the EAJA.

21 **III. CONCLUSION**

22 For the reasons stated above, Plaintiffs respectfully request that the Court accept the bill of
23 costs as timely but, pursuant to the stipulation and stay order, consider it only after the parties
24 have continued their negotiations regarding fees and costs.

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26 ¹ *See also Lucas v. White*, 63 F. Supp. 2d 1046, 1063 (N.D. Cal. 1999); *In re Application of*
27 *Mgndichian*, 312 F. Supp. 2d at 1266; *Johnson*, 2008 WL 3984599, at *3; *Soda Mountain*
28 *Wilderness Council v. Norton*, No. CIV S-04-2583 LKK/CMK, 2006 WL 2054062, at *7 (E.D.
Cal. July 21, 2006); *Nat. Res. Def. Council, Inc. v. Locke*, 771 F. Supp. 2d 1203, 1218 (N.D.
Cal. 2011).

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Dated: August 17, 2017

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