IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	) No. 1:15-cv-01955-TSC

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

The Department of Justice's ("DOJ") opposition to EPIC's motion for attorney's fees does not provide a justification for the Court to deny EPIC's fee motion because the DOJ's arguments do not refute the conclusion that EPIC is both eligible for and entitled to attorney's fees in this case. The agency's principal objection—that the document EPIC ultimately obtained from the DOJ was similar to a document published by the European Commission—should be rejected because it relies on the same *post hoc* assessment of the public-benefit factor that the D.C. Circuit rejected in *Morley v. CIA*, 810 F.3d 841 (D.C. Cir. 2016). The DOJ's position ultimately rests on the faulty assumption that EPIC could have known—in advance of filing the FOIA request and subsequent suit—that another source would produce the document that the DOJ was required to produce under the FOIA. The DOJ also fails to consider the significant public benefit derived from the US government's official acknowledgment and disclosure of the agreement.

The DOJ's other arguments are similarly unavailing because they rely on inaccurate statements of law and rely on cases that are easily distinguishable. EPIC is both eligible and entitle to recover fees, and the fees EPIC seeks in this matter are

reasonable. The Court should accordingly grant EPIC's request in full and award EPIC $21,408.15 in fees, $400 in costs, and $6,109.30 in fees-on-fees for the preparation of this Reply, as outlined in the Exhibit.[1]

I. EPIC is entitled to recover fees under the four-factor test.

Contrary to the DOJ's opposition, the four-factor entitlement test employed by the D.C. Circuit weighs in EPIC's favor. *See Davy v. C.I.A.*, 456 F.3d 162, 163 (D.C. Cir. 2006. Conceding factors two and three, the DOJ focuses on the two remaining factors: the "public benefit" derived from the case, and the reasonableness of the agency's withholding. Def.'s Opp'n to Pl.'s Mot. for Attorney's Fees ("Def.'s Opp'n") at 10–15, ECF No. 22. Both of the DOJ's arguments fail. The agency's public benefit analysis runs squarely contrary to the recent and unambiguous ruling of the D.C. Circuit in *Morley v. CIA*, 810 F.3d 841 (D.C. Cir. 2016). And the agency's reasonableness argument is incorrect as a matter of fact, and based on a fundamental misunderstanding of the law.

A. Under the D.C. Circuit's ruling in *Morley*, the public benefit factor strongly favors EPIC.

The DOJ correctly notes that the "public benefit" factor weighs in favor of a FOIA plaintiff where dissemination of the information obtained is "likely to add to the fund of information that citizens may use in making vital political choices." *Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995); Def.'s Opp'n at 11. But contrary to the agency's assertions, EPIC's success in obtaining the Umbrella Agreement was not "minimal, incidental, [or] speculative." *Aviation Data Serv. v. FAA*, 687 F.2d 1319, 1323 (10th Cir. 1982); Def.'s Opp'n at 11. The agency is further mistaken when it cites *Tax Analysts v. DOJ*, 965 F.2d 1092 (D.C. Cir. 1992), for the proposition that the agency's

[1] *See also* Supp. Aff. Alan Butler; Supp. Aff. Marc Rotenberg; Supp. Aff. T. John Tran.

release of the Umbrella Agreement resulted in no public benefit. *Tax Analysts* involved a FOIA request for federal-court tax decisions in possession of the DOJ, but which were also publicly available from the issuing courts. *Id.* at 1093. In that case, there was no question *ex ante* that the records held by the DOJ and the records routinely available from the courts were exact, one-to-one copies. *See id.* In contrast, here the request concerned a unique document, negotiated in secret, yet subject to almost immediate action by the US Congress. Even though EPIC eventually obtained a version of the Umbrella Agreement from the European Commission, EPIC had no way of knowing whether the version held by the DOJ and likely distributed to the US Congress would include identical text, additional commentary, or explanatory notes. Indeed, the DOJ's Acting FOIA Chief made clear that the Umbrella Agreement released by the agency "had not been finalized" and remained a "draft," emphasizing the uncertainty surrounding the agreement's contents. Decl. of Amanda Marchand Jones at ¶¶ 14–15, ECF No. 22-4.

Put differently, before EPIC filed suit, significant questions about the Government's position on the Umbrella Agreement remained unanswered: whether the government had a different version of the Umbrella Agreement; whether the government's version contained notes or other significant markings; whether the government would even acknowledge the existence of the draft agreement. Contrary to the agency's assertion that "all this lawsuit sought (and has accomplished) is the release to EPIC of the same document from the federal government," Def.'s Opp'n at 1, EPIC sought (and has obtained) answers to these questions. The public-benefit factor thus favors EPIC.

The DOJ does not even attempt to distinguish the most recent D.C. Circuit case concerning the public-benefit factor, *Morley v. Central Intelligence Agency*, and the agency has no way to distinguish it. The Court need not look beyond *Morley* to decide this case; the public benefit factor under *Morley* clearly favors EPIC.

Ignoring the clear public benefit derived from this case, the agency also mistakenly presumes that EPIC had any reason to believe that the document the DOJ would release would be identical to the one released by the EU Commission. In effect, the agency asks the FOIA requester to hypothesize a document that aligns with a characterization at the outset known only to the agency. This is the precisely the type of *post hoc* assessment of the public benefit factor that the D.C. Circuit recently rejected in *Morley*. The *Morley* panel explained that:

> Lest there be any uncertainty, we clarify that the public-benefit factor requires an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest. We can imagine a rare case where the research harvest seemed to vindicate an otherwise quite implausible request. But if it's plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there.

Morley, 810 F.3d at 844.

Thus under the *Morley* rule, the DOJ's assertion that the public benefit is absent simply because "EPIC already had obtained a copy of [the Umbrella Agreement] from the EU Commission before this lawsuit was filed," Def. Opp'n at 1, is mistaken. Because the target of EPIC's request—the US government's version of the Umbrella Agreement and the significance of that acknowledgment and disclosure—had more than a "decent chance of yielding a public benefit," the Court should conclude that "the public-benefit analysis ends there." *Morley*, 810 F.3d at 844.

B. The DOJ had no colorable legal basis for delay in producing the records.

Contrary to the agency's argument, a failure "to explain the basis" for the DOJ's withholding of the Umbrella Agreement "until after" EPIC filed suit "is exactly the kind of behavior the fee provision was enacted to combat." *Davy v. CIA*, 550 F.3d 1155, 1163 (D.C. Cir. 2008). "The question is not whether [EPIC] has affirmatively shown that the agency was unreasonable, but rather whether the agency has shown that it had any colorable or reasonable basis for not disclosing the material until after [EPIC] filed suit." *Id.* The agency has not shown any "colorable or reasonable basis" for withholding the document and thus the reasonableness factor cannot weigh in DOJ's favor here.

The DOJ has never provided a justification for the failure to process EPIC's FOIA request by the statutory deadline. It was not until after the DOJ disclosed the Umbrella Agreement to EPIC that the agency even raised a possible basis for withholding. *See* Jones Decl. at 16–17.

The cases cited by the DOJ are entirely distinguishable because those other matters concerned agencies that had clearly justifiable reasons for withholding documents prior to the suits. *See Dorsen v. SEC*, 15 F. Supp. 3d 112 (D.D.C. 2015) (involving documents initially withheld under FOIA Exemption 5); *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011) (involving documents initially withheld under Exemption 1); Def.'s Opp'n at 13. The agency's discussion of *Mobley v. DHS*, 908 F. Supp. 2d 42 (D.D.C. 2012), a case concerning a FOIA plaintiff's eligibility, is also entirely off point and irrelevant to the assessment of the reasonableness of the agency's withholding. Def.'s Opp'n at 14.

The agency's assertion that "it cannot be said that the [DOJ's] conduct was unreasonable, recalcitrant or obdurate in any way," Def.'s Opp'n at 14, is contradicted by

the record. After dragging its heels in processing EPIC's FOIA request, the DOJ failed to meet the statutory deadline for its Answer, thereby forcing EPIC to seek default judgment. In the opposition, the DOJ boldly attempts to shift the blame for the agency's lack of diligence onto EPIC, making the unprecedented argument that it was EPIC's responsibility to ensure that the agency met its own legal obligations. Def.'s Opp'n at 5.

The framework for ensuring that a defendant agency is properly notified of a lawsuit filed against it has been long established in Rule 4. Fed. R. Civ. P. 4(i). Rule 4(i)'s requires only that a plaintiff suing a federal agency must serve three copies of the complaint and summons on representatives of the United States via certified mail. *Id*. This notice-based system is the one established by Congress to ensure that agencies are given adequate notice and to avoid missteps like the one made by the DOJ in this case. The DOJ has raised no objections to EPIC's service of process, thus the agency has failed to show that its behavior in this case was not unreasonable, recalcitrant or obdurate. Because the agency has not offered any "colorable basis" for withholding the Umbrella Agreement, the fourth factor weighs in favor of EPIC.

II. EPIC is eligible for attorney's fees because EPIC's lawsuit caused the DOJ to expedite the release of the Umbrella Agreement.

"The *sin quo non* of eligibility is the release of tangible records," *CREW v. DOJ*, 83 F. Supp. 3d 297, 305 (D.D.C. 2015), and that is precisely what EPIC accomplished in this case. Contrary to the DOJ's assertion, the record here shows that EPIC's lawsuit *caused* the DOJ to release the Umbrella Agreement on January 25, 2016, rather than delay release until a later date. Indeed, the declaration from the DOJ's FOIA Chief further bolsters this conclusion.

Ms. Jones states that on "January 8, 2016, the Criminal Division was notified by the U.S. Attorney's Office" that EPIC had filed this lawsuit and subsequent Motion for Default Judgment. Jones Decl. at ¶ 12. "On that same day," explains Ms. Jones, "the Criminal Division conducted research" into the issues raised by the Umbrella Agreement. *Id.* Therefore, beginning on January 8th, the Criminal Division's FOIA staff knew that the agency had to act by January 25th and immediately began processing the document. *See* Min. Order (Jan. 8, 2016) ("Defendant shall file a response to the Motion for Default not later 1/25/16."). Although the Court later granted the DOJ a five-day extension to respond to the Motion for Default Judgment, the DOJ instead released to EPIC a copy of the Umbrella Agreement on January 25th. Jones Decl. at ¶ 15.

Further, Ms. Jones indicates that in 2015, "it took the Criminal Division an average of 162.18 days to respond to a complex FOIA/PA request," whereas EPIC "received a response to its complex request in 72 days," including "two days in which federal offices in Washington D.C. were closed for a snow event." *Id.* at ¶ 17. Ms. Jones does not offer any explanation as to why the agency processed EPIC's request twice as fast as similar requests other than the fact of EPIC's suit and motion for default. Nor does the agency claim that it would have released the Umbrella Agreement to EPIC on or before January 25, 2016, if EPIC had not filed the suit or motion.

What we know from the record is that the DOJ, having a deadline with the Court, moved with uncommon speed to produce a document by that deadline. The record thus makes clear that EPIC's litigation caused the DOJ to release the Umbrella Agreement when it did. *See, e.g., EPIC v. DHS*, 892 F. Supp. 2d 28, 49 (D.D.C. 2012) (holding that EPIC's lawsuit was the catalyst after the agency "released five documents that were not

scheduled for release for any other reason, such as an already-existing obligation or commitment to disclose the documents."). As a result, EPIC has "obtained relief" through a "voluntary or unilateral change in position by the agency" on a "not insubstantial" claim. *See* § 552(a)(4)(E)(ii). EPIC is eligible for attorney's fees.

A. The Court must reject the DOJ's exhaustion claim because it is inconsistent with the clear text of the FOIA and was waived by the agency.

For the first time in this litigation, the DOJ argues in the opposition that EPIC failed to exhaust its administrative remedies prior to filing suit. Def.'s Opp'n at 16–19. Not only is the agency's argument wrong as a matter of law, the Court must reject it entirely at this late stage in the litigation. The Court should also disregard the claim for three specific reasons: (1) an opposition to a fee motion is an improper vehicle for an exhaustion claim, (2) the agency has waived the claim, and (3) the claim itself is based on a misreading of the FOIA and is therefore incorrect.

First, this Circuit recognizes the "exhaustion of administrative remedies" requirement in a FOIA case as "a jurisprudential doctrine" rather than a jurisdictional prerequisite. *See Hidalgo v. FBI*, 344 F.3d 1256, 1258–59 (D.C. Cir. 2003) (finding exhaustion requirement is not jurisdictional because "the FOIA does not unequivocally make it so"); *Jones v. DOJ*, 576 F. Supp. 2d 64, 66 (D.D.C. 2008) ("It is settled in this circuit, however, that exhaustion of administrative remedies in a FOIA case is not a jurisdictional car to judicial review . . . the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief may be granted."). Therefore, Rule 12(b)(6) is the appropriate vehicle for dismissal based on a failure to exhaust administrative remedies. Fed. R. Civ. P. 12(b)(6). However, such a defense can only be raised in one of three ways under the Rule: "(A) in any pleading

allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial." Fed. R. Civ. P. 12(h)(2). An opposition to a plaintiff's motion for attorney's fees is not an appropriate vehicle to raise a 12(b)(6) defense.

Second, because the DOJ has expressly waived all arguments unrelated to attorney's fees, the Court should not consider the agency's exhaustion argument. In a status report to the Court, the parties expressly stated that they "are in agreement that there are no remaining issues in this case other than the issue of attorneys' fees." Joint Mot. to Vacate Entry of Default at ¶ 5, ECF No. 19. Although the DOJ attempts to shoehorn this exhaustion defense under fee eligibility, the agency has already conceded the point and cannot attempt to relitigate it in the fee motion.

In addition, the cases cited by DOJ are inapposite and offer no support for the DOJ's position. This case is not like *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 23 (D.D.C. 1998), where the agency had in fact properly raised its exhaustion defense in the answer. *Id.* at 23 ("Defendants listed failure to exhaust administrative remedies as an affirmative defense in their June 7, 1987 answer."). The DOJ also entirely mischaracterizes the holding in *Dorsen v. SEC*, 15 F. Supp. 3d 112 (D.D.C. 2015), by stating that "the agency's discretionary release did not preclude the [DOJ] from raising the failure to exhaust in the context of EPIC's fee motion." Def.'s Opp'n at 16. The court in *Dorsen* merely concluded that an agency's discretionary disclosure of documents initially withheld under Exemption 5 did not constitute a concession that the withholding was unreasonable for fee entitlement purposes. 15 F. Supp. 3d at 124. For these reasons, the Court should conclude that the DOJ waived the exhaustion affirmative defense.

Finally, even if the Court were to consider the DOJ's exhaustion defense at this late stage, the agency's assertion that EPIC's lawsuit was premature is meritless. The agency correctly notes that an agency has "20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt" of a FOIA request to make a determination. 5 U.S.C. § 552(a)(6)(A)(i); Def.'s Opp'n at 17. The DOJ is also correct that an agency may extend that 20-day deadline by "ten working days" in "unusual circumstances." § 552(a)(6)(B)(i); Def.'s Opp'n at 17. But the DOJ is mistaken about when the 20-day period commences under the FOIA. The statute is clear:

> The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than **ten days** after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section.

§ 552(a)(6)(A)(ii) (emphasis added). In this provision, unlike in the previous two provisions, Congress expressly counted time in calendar days rather than business days.

Properly giving the statute's language its plain meaning, the Criminal Division's 20 business-day deadline commenced on September 21, 2015 with its determination (including the 10-day extension for unusual circumstances) due by November 2, 2015. Thus, when EPIC filed this lawsuit on November 4, 2015, EPIC had exhausted its administrative remedies.

III. EPIC'S proposed fee award is reasonable based on the record in this case and prevailing rates upheld by the D.C. Circuit.

The DOJ has provided no evidence to rebut the presumption that EPIC's fee request in this case is reasonable, *see* Def.'s Opp'n at 21–22, and the agency cannot therefore carry its burden to overcome the presumptive reasonableness of EPIC's fee request. *EPIC v. NSA*, 87 F. Supp. 3d 223, 229 (D.D.C. 2015). The DOJ does not dispute,

and thus concedes, that EPIC's billing records are "contemporaneous, complete and standardized," and "accurately reflect the work done by each attorney." *CREW v. FEC*, 66 F. Supp. 3d. 134, 148 (D.D.C. 2014). Rather than cite to relevant facts or law, the DOJ makes bare assertions, unsupported by the record or by prior cases, in an attempt to argue that EPIC's requested award would be excessive. Def.'s Opp'n at 21–22. Furthermore, the DOJ's arguments regarding applicable hourly rates overstate the primacy of the USAO method of adjusting the *Laffey* Matrix and ignore the D.C. Circuit's recent decision in *Salazar ex rel Salazar v. District of Columbia*, 809 F.3d 58 (D.C. Cir. 2015). Instead, the agency merely resubmits arguments made in cases decided prior to *Salazar*. Def. Opp'n at 19–21.

A. EPIC's affidavits and billing records are contemporaneous, accurate, and complete.

The DOJ offers only conclusory accusations, rather than actual evidence, to counter EPIC's reasonable fee request. *See* Def. Opp'n at 18–19. Courts recognize that EPIC's billing process is "exactly the type of recordkeeping required for fee awards." *EPIC v. NSA*, 87 F. Supp. 3d at 235; *see also* Tran Supp. Decl.

Given that EPIC spent many hours preparing and submitting these detailed and complete records to this court, the DOJ bears the burden "to come forward with 'specific contrary evidence' to rebut the presumption of reasonableness that inheres in the plaintiff's fee request." *EPIC v. NSA*, 87 F. Supp. 3d at 235 (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109–10 (D.C. Cir. 1995)). But the DOJ has failed to do so in this case. Even the conclusory list of grievances that DOJ has included in its opposition does not identify any errors that would warrant reducing EPIC's proposed fee award. EPIC has already exercised substantial billing judgment in this case, Tran Decl. at 9–10,

ECF No. 21-1, and "trial courts need not, and indeed should not, become green-eyeshade accountants in examining fee requests since [t]he essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Id.* at 235 (internal quotations omitted).

The DOJ's objection to EPIC's work performed after the DOJ released the Umbrella Agreement on January 25th is meritless. Def.'s Opp'n at 21 n.9. Work performed in this period is devoted to EPIC's request for fees ("fees on fees"), and is recoverable under the FOIA. *EPIC v. FBI*, 80 F. Supp. 3d 149, 162 (D.D.C. 2015). Contrary to the DOJ's assertion, EPIC may recover for time spent on the motion for default judgment and opposition to the DOJ's motion for extension. Def.'s Opp'n at 21 n.9. While the parties agreed that the motion for default judgment was moot following disclosure of the responsive document, the agency cites to no authority that supports denial of fees for this EPIC's work on the motion. It was the agency's own lack of diligence in processing the request and responding to the suit that necessitate EPIC's motion for default judgment in the first place. Given the important role that the Court's scheduling order played in forcing the agency to process the document, EPIC's work on that motion is properly billable. EPIC's time spent preparing the opposition to the DOJ's motion for extension is also billable because it EPIC prevailed in part. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.").

B. The DOJ concedes that the rates established in *Laffey* apply in this case and the D.C. Circuit has found that the LSI adjustment method is superior to the USAO method.

The DOJ concedes that the LSI *Laffey* matrix has been recognized by the D.C. Circuit as establishing a reasonable basis for updating the original *Laffey* matrix for inflation. *See* Def.'s Opp'n at 23. But the agency relies on a fundamental misunderstanding of the law when it asserts that "this litigation presents a unique set of circumstances in which the higher LSI *Laffey* matrix would not be appropriate." *Id.* The LSI *Laffey* matrix was not created to allow organizations "to profit at the public expense," *id.*, but to accurately adjust for inflation the reasonable billing rates that were established by the D.C. Circuit in the *Laffey* case. The DOJ's position is incorrect as a matter of law and thus should be rejected.

The rates established in *Laffey* have been widely recognized as reasonable in complex federal litigation. *Eley v. District of Columbia*, 793 F.3d 97, 100 (D.C. Cir. 2015) ("*Laffey* I established (and *Laffey* II affirmed) the following schedule for lawyers who practice 'complex federal litigation' . . . ."). In recognition of the complex nature of FOIA litigation, courts have previously granted EPIC fee awards based on *Laffey* rates. *See, e.g.*, *EPIC v. FBI*, 72 F. Supp. 3d at 349; *EPIC v. DHS*, 999 F. Supp. 2d at 70. But until recently it was an open question what method should be used to adjust the original *Laffey* rates to account for inflation. The D.C. Circuit answered that question in *Salazar ex rel Salazar v. District of Columbia*, finding that the LSI method produced reasonable results superior to the USAO method. 809 F.3d 58 (D.C. Cir. 2015); *see also CREW v. DOJ*, 80 F. Supp. 3d 1, 3 (D.D.C. 2015) ("[T]he Court is persuaded that the LSI-adjusted Laffey Matrix, while imperfect, offers a better methodology for estimating prevailing market rates for complex federal litigation in Washington, D.C."). More recently, the LSI

Laffey matrix has been adopted in a FOIA case in this Circuit. *CREW v. DOJ*, No. 1:11-CV-00374, 2016 WL 554772, at *1 (D.D.C. Feb. 11, 2016) (awarding FOIA attorneys' fees based on the LSI *Laffey* matrix).

The LSI *Laffey* matrix is a version of the original *Laffey* matrix adjusted for inflation, not adjusted for complexity. No court has concluded otherwise, thus it is incorrect as a matter of law to treat the LSI Laffey matrix as a second, parallel set of rates for especially complex litigation. The only case that the DOJ cites in support of its position, *Poulsen v. DHS*, No. 13-498 (CKK), 2016 WL 1091060 (D.D.C. Mar. 21, 2016), is easily distinguishable. Def.'s Opp'n at 23. The court in *Poulsen* concluded, without any reference to *Salazar*, that litigation must meet some requisite level of complexity to qualify for LSI *Laffey* rates. 2016 WL 1091060, at *6. Not only was *Poulsen* likely incorrectly decided in light of the D.C. Circuit's ruling in *Salazar* a few months prior, it is easily distinguishable because, unlike in this litigation, the parties did not file any dispositive motions. *Id*. In this case, EPIC spent time preparing a dispositive motion in the form of the motion for default judgment. *See* Pl.'s Mot. for Default J.

The billing record in this matter contains detailed, contemporaneous time entries along with a calculation of the lodestar rate for each individual entry based on the applicable rate for each attorney in the LSI *Laffey* matrix. Tran Decl. ¶¶ 3–6. Because the D.C. Circuit has found that the LSI method produces reasonable fee rates and because courts in this Circuit have applied LSI *Laffey* rates in FOIA cases, the Court should find that the rates used to calculate fees requested by EPIC in this matter are reasonable.

In addition, the DOJ's arguments about the rates used for specific EPIC attorneys are unsupported by the cases cited by the agency and are inconsistent with the *Laffey*

matrix and with other decisions in this Circuit. The agency mistakenly asserts that an attorney's relevant hourly rate should be based that attorney's date of admission to the state bar in which the court sits. This case is not like *Dickens v. Friendship-Edison P.C.S.*, which involved attorneys, not admitted to practice in D.C. but admitted in other jurisdictions, who by local rule, were not permitted to represent parents in administrative hearings before the D.C. public school system. 724 F. Supp. 2d 113, 119 (D.D.C. 2010). The *Laffey* matrix calculates rates "based on years after graduation," *EPIC v. DHS*, 982 F. Supp. 2d 56, 61 (D.D.C. 2013), not years after bar admission.

The DOJ's objection to Mr. Rotenberg's billed time similarly fails. The agency's bare assertion that Mr. Rotenberg "failed to establish that he served in the capacity as an attorney of EPIC" is contradicted by the record and the agency's own words. *See* Def.'s Opp'n at 22–23, nn. 10–11. EPIC's billing records for Mr. Rotenberg clearly describe the nature of his work as an attorney for EPIC. *See* Billing Records, Ex. G (ECF No. 21-8). Because the DOJ cannot cite even one instance of an improper entry, this argument can be rejected on this basis alone. But in the very next footnote, the DOJ argues that in this "straightforward" litigation, EPIC did not need Mr. Rotenberg's substantial legal expertise. Def.'s Opp'n at 22–23. According to the DOJ, Mr. Rotenberg either contributed too much or too little to EPIC's litigation. But the agency cannot have it both ways. Because the DOJ's argument for reducing Mr. Rotenberg's time is not borne out by the record, the argument should be rejected.

C. EPIC's request for fees on fees is reasonable and should be awarded in full.

It is "'is settled in this circuit' that '[h]ours reasonably devoted to a request for fees are compensable,'" provided they are reasonable. *EPIC v. FBI*, 80 F. Supp. 3d 149,

162 (D.D.C. 2015) (citing *Noxell Corp. v. Firehouse No. 1 Bar–B–Que Rest.*, 771 F.2d 521, 528 (D.C. Cir. 1985) (modification in the original)). EPIC is entitled to fees incurred in the production of this reply brief because the DOJ has "raised a variety of threshold and substantive objections to fees" to which EPIC has "appropriately responded." *Am. Immigration Council v. DHS*, 82 F. Supp. 3d 396, 413 (D.D.C. 2015) (finding that plaintiff's request for fees-on-fees, which included successful litigation on whether plaintiff was even eligible for and entitled to attorneys' fees, was "not excessive" and was "reasonably devoted to its request for fees" (internal quotation marks and alterations omitted)).

Because the DOJ has failed to provide any evidence to rebut the presumptive reasonableness of EPIC's request for fees on fees, the Court should award EPIC the full request for fees on fees, including the fees for time spent preparing this Reply.

CONCLUSION

EPIC is eligible for and entitled to recover its fees and costs from the DOJ in this matter. EPIC's fees are reasonable and supported by the proper documentation. The Court should award EPIC $21,408.15 in fees, $400 in costs, and $6,109.30 in fees-on-fees for time spent preparing this Reply, as documented in the Exhibits attached to EPIC's Motion for Fees and the Exhibits attached to this Motion.

Respectfully submitted,

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