

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES (1976)**

BETWEEN:

ELI LILLY AND COMPANY

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

(Case No. UNCT/14/2)

**GOVERNMENT OF CANADA
SUBMISSION ON COSTS
August 22, 2016**

Trade Law Bureau
Departments of Justice and of
Foreign Affairs, Trade and
Development
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

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I. INTRODUCTION

1. This claim should never have been brought to NAFTA Chapter Eleven arbitration. Claimant initiated this arbitration in an obvious attempt to create yet one more level of appeal from the sort of patent validity findings made in the respective courts of each of the NAFTA Parties as a matter of ordinary course. Its claim asks this Tribunal to second-guess the reasoned decisions of Canadian courts properly applying Canadian law to complex factual situations. As Canada has shown, this claim is manifestly without legal merit, time-barred, and beyond the Tribunal's jurisdiction *ratione temporis*. Further, even if this claim could proceed as a matter of law, Claimant has failed to prove the facts that it claims (wrongly) would be sufficient to establish a breach of Articles 1110 and 1105. Despite its meritless nature, because of the sensitivity of the issues involved and the ever-shifting nature of Claimant's allegations, Canada has been forced to mount a very substantial and costly defence. The Canadian taxpayers should not be forced to pay the cost for Claimant's ill-advised attempt to turn a Chapter Eleven tribunal into a supra-national court of appeal on patent validity challenges. Canada should be awarded all of its costs in this arbitration, including both its share of the Tribunal's fees and expenses, and the reasonable costs of its legal representation and assistance. These costs total approximately CDN \$6,533,285.42.

II. CANADA IS ENTITLED TO RECOVER ITS REASONABLE COSTS

2. Under NAFTA Chapter Eleven and the 1976 UNCITRAL Arbitration Rules ("UNCITRAL Rules"), the Tribunal has the authority to apportion the arbitration costs as it believes appropriate. Article 1135 of NAFTA grants the Tribunal authority to award Canada its costs in this arbitration in accordance with the applicable provisions of the UNCITRAL Rules. Article 38 of the UNCITRAL Rules sets out categories of recoverable costs, which include the fees and expenses of the arbitral tribunal¹ and the costs of legal representation and assistance.² Article 40 of the UNCITRAL Rules governs the apportionment of costs, and provides:

¹ UNCITRAL Rules, Articles 38(a) and (b).

² UNCITRAL Rules, Article 38(e).

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. NAFTA tribunals have consistently recognized that these Rules, and the principles they embody, apply to disputes brought under Chapter Eleven.³ A long list of NAFTA tribunals have awarded the prevailing party reasonable arbitration and legal costs,⁴ including most recently in *Mesa Power Group, LLC v. Canada*.⁵ Non-NAFTA tribunals, operating under the UNCITRAL Arbitration Rules, have also agreed that as a “general rule” the “unsuccessful litigant in international arbitration should bear the reasonable costs of its opponent.”⁶ This is especially the

³ *International Thunderbird Gaming Corporation v. United Mexican States*, (UNCITRAL) Arbitral Award, 26 January 2006, (“*Thunderbird Award*”), paras. 212-215 (**RL-003**); *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, IV, Chap. C (“*Methanex Final Award on Jurisdiction*”), paras. 1-12 (**RL-011**); *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, Award, 2 August 2010 (“*Chemtura Award*”), para. 272 (**RL-057**); *Waste Management Inc. v. Mexico* (ICSID No. ARB(AF)00/3) Award, 30 April 2004 (“*Waste Management II Award*”), para. 183 (**RL-014**); *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Award, 24 March 2016 (“*Mesa Award*”), paras. 696-698 (**RL-159**).

⁴ *Methanex Final Award on Jurisdiction*, paras. 5 and 13 (**RL-011**); *Thunderbird Award*, paras. 219-221 (**RL-003**); *Canfor Corporation, Tembec et al., Terminal Forest Products v. United States of America* (UNCITRAL), Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007, para. 190 (**RL-160**); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (“*Cargill Award*”), paras. 546-547 (**RL-015**); *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL) Award, 8 June 2009 (“*Glamis Award*”), para. 833 (**RL-006**); *Chemtura Award*, paras. 272-273 (**RL-057**); *Melvin J. Howard Order for the Termination of the Proceedings and Award on Costs*, paras. 75-77 and 82 (**RL-161**); *Apotex Inc v. United States*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013 (“*Apotex Award on Jurisdiction*”), paras. 339-340 (**CL-176**) (awarding the United States its full arbitration and legal costs by virtue of its success in the arbitrations); *Apotex Holdings Inc., Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (“*Apotex Holdings Award*”), paras. 10.34-10.35 (**RL-016**); *Detroit International Bridge Company v. Canada* (UNCITRAL), Award on Costs, 17 August 2015, para. 51 (**RL-162**).

⁵ *Mesa Award*, paras. 700 and 705 (**RL-159**).

⁶ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 24.1 (**CL-54**). See also *ADC Affiliate Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para.

case where a respondent State is successful on an objection to jurisdiction.⁷ Commentators have also noted the rule under NAFTA and the UNCITRAL Rules that costs follow the event.⁸

4. Tribunals have considered several factors when exercising discretion in the apportionment of costs, such as the relative success of the parties,⁹ the quality of the claims,¹⁰ the complexity of the issues,¹¹ and the reasonableness of the parties' incurred expenses.¹² All of these factors support an award to Canada of all of its costs in this arbitration because Canada "has in effect

533 (CL-89); *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 107 (RL-163); *Bernardus Henricus Funnekotter and ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 147 (CL-83); *Rachel Grynberg, Stephen Grynberg, Miriam Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 8.3.4-8.3.6 (RL-164); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 380 (RL-165); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, Part XVII, para. 17-22 (RL-166).

⁷ *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/02, Award, 13 August 2009, para. 185 (RL-167) (awarding Turkey its full costs to "compensat[e] the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims"); *Iberdrola Energia S.A. v. Guatemala*, ICSID Case No. ARB/09/5, Award (Unofficial English Translation), 17 August 2012, paras. 516-518 (RL-168) (awarding Guatemala its full costs, taking into account that the "objection to jurisdiction filed by the Respondent against the main claims of the Claimant was successful").

⁸ See, e.g., Meg N. Kinnear, Andrea K. Bjorklund & John F.G. Hannford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, looseleaf (The Netherlands, Kluwer Law International, 2009), Article 1135, p. 33 (RL-169) ("Essentially, [NAFTA tribunals] have followed the 'cost follow the event' rule, but based on an assessment of relative success rather than simply on which party won the case."); John Y. Gotanda, *Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitrations*, 28 ICSID Rev.—FILJ 420 (2013) (RL-170); Thomas H. Webster, *Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues*, 25 Arb.Int'l 469 (2009) (RL-171).

⁹ See *Apotex Holdings Award*, para. 10.30 (RL-016); *Cargill Award*, para. 546 (RL-015); *Archer Daniels Midland Company v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 302 (RL-074); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 208 (RL-058); *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 ("Azinian Award"), para. 125 (RL-002).

¹⁰ See, e.g., *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, para. 125 (RL-012); *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, para. 221 (CL-45); *Apotex Award on Jurisdiction*, para. 342 (CL-176).

¹¹ See *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB (AF)/07/4, Award, 20 February 2015, para. 176 (RL-172); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 200 (RL-005); *The Loewen Group Inc. and Raymond Loewen v. United States of America*, ICSID ARB(AF)/98/3, Award on Merits, 26 June 2003, para. 240 (RL-013); *Azinian Award*, para. 126 (RL-002); *Apotex Award on Jurisdiction*, para. 342 (CL-176).

¹² See *Apotex Holdings Award*, para. 10.32 (RL-016); *Apotex Award on Jurisdiction*, para. 342 (CL-176).

been forced to go through the process in order to achieve success, and should not be penalised by having to pay for the process itself.”¹³

5. Canada has demonstrated that Claimant’s claim is internally inconsistent and cannot be sustained. Whether its claim fails because it is manifestly without legal merit due to Claimant’s failure to even plead a denial of justice, because it is time-barred in light of the decision in 2008 with respect to Claimant’s raloxifene patent, because it is outside of the Tribunal’s jurisdiction *ratione temporis* given that the law Claimant challenges pre-existed Claimant’s investments, or because it has failed to make out its own (incorrect) legal case under Articles 1110 and 1105 on the facts, Canada has shown Claimant’s case to be meritless.

6. The lack of quality in Claimant’s claims goes beyond a typical unsuccessful claim; these are claims that should not reasonably have been brought before a NAFTA Chapter Eleven tribunal. Claimant asks the Tribunal to act as a supra-national court of appeal and reconsider the decisions of the Canadian courts with respect to the validity of its patents. All three NAFTA Parties agreed that this request falls outside the purview of a NAFTA Chapter Eleven tribunal.

7. Claimant’s conduct in presenting its case – including the constantly shifting nature and scope of its claim, the broad scope of its experts’ testimony, and its insistence on eleven full days for a hearing – also weighs in favour of awarding Canada its costs. First, as late as its Post-Hearing Memorial, Claimant had still not clearly articulated the nature and scope of its claim. Depending on the needs of a particular argument, Claimant shifted from alleging the breach was the promise utility doctrine itself to alleging the breach was in the doctrine’s specific application to Claimant’s olanzapine and atomoxetine patents. Claimant was also unclear on whether the Supreme Court’s *AZT* decision was part of the alleged measure it challenged. In addition, Claimant provided inconsistent answers on whether its claim depended on the Tribunal agreeing with it on all three alleged elements of the promise utility doctrine, or whether a subset would suffice, and if so, which subset. All of this ambiguity in Claimant’s claim introduced unnecessary

¹³ *S.D. Myers Inc. v. Canada* (UNCITRAL), Final Award, 20 December 2002, para. 15 (RL-173).

complexity in the proceedings, made it more difficult for Canada to defend against the claim, and consumed time at the hearing.

8. Claimant also increased the costs of this arbitration through its submission of voluminous expert reports that covered subject matter of limited relevance to its claim. For example, Claimant submitted two expert reports by Mr. Erstling who argued that Canada was in breach of its obligation under the Patent Cooperation Treaty. Canada was forced to respond to these allegations of breach, including through the presentation of its own expert, only to have Claimant clarify at the hearing that it was not basing its claim on any such alleged breach of the PCT. Similarly, Claimant filed eight expert reports detailing aspects of U.S. and Mexican patent law that have nothing to do with the content or application of Canadian patent law, let alone whether the Canadian courts denied Claimant justice in adjudicating the validity of its patents under Canadian law. In its Reply submission, Claimant also unnecessarily retained a Columbia statistics professor, Dr. Levin, to perform calculations on a number of matters that did not correspond to Claimant's alleged breach and were, thus, largely irrelevant. While much of the extensive expert evidence submitted by Claimant was unnecessary and of limited relevance, Canada, as the Respondent, was put into a position where it was forced to answer, increasing its costs.

9. Finally, Claimant increased the arbitration costs by insisting that the parties and the Tribunal reserve eleven full days for the hearing of the case. As Canada argued, Claimant's position was unreasonable, particularly given that the hearing did not involve consideration of damages. The Tribunal granted Claimant's request for a lengthy hearing, but the hearing was concluded in approximately eight days. Claimant's position resulted in the disputing parties, experts, and the Tribunal incurring additional and unnecessary travel costs and expenses.

10. For all of these reasons, Canada is entitled to a full award of its costs, including its share of the arbitration costs to date as well as its fees for legal counsel and assistance.¹⁴

¹⁴ Even if Canada is not successful on all of its arguments, the deficiencies of Claimant's claims are such that if Canada is the ultimately successful party, Canada should be awarded all of its costs. However, in the event the

III. CANADA’S COSTS ARE REASONABLE

11. In light of the almost 600 pages of submissions, 545 exhibits, and 22 expert reports and witness statements filed by Claimant in this arbitration, the costs incurred by Canada in its defence are entirely reasonable. Claimant insisted on delving into the complex details of not only Canadian patent law, but also of U.S. and Mexican patent law, and international patent law. As set out below, Canada was forced to expend considerable resources defending Claimant’s baseless allegations.

A. Arbitration Costs

12. Articles 38(a) and (b) of the UNCITRAL Rules include the fees, travel and other expenses of the Tribunal as allowable costs that can be recovered. To date, the parties have shared the costs of this arbitration equally. Canada has thus far contributed CDN \$601,785.00 towards arbitration fees and expenses. Claimant should be ordered to reimburse Canada in this amount, and bear the remainder of the arbitration costs, to be determined when the proceedings are complete.

B. Legal Costs

13. Article 38(e) of the UNCITRAL Rules also includes as recoverable costs those incurred for legal representation and assistance, including expert assistance and other disbursements.

1. Canada’s Legal Fees

14. Canada was represented in this arbitration by lawyers and paralegals employed by the Government of Canada’s Trade Law Bureau. The cost of this time has been assessed by applying the hourly “billable rate” used by Canada’s Department of Justice. Like its counterpart in private practice, this billable rate is intended to capture all of the costs associated with providing legal services, including the cost of office space, equipment, and administrative support. This rate varies according to the position in question, and ranges from CDN \$142.22/hr for paralegals to CDN \$305.19/hr for the most senior lawyers. The billable rates Canada uses are substantially

Tribunal finds for Claimant on the merits, Canada should not be penalized for pursuing a legitimate defence, and the parties should bear their own costs.

lower than those used by comparable practitioners in the private sector. Canada's legal fees, detailed in Annex I, total CDN \$4,579,260.92.

15. The fees claimed are a reasonable reflection of the defence required in this arbitration, especially in light of the fact that the claim involved a number of elements not previously subject to dispute settlement, such as the interpretation of Article 1110(7) and Chapter 17. The hours spent preparing Canada's defence of this claim over four years include time spent meeting with clients, assembling and reviewing documentary evidence, undertaking legal research and analysis, identifying and working with fact and expert witnesses, drafting and reviewing written pleadings, addressing procedural matters, and appearing before the Tribunal. Canada is not claiming for the hours worked by students or technical support staff. Nor is Canada claiming for hours worked by lawyers at other Government of Canada Departments. In particular, Canada is not seeking to recover for the time spent by legal counsel at Innovation, Science and Economic Development Canada who assisted in preparing Canada's response to Claimant's misrepresentation of Canada's domestic patent law.

2. Witness Costs

16. Canada required the assistance of seven witnesses to respond to Claimant's allegations. These witnesses clarified inaccuracies in Claimant's allegations, and assisted the Tribunal with independent and unbiased testimony in their areas, including Canadian Intellectual Property Office practice, Canadian, American and Mexican patent law, and international patent law and practice. The fees and expenses for each of Canada's witnesses are detailed under "disbursements" in Annex II and total CDN \$997,745.24. Canada's expenses are reasonable in the context of the complex domestic and international patent law questions at issue here. Further, Canada filed fewer expert reports than Claimant to respond to the full scope of issues raised by Claimant. For example, Claimant filed two expert reports relating to the patent law and practice of Canada (Professor Siebrasse and Mr. Reddon), the United States (Professor Merges and Mr. Kunin) and Mexico (Ms. Gonzalez and Mr. Salazar), but Canada filed only one for each (Mr. Dimock, Professor Holbrook and Ms. Lindner, respectively).

3. Additional Disbursements

17. Canada incurred travel costs of CDN \$116,060.90. This amount includes the costs of attending the initial procedural hearing, meeting with clients and expert witnesses, and attending the hearing on jurisdiction and merits in Washington, D.C. Canada also incurred costs of \$187,253.86 for technical assistance needed to defend this arbitration. For example, Canada retained Strut Legal to hyperlink its submissions in accordance with Procedural Order No. 1, and SRW Trial Graphics to assist Canada with its visual presentation at the hearing. These firms provided services that facilitated the presentation of evidence and argument in order to assist the Tribunal. Canada also incurred CDN \$51,179.50 for printing, photocopying, courier and board room rental costs (the latter being associated with creating work spaces in Washington for the duration of the hearing – a cost Claimant avoided because of its counsel’s offices there).

IV. CONCLUSION

18. Pursuant to NAFTA Article 1135 and Articles 38 and 40 of the UNCITRAL Rules, the Tribunal has the authority to apportion the arbitration costs, including not only its own fees and expenses but also the costs of legal representation and assistance for the parties. In light of the meritless nature of Claimant’s claim, the Tribunal should award Canada all of its costs. Such an award will compensate Canada for having to defend against Claimant’s attempt to remake a NAFTA Chapter Eleven arbitration tribunal into a supra-national court of appeal that threaten the independence, integrity and sovereignty of the NAFTA Parties’ judicial systems.

August 22, 2016

[signed]

Sylvie Tabet
Shane Spelliscy
Mark A. Luz
Adrian Johnston
Krista Zeman
Mariella Montplaisir

Trade Law Bureau
Department of Justice and of Foreign
Affairs, Trade and Development

ANNEX I – COST OF LEGAL REPRESENTATION

Description	Lawyers' Fees		
	Rate	Hours	Total Fees
FISCAL YEAR 2012-2013			
Tabet, Sylvie	\$288.88	22.00	\$6,355.36
Bondy, Christophe	\$250.91	63.00	\$15,807.33
Sub-Total (2012-2013):		85.00	\$22,162.69
FISCAL YEAR 2013-2014			
Tabet, Sylvie	\$305.19	61.25	\$18,692.89
Bondy, Christophe	\$281.68	1,161.00	\$327,030.48
Shaker, Yasmin	\$262.16	128.00	\$33,556.48
Dea, Maxime	\$218.58	704.76	\$154,045.70
Johnston, Adrian	\$218.58	684.67	\$149,655.17
Paralegals			
Lesaux, Shawna	\$142.22	256.00	\$36,408.32
Sub-Total (2013-2014):		2,995.68	\$719,389.04
FISCAL YEAR 2014-2015			
Tabet, Sylvie	\$305.19	45.00	\$13,733.55
Bondy, Christophe	\$281.68	1,866.92	\$525,874.03
Luz, Mark	\$262.16	574.50	\$150,610.92
Shaker, Yasmin	\$262.16	675.00	\$176,958.00
Dea, Maxime	\$218.58	915.79	\$200,172.29
Johnston, Adrian	\$218.58	1,488.50	\$325,356.33
Montplaisir, Mariella	\$218.58	342.63	\$74,890.97
Hanlon, Meghan	\$218.58	701.68	\$153,372.12
Paralegals			
Lesaux, Shawna	\$142.22	1,066.45	\$151,670.52
Sub-Total (2014-2015):		7,676.47	\$1,772,638.73
FISCAL YEAR 2015-2016			
Tabet, Sylvie	\$305.19	31.80	\$9,705.04
Bondy, Christophe	\$281.68	189.50	\$53,378.36
Spelliscy, Shane	\$281.68	553.25	\$155,839.46
Luz, Mark	\$281.68	355.50	\$100,137.24
Johnston, Adrian	\$218.58	748.25	\$163,552.49
Zeman, Krista	\$218.58	587.25	\$128,361.11
Montplaisir, Mariella	\$218.58	661.75	\$144,645.32

Hoffman, Michelle	\$218.58	549.85	\$120,186.21
Hanlon, Meghan	\$218.58	223.00	\$48,743.34
Paralegals			
Lesaux, Shawna	\$148.01	949.50	\$140,535.50
Leveille, Marc-Andre	\$142.22	123.50	\$17,564.17
Sub-Total (2015-2016):		4,973.15	\$1,082,648.24
FISCAL YEAR 2016-2017			
Tabet, Sylvie	\$305.19	57.90	\$17,670.50
Spelliscy, Shane	\$281.68	872.08	\$245,647.49
Luz, Mark	\$281.68	407.93	\$114,905.72
Johnston, Adrian	\$218.58	667.50	\$145,902.15
Zeman, Krista	\$218.58	738.50	\$161,421.33
Montplaisir, Mariella	\$218.58	637.50	\$139,344.75
Paralegals			
Lesaux, Shawna	\$148.01	691.50	\$102,348.92
Leveille, Marc-Andre	\$142.22	388.00	\$55,181.36
Sub-Total (2016-2017):		4,412.41	\$982,422.22
TOTAL:		20,142.71	\$4,579,260.92

ANNEX II – DISBURSEMENTS

Disbursement	Total (\$ CDN)
Dimock Stratton	\$492,438.29
Professor Gervais	\$171,786.17
Arochi Lindner	\$157,365.55
Professor Holbrook	\$107,793.79
Micheal Gillen	\$7,845.45
David Reed	\$56,416.44
Marcel Brisebois ¹⁵	\$4,099.55
SRW Trial Consulting (Trial Technology & Graphic Consultants)	\$159,571.17
Strut Legal (Hyperlinking of Documents)	\$27,682.69
Printing	\$20,173.60
Courier	\$2,572.96
Hotel Boardroom Rentals (Hearing)	\$27,783.29
Materials & Supplies	\$649.65
Travel Costs	\$116,060.90
TOTAL DISBURSEMENTS	\$1,352,239.50

¹⁵ Marcel Brisebois is a Government of Canada employee, his disbursements include only his travel and expenses while at the hearing in Washington, D.C.