

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CRYSTAL D. SOUTHALL-NORMAN

)  
Appellant, )

v. )

CAVC No. 15-1357  
EAJA

)  
DAVID J. SHULKIN, M.D., )  
SECRETARY OF )  
VETERANS AFFAIRS, )  
Appellee )

APPELLANT'S APPLICATION FOR AN  
AWARD OF ATTORNEYS FEES AND EXPENSES  
PURSUANT TO 28 U.S.C. § 2412(d)

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (1994), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$25,112.77**.

The basis for the application is as follows:

**Grounds for an Award**

This Court has identified four elements as being necessary to warrant an award by the Court of attorneys' fees and expenses to an eligible party pursuant to the EAJA. These are: (1) a showing that the appellant is a prevailing party; (2) a showing that the appellant is eligible for an award; (3) an allegation that the government's position is not substantially justified; and (4) an itemized statement of

the fees sought. *Owens v. Brown*, 10 Vet. App. 65, 66 (1997) (quoting *Bazalo*, 9 Vet. App. at 308). See also 28 U.S.C. §§ 2412(d)(1)(A),(B).

As will be demonstrated below, Appellant satisfies each of the above-enumerated requirements for EAJA.

1. THE APPELLANT SATISFIES EACH OF THE REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

A. *The Appellant Is a Prevailing Party*

In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct 1835 (2001) (hereafter "Buckhannon"), the Supreme Court explained that in order to be a prevailing party the applicant must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. 532 U.S. at 603-605. The Federal Circuit adopted the *Buckhannon* test in *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) and applied it to an EAJA applicant. The Federal Circuit explained in *Rice Services, LTD. v. United States*, that "in order to demonstrate that it is a prevailing party, an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court ordered consent decree that materially altered the legal relationship between the parties, or the equivalent of either of those." 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006), this Court explained that the Federal Circuit case of *Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005) "did not change the focus for determining prevailing party status from a standard that looks to the basis for the remand to one that looks to the outcome of the remand. *Akers* simply did not involve a remand that was predicated on an administrative error." 19 Vet. App. at 547. (internal quotations omitted). The Court held in *Zuberi* that *Motorola* provided the proper test for prevailing party. *Id.* Next in *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006), the Federal Circuit held that:

To be considered a prevailing party entitled to fees under EAJA, one must secure some relief on the merits. Securing a remand to an agency can constitute the requisite success on the merits. [W]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party ... without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court.

*Id.* at 1353 (internal citations and quotations omitted).

The Appellant in the instant matter is a prevailing party. After oral argument, in a precedential decision, the Court set aside and remanded the Board's January 5, 2015 decision denying entitlement to an initial compensable evaluation for a bilateral foot disability prior to June 2, 2014 and a separate evaluation for impairment of sphincter control based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-13 of the Precedential

Decision. The mandate was issued on March 8, 2017. Based upon the foregoing, Ms. Southall-Norman is a prevailing party.

*B. Appellant Is Eligible For An EAJA Award*

Appellant also satisfies the EAJA requirement that her net worth at the time her appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Ms. Southall-Norman had a net worth under \$2,000,000 on the date this action was commenced. See Paragraph 3 of the fee agreement filed with the Court. Therefore, Ms. Southall-Norman is a person eligible to receive an award under the EAJA.

*C. The Position of the Secretary Was Not Substantially Justified*

In *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2004) the Federal Circuit applied the totality of the circumstances test and noted that "EAJA requires that the record must supply the evidence of the Government's substantial justification." 412 F.3d at 1316. The Secretary's position during proceedings before the Agency and in Court was not reasonable, either in law or in fact, and accordingly the Secretary's position was not substantially justified at either the administrative or litigation stage in this case. There thus is nothing substantially justified in the Board's failure to provide an adequate statement of reasons or bases. Moreover, there is no evidence

that special circumstances exist in Appellant's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A)

2. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

Appellant has claimed a reasonable amount of attorneys' fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997) (quoting *Elczyn*, 7 Vet. App. at 176-177).

Six attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Jenna Zellmer, Danielle M. Gorini, Michael Just, Christian McTarnaghan, Barbara Cook, and Zachary Stolz.<sup>1</sup> Attorney Jenna Zellmer

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<sup>1</sup>“There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer.” *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); see also *Baldrige v. Nicholson*, 19 Vet.App. 227, 237-38 (2005) (“the fees sought must be ‘based on the distinct contribution of each individual counsel.’”). “The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work.” *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) holding modified by *Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). “Careful preparation often requires collaboration and rehearsal[.]” *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998). As demonstrated in Exhibit A, each attorney involved in the present case provided a distinct, and non-duplicative contribution to the success of the appeal. See *Baldrige*, 19 Vet.App. at 237 (“An

graduated from Boston University Law School in 2013 and the *Laffey Matrix* establishes that \$322.00 is the prevailing market rate for an attorney with her experience.<sup>2</sup> Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey Matrix* establishes that \$465.00 is the prevailing market rate for an attorney with her experience. Michael Just graduated from Roger Williams University Law School in 2008 and the *Laffey Matrix* establishes that \$395.00 is the prevailing market rate for an attorney with his experience. Christian McTarnaghan graduated from Suffolk University Law School in 2014 and the *Laffey Matrix* establishes that \$322.00 is the prevailing market rate for an attorney with his experience. Barbara Cook graduated from University of

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application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct contribution of each counsel.”).

<sup>2</sup>The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part by* 746 F.2d.4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488 (1985). This Court has approved the use of the Laffey Matrix for determining the prevailing market rate for EAJA fees. *See, e.g., Wilson v. Principi*, 16 Vet. App. 509, 213 (2002) (finding the Laffey Matrix a “reliable indicator of fees...particularly as to cases involving fees to be paid by government entities or determined under fee-shifting statutes”), *vacated on other grounds by* 391 F.3d 1203 (Fed. Cir. 2004); *see also Sandoval*, 9 Vet. App. at 181 (using the Laffey Matrix as an indicator of prevailing market rate and holding that once a prevailing market rate is established, the government has the burden of producing evidence to show that the rate is erroneous.) *See Exhibit B (Laffey Matrix)*.

Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$581.00 is the prevailing market rate for an attorney with her experience. Zachary Stolz graduated from the University of Kansas School of Law in 2005 and the *Laffey* Matrix establishes that \$465.00 is the prevailing market rate for an attorney with his experience.

In addition, one non-attorney practitioner, Landon Overby, worked on this case. Mr. Overby's credentials are set forth in detail in the Court's decision in *McDonald v. Nicholson*, 21 Vet. App. 257 (2007). He entered his appearance and started working on the case shortly after the appeal was filed in this case.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$193.92 per hour for Ms. Zellmer, Ms. Gorini, Mr. Just, Mr. McTarnaghan, and Mr. Stolz for representation services before the Court.<sup>3</sup> This rate per hour, multiplied by the number of hours billed for these five attorneys (121.90) results in a total attorney's fee amount of \$23,638.80.

Appellant seeks attorney's fees at the rate of \$188.23 per hour for Ms. Cook's

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<sup>3</sup>This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. See *Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to November 2015 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (0.30) results in a total attorney's fee amount of \$37.64.

In addition, Appellant seeks attorney's fees at the rate of \$163.56 per hour for representation services before the Court for Mr. Overby's time.<sup>5</sup> This rate per hour, multiplied by the number of hours billed (0.60) results in a total attorney's fee amount of \$98.14.

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<sup>4</sup> This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Cincinnati. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date fo the EAJA rate), to November 2015 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

<sup>5</sup> The hourly billing rate at which fees are claimed for those hours expended is based on the rate of \$120.00 per hour plus the cost-of-living allowance ("COLA"), which is adjusted according to the formula described in *Apodackis v. Nicholson*, 19 Vet. App. 91, 95-96 (2005). *McDonald v. Nicholson*, 21 Vet. App. 257, 262-63 (2007); *see Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994) ("[T]he Court will permit-and encourage-the selection of a single mid-point date, such as the date upon which an appellant's principal brief...is filed with the Court, as the base for calculating a cost of living increase."). This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. The mid-point date in this litigation is November 2015, the period of time during which the opening brief was filed with the Court.



In addition, Ms. Southall-Norman seeks reimbursement for the following expenses:

Filing Fee:	\$50.00
Airfare to/ from DC – CM:	\$220.20
Airfare to / from DC – JZ:	\$258.20
Expenses while in DC – CM:	\$245.01
Expenses while in DC – JZ:	\$69.30
Hotel – CM:	\$228.78
Hotel – JZ:	\$213.83
Train to Boston airport – CM:	\$7.50
Taxi to / from airport – JZ:	\$45.37

Based upon the foregoing, the total fee sought is **\$25,112.77.**<sup>6</sup>

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<sup>6</sup> In the exercise of billing judgment, Appellant has omitted 17.20 hours for that time spent by other attorneys in the firm who assisted in the preparation for the oral argument.

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives. I have considered and eliminated all time that I believe, based upon my over ten years of practicing before this Court, is either excessive or redundant.

Respectfully submitted,  
Crystal D. Southall-Norman  
By Her Attorneys,  
CHISHOLM CHISHOLM & KILPATRICK  
/s/Zachary M. Stolz  
One Turks Head Place, Ste. 1100  
Providence, Rhode Island 02903  
(401) 331-6300  
Fax: (401) 421-3185

## Exhibit A

		<u>Hours</u>
1/13/2015 LEO	Reviewed BVA decision. Researched law. Accepted case for appeal.	0.60
4/10/2015 DMG	Reviewed file and appeal documents. Filed appeal documents with the Court - Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, and Fee Agreement. Posted Court confirmation email to the file. Updated file	0.20
4/14/2015 DMG	Reviewed docketed appeal documents and ensured Notice of Appeal, Notice of Appearance for Robert Chisholm, and Fee Agreement were properly docketed with the Court. Posted Court emails re: same to the file. Updated case information and case file	0.20
5/6/2015 MSJ	prepare and file notice of appearance; update file.	0.10
5/6/2015 MSJ	initial review of BVA decision and file; take notes on issues and potential arguments for appeal	1.10
5/18/2015 MSJ	review transmittal of BVA decision; update file	0.10
6/15/2015 MSJ	review RBA certificate of service; update file	0.10
6/17/2015 MSJ	review Aee notice of appearance; update file	0.10
6/17/2015 MSJ	received and reviewed notice that RBA was received and uploaded to the file; ensured correct BVA decision was included; update file	0.10
6/23/2015 MSJ	begin case map and review of RBA	1.90
6/23/2015 MSJ	continue case map and review of RBA through page 1338; review file in preparation for drafting PBC memo - review BVA decision and pertinent	2.70

## Exhibit A

		<u>Hours</u>
	evidence of record; conduct legal research; take notes on argument strategy; outline PBC memo	
6/23/2015 MSJ	draft PBC memo	3.00
6/23/2015 MSJ	edits and revisions to PBC memo	0.30
6/23/2015 MSJ	prepared status letter to client	0.10
6/23/2015 MSJ	email to VA counsel re: non dispute of RBA	0.10
7/7/2015 MSJ	review notice to file brief; calculate brief deadline; update file	0.10
7/15/2015 MSJ	review PBC order; calculate memo deadline; update file	0.10
7/27/2015 MSJ	final edits and revisions to PBC memo; submit PBC memo; prepare certificate of service and file with Court; update file	0.40
8/26/2015 MSJ	review file in preparation for PBC	0.80
8/26/2015 MSJ	PBC; memo to file on outcome	0.50
8/26/2015 MSJ	called Veteran to discuss case	0.10
9/9/2015 MSJ	email to VA counsel with followup from PBC	0.10
9/10/2015 MSJ	email from VA counsel re: followup from PBC; reply	0.10
9/14/2015 MSJ	email from VA counsel re: defending	0.10
9/28/2015 MSJ	email to VA counsel with JMR that was filed in a similar case.	0.10

## Exhibit A

		<u>Hours</u>
11/5/2015 JZ	Reviewed Mike's opening brief. Made edits and suggestions.	0.50
11/5/2015 MSJ	review file in preparation for drafting opening brief - review BVA decision, RBA and pertinent evidence, case notes; conduct legal research; take notes on argument strategy; outline opening brief	1.20
11/5/2015 MSJ	begin drafting opening brief	2.10
11/5/2015 MSJ	continue drafting opening brief - remaining sections; edits and revisions to entire brief	3.00
11/6/2015 MSJ	file opening brief with Court; update file	0.10
1/5/2016 MSJ	email from VA counsel re: motion for extension of time to file brief; reply	0.10
1/5/2016 MSJ	review Aee motion for extension of time to file brief; update file	0.10
2/4/2016 MSJ	email from VA counsel re: motion for extension of time to file brief; reply	0.10
2/4/2016 MSJ	review Aee additional motion to extend time to file brief; update file	0.10
2/19/2016 MSJ	received and reviewed notice with Aee brief; update file	0.10
3/3/2016 MSJ	review Aee brief - take notes; review file in preparation for drafting reply brief - review BVA decision, RBA and evidence, prior filings and case notes; conduct legal research; take notes on argument strategy for reply brief; outline reply brief	1.10

## Exhibit A

		<u>Hours</u>
3/3/2016 MSJ	draft reply brief	2.10
3/3/2016 MSJ	continue drafting reply brief - additional arguments; edits and revisions to reply brief; file brief	1.40
3/8/2016 MSJ	review ROP; review file; prepare letter of acceptance and file with Court; update file	0.10
3/10/2016 MSJ	case assigned to Judge; update file	0.10
5/2/2016 MSJ	review Court order; update file	0.10
5/2/2016 MSJ	email to VA counsel re: motion for oral argument	0.10
5/2/2016 MSJ	draft motion requesting oral argument	0.10
5/2/2016 MSJ	file motion for oral argument with Court; update file.	0.10
5/10/2016 MSJ	review Court order; update file	0.10
5/31/2016 MSJ	review Court order re oral argument; update file	0.10
6/17/2016 CM	Draft and file notice of appearance. Update file.	0.10
6/20/2016 CM	Carefully review Board decision, opening brief, VA's brief, and reply in preparation of oral argument.	0.80
6/21/2016 CM	Begin to conduct research in preparation for oral argument.	2.30
6/21/2016 CM	Contiue to research for oral argument presentation.	2.30

## Exhibit A

		<u>Hours</u>
6/26/2016 CM	Continue to prepare for oral argument. Research case law involving 4.59 and 4.45. Research statutory interpretation case law.	2.80
6/26/2016 CM	Continue to prepare for oral argument. Review Petitti oral argument. Review pleadings filed in Petitti case.	2.30
6/28/2016 CM	Continue to prepare for oral argument. Research case law involving plain meaning of the regulation and regulatory interpretation.	2.00
6/28/2016 CM	Continue to prepare for oral argument. Review cases involving §4.59 and regulatory interpretation. Listen to oral arguments involving deference arguments at CAVC.	2.80
6/30/2016 CM	Continue to prepare for oral argument.	2.50
7/6/2016 CM	Continue to prepare for oral argument. Read Correia decision and all filed pleadings regarding section 4.59.	1.00
7/7/2016 CM	Research case law regarding painful joints and painful motion in preparation for oral argument.	2.00
7/7/2016 CM	Review regulation 4.59, 4.45, and 4.40. Review case law interpreting 4.59. Research foot cases and 4.59. Carefully review case law pertaining to regulatory interpretation and deference.	1.70
7/7/2016 CM	Continue to prepare for oral argument. Carefully read Court's new Correia decision and all filed pleadings. Compare to case at bar. Update oral argument notes.	0.70
7/8/2016 CM	Draft and send email to VA re: Court's Correia decision.	0.20

## Exhibit A

		<u>Hours</u>
7/8/2016 CM	Draft and file 30(b) letter re Correia decision.	0.30
7/8/2016 CM	Review and prepare for oral argument. Continue to research agency deference argument. Rough draft of opening statement.	1.30
7/8/2016 CM	Continue to prepare for oral argument.	2.80
7/11/2016 CM	Continue to prepare for oral argument. Continue to revise oral argument strategy.	2.80
7/11/2016 CM	Continue to prepare for oral argument. Condense oral argumnet outline.	1.00
7/11/2016 CM	Prepare for moot of case. Review all pleadings. Review and edit outline for oral argument.	2.00
7/13/2016 CM	Continue to prepare for oral argument.	1.50
7/13/2016 JZ	Reviewed pleadings and prepared for oral argument	1.00
7/14/2016 CM	Prepare for moot	0.70
7/14/2016 CM	Participate in moot.	1.30
7/14/2016 JZ	Prepared for and participated in moot - reviewed case law and VA OGC precedential opinions, pleadings, and regulations	2.00
7/14/2016 ZMS	Prepared for and participated in moot court.	2.00
7/14/2016 CM	Continue to prepare and revise 4.59 section of oral argument.	1.80
7/14/2016 CM	Review and outline oral argumnet on impairment of sphincter control.	1.40



## Exhibit A

		<u>Hours</u>	
7/14/2016	CM	Continue to prepare for oral argument and moot.	1.30
7/15/2016	CM	Participate in moot.	1.50
7/15/2016	JZ	Prepared for and participated in moot. Reviewed RBA for pertinent record citations.	2.00
7/15/2016	CM	Review entire record for facts contained therein in support in oral argument position.	1.30
7/18/2016	BJC	Review revised 30(b) letter prior to filing to ensure accuracy. Suggest edit to same.	0.10
7/18/2016	CM	Draft 30(b) Petitti oral argument letter.	0.40
7/18/2016	BJC	Review final draft of supplemental authority prior to filing and suggest edit to same.	0.10
7/18/2016	CM	Proofread, edit, and file two 30(b) letters.	0.30
7/18/2016	CM	Receive and review VA's 30(b) letter. Update client file.	0.10
7/19/2016	CM	Prepare for second moot. Carefully review Mitchell, Petitti, and Correia for application to case.	2.20
7/19/2016	CM	Continue to prepare for oral argument. Research applicability of newly cited M21-1 provision.	2.00
7/19/2016	CM	Continue to prepare for oral argument and second moot.	1.70
7/20/2016	JZ	Prepared for and participated in second moot	1.20
7/20/2016	CM	Prepare for second oral argument moot. Participate in second oral argument moot.	2.60

## Exhibit A

		<u>Hours</u>
7/20/2016 ZMS	Prepare for and participate in moot	1.30
7/20/2016 CM	Revise defence argument. Prepare for defense oral argument strategy.	1.70
7/20/2016 CM	Continue to prepare for oral argument. Continue to research deference and case law applicable to deference argument.	1.40
7/21/2016 JZ	Participate in final moot for oral argument	0.70
7/21/2016 CM	Participate in final moot of oral argument.	0.70
7/21/2016 CM	Continue to prepare for oral argument. Review argument outline and case law.	1.30
7/22/2016 JZ	Final discussion and oral argument preparation with Christian prior to leaving for DC	0.40
7/23/2016 JZ	Travel to DC for oral argument. Travel to Logan Airport in Boston, Flight time, travel to hotel from airport	2.40
7/24/2016 CM	Continue to prepare for oral argument at Court. Organize notes. Revise oral argument outline.	2.50
7/25/2016 JZ	Final preparation for oral argument	2.00
7/25/2016 CM	Travel to DC for oral argument: travel to airport, flight time; travel from airport to hotel	3.90
7/26/2016 JZ	Participated in oral argument	2.00
7/26/2016 CM	Preparations for oral argument.	1.50
7/26/2016 CM	Travel from DC to Boston: travel to airport; air travel to Boston; travel home from airport	3.50

## Exhibit A

		<u>Hours</u>
7/27/2016 CM	Additional study and preparation for oral argument.	2.50
7/27/2016 CM	Travel to Court in DC; Oral Argument held at Court.	2.00
8/15/2016 CM	Send email re: case and oral argument.	0.10
11/29/2016 CM	Telephone call with client to discuss status of case.	0.10
12/15/2016 CM	Review precedential decision carefully. Compre to brief and oral argumnet.	0.70
12/15/2016 CM	Call client to discuss precedential decision.	0.20
12/15/2016 CM	Receive and review notice with precedential decision. Update client file.	0.10
12/16/2016 ZMS	Reviewed Court's precedential decision, notes on case, and pleadings. Prepared letter to client concerning Court's decision.	0.80
12/21/2016 CM	Telephone call with client.	0.10
1/6/2017 CM	Receive and review judgment. Update client file.	0.10
1/9/2017 ZMS	Prepared letter to client concerning entry of Court's judgment.	0.30
2/14/2017 CM	Telephone call with client to discuss status of case.	0.10
3/8/2017 CM	Receive and review mandate. Update client file.	0.10
3/8/2017 CM	Research M21-1. Notice that a section at issue in Southall-Norman had not changed. Review Southall-Norman. Draft and send email to VA	0.70

## Exhibit A

		<u>Hours</u>
	notifying them that the Manual provision needs to be changed.	
3/9/2017 DMG	Prepared and e filed Notice of Appearance. Received, reviewed, and saved Court confirmation email. Checked docket sheet to ensure proper filing. Updated case file.	0.20
3/9/2017 DMG	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Petition for proofreading and billing accuracy review.	0.90
3/9/2017 ZMS	Reviewed EAJA Petition for proofreading purposes and to ensure billing accuracy	0.30
		<u>Amount</u>
		122.70 \$23,774.58
Expenses		
	Airfare for oral argument - CM	220.20
	Airfare for oral argument - JZ	258.20
	Expenses in DC - CM	245.01
	Expenses in DC - JZ	69.30
	Filing Fee	50.00
	Hotel - Oral Argument- CM	228.78
	Hotel - Oral Argument- JZ	213.83
	Taxi in RI to /fr airport - JZ	45.37

## Exhibit A

	<u>Amount</u>
Train to BOS airport - CM	7.50
Total Expenses	<u>\$1,338.19</u>
	<u>122.70</u> <u>\$25,112.77</u>

## Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Barbara J. Cook	0.20	188.23	\$37.64
Christian McTarnaghan	77.10	193.92	\$14,951.24
Danielle M. Gorini	1.50	193.92	\$290.87
Jenna Zellmer	14.20	193.92	\$2,753.66
Landon E. Overby	0.60	163.56	\$98.14
Michael S. Just	24.40	193.92	\$4,731.59
Zachary M. Stolz	4.70	193.92	\$911.44

## EXHIBIT B

## USAO ATTORNEY'S FEES MATRIX – 2015 – 2017

*Revised Methodology starting with 2015-2016 Year*

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17
31+ years	568	581
21-30 years	530	543
16-20 years	504	516
11-15 years	455	465
8-10 years	386	395
6-7 years	332	339
4-5 years	325	332
2-3 years	315	322
Less than 2 years	284	291
Paralegals & Law Clerks	154	157

*Explanatory Notes*

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, see note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. See *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).
5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.
6. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). See *Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. See, *e.g.*, *EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
7. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.
9. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the USAO as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia

have relied on the USAO Matrix, rather than the so-called “Salazar Matrix” (also known as the “LSI Matrix” or the “Enhanced Laffey Matrix”), as the “benchmark for reasonable fees” in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); *see, e.g., Joaquin v. Friendship Pub. Charter Sch.*, --- F. Supp. 3d ---, 2016 WL 3034151 (D.D.C. 2016); *Prunty v. Vivendi*, --- F. Supp. 3d ---, 2016 WL 3659889 (D.D.C. 2016); *CREW v. U.S. Dep’t of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne’s Conservation Ass’n v. Dep’t of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc.*, 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). *But see, e.g., Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). The USAO contends that the Salazar Matrix is fundamentally flawed, does not use the Salazar Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based.