

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

EDDIE C. CLARK)	
Appellant,)	
)	
v.)	CAVC No. 16-2826
)	EAJA
)	
ROBERT L. WILKIE,)	
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), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$25,255.35**.

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).

Most recently, this Court in *Blue v. Wilkie*, _ Vet.App. _ (2018), No. 15-1844(E), 2017 WL 1407530, laid out the following three-part test relating to when an appellant is considered a prevailing party under the EAJA:

An appellant who secures a remand to an administrative agency is a prevailing party under the EAJA if (1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.

Id. at WL 1407530, at *3, citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016).

The Appellant in the instant matter is a prevailing party. After oral argument, in a precedential decision, the Court vacated and remanded the Board's June 30, 2016 decision based upon the Board's failure to provide Appellant with a full ninety days of post remand notice in which to submit new and material evidence and based on its failure to inform him that he was entitled to that entire period. See pages 1-13 of the Decision. The mandate was issued on October 2, 2018. Based upon the foregoing, and because the three-part test promulgated in *Blue* is satisfied, Appellant is a prevailing party.

B. Appellant Is Eligible For An EAJA Award

Appellant also satisfies the EAJA requirement that his net worth at the time his appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Mr. Clark 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, Mr. Clark 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 Appellant with a full ninety days of post remand notice in which to submit new and material evidence or in its failure to inform him that he was entitled to that entire period. 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).

Ten attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Robert Chisholm, Danielle M. Gorini, Emma Peterson, Megan Ellis, Dana Weiner, Jenna Zellmer, Sarah Barr, Alyse Galoski, Barbara Cook, and

Zachary Stolz.¹ Attorney Robert Chisholm graduated from Boston College Law School in 1991 and the *Laffey* Matrix establishes that \$563.00 is the prevailing market rate for an attorney with his experience.² Danielle Gorini graduated from

¹“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 Baldridge 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 Baldridge*, 19 Vet.App. at 237 (“An 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.”). The Exhibit A in this case is separated into two documents as our firm is transitioning to a new time keeping program beginning October 1, 2018.

²The 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.2d4 (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

Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with her experience.

Emma Peterson graduated from Roger Williams University Law School in 2011 and the *Laffey* Matrix establishes that \$352.00 is the prevailing market rate for an

attorney with her experience. Megan Ellis graduated from Boston College Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing

market rate for an attorney with her experience. Dana Weiner graduated from

Roger Williams University Law School in 2015 and the *Laffey* Matrix establishes that \$334.00 is the prevailing market rate for an attorney with her experience.

Jenna Zellmer graduated from Boston University Law School in 2013 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney

with her experience. Sarah Barr graduated from Suffolk University Law School

in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Alyse Galoski graduated from Roger

Williams University Law School in 2014 and the *Laffey* Matrix establishes that

\$346.00 is the prevailing market rate for an attorney with her experience. Barbara

Cook graduated from University of Michigan Law School in 1977 and the *Laffey*

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).

Matrix establishes that \$602.00 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 \$483.00 is the prevailing market rate for an attorney with his experience.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$198.69 per hour for Mr. Chisholm, Ms. Gorini, Ms. Peterson, Ms. Ellis, Ms. Weiner, Ms. Zellmer, Ms. Barr, Ms. Galoski, and Mr. Stolz for representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for these nine attorneys (116.10) results in a total attorney's fee amount of \$23,426.20.

Appellant seeks attorney's fees at the rate of \$192.91 per hour for Ms. Cook's representation services before the Court.⁴ This rate per hour, multiplied by

³This 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 February 2017 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

⁴ 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 for the EAJA rate), to February 2017 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

the number of hours billed for Ms. Cook (7.20) results in a total attorney's fee amount of \$1,388.95.

Based upon the foregoing, the total fee sought is **\$24,815.15** In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Washington DC – SB: \$100.40

Hotel in Washington DC – SB: \$205.49

Travel expenses in Washington DC– SB: \$110.31

Parking at the Providence Airport – SB: \$24.00

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$25,255.35**.

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,

Eddie C. Clark

By His 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>
7/11/2016 EP	Reviewed Board decision and gave opinion and recommendation for an appeal to Court.	0.30
8/12/2016 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, Fee Agreement, and Declaration of Financial Hardship with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case checklist.	0.20
8/12/2016 DMG	Reviewed emails from Court with docketed appeal documents. Posted emails to the file. Checked Court docket sheet to ensure Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, Fee Agreement, and Declaration of Financial Hardship were properly docketed. Updated case information and case checklist.	0.20
8/18/2016 DNW	Prepared and filed notice of appearance. Updated file.	0.10
8/24/2016 SKB	Prepared and e-filed notice of appearance; updated file.	0.10
8/31/2016 DNW	Client called with question about case; note to file.	0.10
10/5/2016 DNW	Received and reviewed OGC's notice of appearance. Updated file.	0.10
10/7/2016 DNW	Received and reviewed e-mail from OGC re: OGC consent form	0.10
10/7/2016 DNW	Received and reviewed notice from Court of RBA filing. Updated file.	0.10

Exhibit A

		<u>Hours</u>
10/11/2016 DNW	Received and reviewed notice RBA was received and added to file. Ensured correct BVA decision was included and noted length. Updated file.	0.10
10/27/2016 DNW	Casemapped and reviewed RBA through p. 427.	1.20
10/28/2016 DNW	Emailed OGC re: potentially missing exam report.	0.10
10/28/2016 DNW	Completed additional review of record for potentially missing examination.	0.20
10/28/2016 DNW	Completed case map and review of RBA	0.50
10/28/2016 DNW	Researched relevant case law and drafted PBC memo.	1.30
11/3/2016 DNW	Reviewed RBA again to locate potentially missing exam.	0.10
11/17/2016 SKB	reviewed PBC memo for legal accuracy and proofreading purposes; made recommendations for revisions	0.30
11/18/2016 DNW	Revised PBC memo.	0.10
11/18/2016 DNW	Prepared status letter to client.	0.10
12/13/2016 DNW	Received and reviewed notice to file brief; calculated deadline to file brief; updated case file and calendar with briefing deadline.	0.10
12/22/2016 DNW	Received and reviewed PBC scheduling order; calculated memo deadline; updated case file and calendar.	0.10
12/22/2016 DNW	Made additional revisions to PBC memo.	0.10

Exhibit A

		<u>Hours</u>	
12/22/2016	DNW	Prepared and filed rule 33 certificate of service.	0.10
12/22/2016	DNW	E-mailed PBC memo to OGC and CLS.	0.10
2/3/2017	DNW	Reviewed RBA in preparation for PBC.	0.30
2/3/2017	DNW	Participated in PBC; prepared note to file with OGC's position and CLS' comments and suggestions.	0.30
2/7/2017	DNW	Received and reviewed e-mail from OGC indicating she followed up with deputy and will not be offering a remand.	0.10
2/7/2017	DNW	Responded to OGC's e-mail re: not offering a remand	0.10
2/7/2017	DNW	Completed draft of brief.	0.40
2/7/2017	DNW	Began drafting first argument of opening brief and began researching relevant case law.	1.30
2/7/2017	DNW	Continued researching relevant case law; continued drafting first argument and began drafting second for opening brief; began drafting statement of the case section of brief.	2.40
2/8/2017	DNW	Called client to discuss PBC outcome; left voicemail and made note to file.	0.10
2/10/2017	DNW	Returned client's call; left voicemail and made note to file.	0.10
2/10/2017	DNW	Spoke with client re: PBC outcome and answered his questions about the arguments we will make on his behalf; note to file.	0.20

Exhibit A

		<u>Hours</u>	
2/14/2017	DNW	Revised opening brief.	0.30
2/16/2017	DNW	Made final revisions to and filed opening brief; updated case file and calendar.	1.30
4/12/2017	DNW	Responded to OGC's e-mail re: position on motion for extension of time to file brief.	0.10
4/13/2017	DNW	Received and reviewed clerk's stamp order granting OGC's motion to extend time to file OGC's brief; updated case file and calendar.	0.10
5/31/2017	DNW	Received and reviewed Court's notice OGC filed its brief; updated case file and calendar.	0.10
7/24/2017	DNW	Reviewed OGC's brief; began drafting reply.	0.40
7/24/2017	DNW	Researched relevant law regarding submission of evidence after remands; continued drafting reply brief.	2.40
7/25/2017	DNW	Revised reply brief.	0.40
7/27/2017	ME	Reviewed case notes, opening brief, and Appellee brief, reviewed and proofread draft reply brief, suggested additional edits	0.50
7/31/2017	BJC	Review reply brief, check due process law, suggest the addition of case law	1.00
7/31/2017	DNW	Prepared final revisions to and filed reply brief; updated file.	0.40
7/31/2017	DNW	Researched additional case law regarding due process; made additional revisions to reply brief.	2.00
8/8/2017	DNW	Received and reviewed Court's notice OGC filed the ROP; updated case file.	0.10

Exhibit A

		<u>Hours</u>
8/8/2017 DNW	Reviewed ROP for accuracy.	0.10
8/8/2017 DNW	Prepared and filed letter with Court accepting the ROP.	0.10
8/11/2017 DNW	Received and reviewed notice of judge assignment; updated file.	0.10
9/26/2017 DNW	Received and reviewed Court's order submitting case for a panel decision. Updated file.	0.10
10/4/2017 DNW	Received and reviewed e-mail from OGC indicating they take no position on motions for oral argument. Saved e-mail to file. Updated case file.	0.10
10/4/2017 DNW	E-mailed OGC re: position on motions for oral argument/moving for argument out of time. Updated case file.	0.10
10/4/2017 JZ	Reviewed case file notes and DW's motions. Suggested minor edits	0.20
10/4/2017 DNW	Reviewed pleadings and drafted motion for leave to request oral argument out of time and motion for oral argument. Updated case file.	0.30
10/5/2017 DNW	Received and reviewed Court's order ordering oral argument. Saved Court's e-mail and order to file. Reviewed order to review the questions the Court specifically requested argument on. Updated case file.	0.20
10/5/2017 DNW	Revised motion for oral argument. Updated case file.	0.20

Exhibit A

		<u>Hours</u>
10/17/2017 DNW	Received Court's order scheduling oral argument. Reviewed order for accuracy and saved document to file. Updated case calendar with date for argument. Updated case file.	0.10
10/19/2017 DNW	Received OGC's notice of appearance as lead counsel. Reviewed document for accuracy. Updated case file.	0.10
10/19/2017 DNW	Spoke with client re: status update and to discuss appeal in light of scheduling of oral argument. Note to file re: conversation. Updated case file.	0.20
10/25/2017 ME	Prepared and filed notice of appearance; reviewed docket for procedural status and updated file.	0.20
10/25/2017 ME	Discussed joint motion for supplemental pleading with VA counsel, reviewed draft joint motion	0.20
10/26/2017 ME	Emailed VA counsel with suggested edits to draft joint motion and signature page	0.10
10/26/2017 ME	Received notice of filing of joint motion for supplemental pleading, reviewed motion as filed for accuracy, updated client file and calendar to reflect submission	0.10
10/26/2017 ME	Reviewed Court order regarding issues for argument, continued researching issue and drafting responses to questions	1.30
10/26/2017 ME	Reviewed pleadings in case, began researching relevant case law and regulations in preparation for oral argument	2.60
11/7/2017 ME	Continued researching relevant case law and regulations for drafting supplemental memorandum	2.10

Exhibit A

		<u>Hours</u>
11/8/2017 ME	Continued researching relevant case law, regulations, and statutes for supplemental pleading, reviewed relevant pleadings in similar cases and continued drafting answers to Court's questions	1.50
11/15/2017 SKB	researched legislative history in preparation for oral argument	0.60
11/15/2017 ME	Reviewed case notes, previous research notes, and amicus pleading in preparation for adding to supplemental pleading and in preparation for oral argument	1.00
11/15/2017 ME	Edited responses to supplemental pleading questions, continued drafting response	2.50
11/15/2017 SKB	reviewed relevant regulations and caselaw in preparation for oral argument	3.00
11/16/2017 ME	Received and reviewed notice of filing of Appellee response to motion for amicus brief, reviewed to determine if response necessary, updated client file and calendar to reflect receipt	0.20
11/16/2017 SKB	reviewed court order, appellant's brief, and appellee brief in depth in preparation for oral argument, took notes	0.30
11/16/2017 SKB	began creating oral argument binder - added pleadings, caselaw	0.70
11/17/2017 ME	Continued working on draft supplemental pleading	0.80
11/17/2017 SKB	prepared for oral argument: reviewed relevant caselaw; strategized for argument	2.00

Exhibit A

		<u>Hours</u>
11/21/2017 ME	Additional drafting of supplemental pleading, researched cases regarding waiver of rights and waiver of notice	1.30
11/21/2017 SKB	worked on introduction for oral argument	1.60
11/21/2017 ME	Continued work on draft supplemental pleading, continued research on due process and notice standards	3.00
11/22/2017 ME	Received Court order granting motion for amicus brief, reviewed for accuracy, updated client file and calendar to reflect new deadline	0.10
11/22/2017 AG	Prepare for and participate in oral argument walk through	1.20
11/22/2017 ME	Prepared for and participated in oral argument walkthrough	1.60
11/22/2017 SKB	prepared for oral argument walk through; participated in walkthrough	1.70
11/22/2017 ME	Finished draft of supplemental pleading	2.20
11/22/2017 ZMS	Prepared for and participated in walk through of argument. Researched questions of due process and effects of Kutcherousky.	2.50
11/26/2017 SKB	reviewed draft supplemental pleading for legal accuracy and proofreading purposes. Made substantial recommendations for revisions.	1.40
11/27/2017 BJC	Review draft of supplemental pleading, reviewed Thurber and Kutscerousky cases and note various places where more explanation is needed, review Nohr for fair process argument	2.20

Exhibit A

		<u>Hours</u>
11/27/2017 ME	Began working on edits to supplemental pleading	1.30
11/28/2017 BJC	Reviewed edited first argument and suggest additional points to make and add to second argument	1.20
11/28/2017 SKB	reviewed and made additional edits to pages 13-15 of supplemental pleading	0.70
11/28/2017 ME	Finished edits to questions 2, 3, and 4 of supplemental pleading	1.80
11/28/2017 SKB	reviewed and made additional edits to pages 1-6 of supplemental pleading	3.00
11/28/2017 SKB	reviewed and made additional edits to pages 7 - 12 of supplemental pleading	3.00
11/29/2017 SKB	made final edits to supplemental pleading	0.50
11/29/2017 SKB	reviewed appellee response to court order; began legal research on issues relevant for argument, and to prepare for moot	2.30
12/1/2017 BJC	Participated in first moot	1.20
12/1/2017 SKB	reviewed notes from moot and began revising argument	0.50
12/1/2017 ME	Performed additional caselaw research regarding waiver standards to assist Sarah with moot	1.00
12/1/2017 ME	Prepared for and participated in moot argument	1.20
12/1/2017 SKB	participated in first moot to prepare for oral argument	1.20

Exhibit A

		<u>Hours</u>
12/1/2017 AG	Participated in first moot of oral argument.	1.20
12/1/2017 RVC	Participated in first moot in preparation of oral argument	1.20
12/1/2017 DNW	Participated in first moot of oral argument	1.20
12/1/2017 SKB	prepared outline for first moot; prepared questions and answers; practiced argument	1.50
12/5/2017 SKB	reviewed in depth two key cases relevant to oral argument; created outline summaries of cases for oral argument binder	1.70
12/7/2017 SKB	reviewed and outlined necessary caselaw in preparation for second moot; reviewed important statutory provisions; outlined due process issue	2.70
12/8/2017 BJC	Participated in second moot	1.00
12/8/2017 RVC	Participated in second moot of case	1.00
12/8/2017 DNW	Participated in second moot	1.00
12/8/2017 AG	Prepared for and participated in second moot oral argument.	1.40
12/8/2017 ZMS	Prepared for and participate in second moot	2.00
12/8/2017 SKB	prepared for second moot; participated in second moot	2.80
12/11/2017 SKB	continued reviewing relevant caselaw in preparation for oral argument	1.00
12/11/2017 SKB	Reviewed relevant caselaw; outlined legal principles to remember; analyzed application of caselaw to case on appeal	3.00

Exhibit A

		<u>Hours</u>
12/12/2017 SKB	travel from CCK to Rhode Island airport, waited for delayed flight, reviewed notes for oral argument	3.00
12/12/2017 SKB	flight from Providence to DCA, taxi from DCA to hotel; reviewed notes for oral argument in hotel room	3.00
12/12/2017 SKB	continued reviewing notes for oral argument and made final preparations	3.00
12/13/2017 SKB	flew from DCA to Providence; travel from Providence airport back to CCK	2.00
12/13/2017 SKB	argued case in front of CAVC; traveled from argument back to DCA airport; waited for flight	3.00
12/13/2017 SKB	reviewed notes morning of argument; traveled from hotel to CAVC; participated in pre-argument conference with OGC and clerk of court	3.00
4/26/2018 DNW	Called client re: status. Left voice mail and made note to file.	0.10
4/26/2018 DNW	Telephone call with client; provided status update. Note to file re: conversation. Updated file.	0.10
6/7/2018 BJC	Review Acree, review supplemental authority and suggest addition of holdings	0.60
6/7/2018 ME	Reviewed recent precedential decision, reviewed case notes and pleadings in preparation for drafting notice of supplemental authority, drafted notice of supplemental authority	1.60

Exhibit A

		<u>Hours</u>
6/8/2018 ME	Made final edits to notice of supplemental authority, e-filed notice, updated client file and calendar to reflect submission	0.30
7/10/2018 DNW	Received notice of issuance of favorable decision; reviewed notice for accuracy; updated file.	0.10
7/10/2018 DNW	Reviewed decision; updated file.	0.20
7/10/2018 ZMS	Reviewed Court decision, pleadings, and notes in case. Prepared letter to client concerning Court's decision. Ensured case file was updated with necessary letters, pleadings, and correspondence so that client could be properly informed of case progress, disposition, and next steps.	0.70
7/18/2018 DNW	Returned client's call. Left voice mail. Updated file.	0.10
7/18/2018 DNW	Listened to client voice mail. Updated file.	0.10
7/18/2018 DNW	Telephone call with client re: case update; note to file re: conversation.	0.20
8/2/2018 DNW	Received judgment; reviewed for accuracy; updated file.	0.10
8/3/2018 ZMS	Prepared letter to client concerning entry of Court's judgment.	0.30
9/27/2018 DNW	Telephone call with client re: mandate. Updated file.	0.10
	_____	<u>Amount</u>
	123.30	\$24,457.51

Exhibit A

Expenses

	<u>Amount</u>
Airfare for Oral Arg- SB	100.40
Hotel - Oral Argument - SB	205.49
Parking at airport - SB	24.00
Travel expenses in DC - SB	110.31
Total Expenses	<u>\$440.20</u>
	<u>123.30</u> <u>\$24,897.71</u>

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alyse Galoski	3.80	198.69	\$755.03
Barbara J. Cook	7.20	192.91	\$1,388.95
Dana Weiner	22.60	198.69	\$4,490.50
Danielle M. Gorini	0.40	198.69	\$79.48
Emma Peterson	0.30	198.69	\$59.61
Jenna Zellmer	0.20	198.69	\$39.74
Megan Ellis	28.50	198.69	\$5,662.69
Robert V. Chisholm	2.20	198.69	\$437.12
Sarah K. Barr	52.60	198.69	\$10,451.59
Zachary M. Stolz	5.50	198.69	\$1,092.80

10/3/2018

Exhibit A

Time from 10/1/2018 to 10/3/2018

Case No. 233712

Client: Clark, Mr. Eddie C.

			<u>Hours</u>
10/2/2018	DWEINER	Received mandate; reviewed for accuracy; updated file.	0.10
10/3/2018	DANIELLE	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
10/3/2018	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.00
10/3/2018	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.50

Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
DANIELLE	1.20	\$ 198.69	\$ 238.43
DWEINER	0.10	\$ 198.69	\$ 19.87
ZACH	0.50	\$ 198.69	\$ 99.35
Totals:	1.80		\$ 357.64

USAO ATTORNEY'S FEES MATRIX — 2015-2018*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	2017-18
31+ years	568	581	602
21-30 years	530	543	563
16-20 years	504	516	536
11-15 years	455	465	483
8-10 years	386	395	410
6-7 years	332	339	352
4-5 years	325	332	346
2-3 years	315	322	334
Less than 2 years	284	291	302
Paralegals & Law Clerks	154	157	164

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's *Laffey* 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.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Prunty v. Vivendi*, 195 F. Supp. 3d 107 (D.D.C. 2016); *CREW v. U.S. Dep't of Justice*, 142 F. Supp. 3d 1 (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). Since initial publication of the instant USAO Matrix in 2015, multiple courts similarly have employed the USAO Matrix rather than the *Salazar* Matrix for fees incurred since 2015. E.g., *Electronic Privacy Information Center v. United States Drug Enforcement Agency*, --- F. Supp. 3d ---, 2017 U.S. Dist. LEXIS 111175, at *17 (D.D.C. 2017) ("After examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the most suitable choice here.") (requiring re-calculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), slip op. at 9-10 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"). 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.