

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WOLFGANG A. PETERMANN)	
Appellant,)	
)	
v.)	CAVC No. 16-1093
)	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 **\$26,775.85**.

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 February 11, 2016 decision based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-8 of the Decision. The mandate was issued on November 7, 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. Petermann 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. Petermann 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).

Ten attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Matthew Ilacqua, Danielle M. Gorini, Christian McTarnaghan, April Donahower, Nicholas Phinney, Alyse Galoski, Megan Ellis, Bradley Hennings, Barbara Cook, and Zachary Stolz.¹ Attorney Matthew Ilacqua 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

Boston University Law School in 2013 and the *Laffey Matrix* establishes that \$346.00 is the prevailing market rate for an attorney with his experience.² Danielle

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 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).

Gorini graduated from 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. Christian McTarnaghan graduated from Suffolk University Law School in 2015 and the *Laffey* Matrix establishes that \$334.00 is the prevailing market rate for an attorney with his experience. April Donahower graduated from Temple University Law School in 2013 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Nicholas Phinney graduated from Roger Williams University Law School in 2007 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his 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. 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. Bradley Hennings graduated from Rutgers University Law School in 2006 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* 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 \$196.63 per hour for Mr. Ilacqua, Ms. Gorini, Mr. McTarnaghan, Ms. Donahower, Mr. Phinney, Ms. Galoski, Ms. Ellis, Mr. Hennings, 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 (127.30) results in a total attorney's fee amount of \$25,031.00.

Appellant seeks attorney's fees at the rate of \$191.73 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 September 2016 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 September 2016 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 (3.60) results in a total attorney's fee amount of \$690.23.

In addition, Appellant seeks reimbursement for the following expenses:

Airfare for oral argument – CM: \$297.72

Travel expenses relating to oral argument – CM: \$314.61

Airfare for oral argument – AD: \$392.29

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$26,775.85**.

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,

Wolfgang A. Petermann

By His Attorneys,

CHISHOLM CHISHOLM & KILPATRICK

/s/Zachary M. Stolz

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Providence, Rhode Island 02903

(401) 331-6300

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Exhibit A

		<u>Hours</u>
2/22/2016 MI	Reviewed Board decision, made recommendations for appeal and suggested potential arguments.	0.40
3/29/2016 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, and Fee Agreement with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case file	0.20
3/30/2016 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, and Fee Agreement were properly docketed. Updated case information and case file	0.20
5/24/2016 NP	Prepared & filed appearance; updated file.	0.10
5/24/2016 CM	Draft and file notice of appearance. Check docket to ensure proper filing and for procedural status. Update client file.	0.20
5/26/2016 CM	Receive and review RBA certificate of service. Update client file. Update client calendar.	0.10
5/27/2016 CM	Receive and review notice RBA was received and uploaded to the file. Ensured correct BVA decision was included and noted length. Update client file.	0.10
6/10/2016 CM	Review RBA pages 1-826.	1.80
6/13/2016 CM	Draft status letter to client.	0.10

Exhibit A

		<u>Hours</u>	
6/13/2016	CM	Review RBA pages 827-1346.	1.30
6/14/2016	CM	Receive and review notice to file brief. Calculate brief due date. Update client file. Update client calendar.	0.10
6/24/2016	NP	Proofread PBC memo & reviewed memo for legal accuracy & suggested edits to same.	0.10
6/24/2016	CM	Draft PBC memo.	1.10
6/27/2016	CM	Edited PBC memo. Send same to CLS and VA. Prepare and file Rule 33 certificate of service. Update client file.	0.30
7/8/2016	CM	Telephone call with client to discuss status of case.	0.10
7/13/2016	CM	Spoke with client about VA defense of Board decision at PBC	0.20
7/13/2016	CM	Participate in PBC. Draft memo to file about VA's defense.	0.20
7/13/2016	CM	Prepare for PBC - review PBC memo.	0.30
7/18/2016	BJC	Prepare and enter appearance; update file.	0.10
8/11/2016	CM	Carefully review Board decision, PBC memo, and notes from RBA review. Outline arguments for opening brief.	1.20
9/20/2016	CM	Continue to draft argument section of opening brief.	0.80
9/20/2016	CM	Draft statement of the case section of opening brief.	1.10

Exhibit A

		<u>Hours</u>	
9/20/2016	CM	Continue to draft argument section of opening brief.	1.80
9/20/2016	CM	Begin to draft argument section of opening brief.	2.50
9/26/2016	BJC	Review opening brief and suggest edits to draft - suggest adding prejudice and to raise issue of pure schedular	1.20
9/26/2016	CM	Complete draft of opening brief. Ensure accurate citations to record and case law.	1.40
9/26/2016	CM	Completed draft of argument section of opening brief.	2.60
9/28/2016	BJC	Perform final proofread of brief and file brief	0.30
11/22/2016	CM	Receive and review VA's request for position on motion for extension of time to file brief. Respond unopposed.	0.10
11/27/2016	CM	Receive and review VA's motion for extension of time. Update client file.	0.10
11/27/2016	CM	Receive and review Court's grant of VA's motion for extension of time to file brief. Update client file. Update client calendar.	0.10
12/6/2016	CM	Telephone with client to discuss case.	0.10
1/13/2017	CM	Receive and review email with VA's brief. Update client file. Calculate reply brief deadline. Update client calendar.	0.10
1/25/2017	CM	Begin to draft reply brief.	0.70
1/25/2017	CM	Review VA's brief carefully. Outline reply brief arguments.	1.70

Exhibit A

		<u>Hours</u>
1/27/2017 CM	Telephone call with client to discuss status of case.	0.10
3/1/2017 CM	Continue to draft reply brief.	2.00
3/2/2017 CM	Continue to draft reply brief.	1.80
3/3/2017 CM	Continue to draft reply brief.	2.90
3/6/2017 BJC	Review reply brief and suggest edits to same	0.90
3/13/2017 CM	Revise reply brief. Add case involving Court remanding extraschedular when a higher schedular rating was available. Ensure all record and legal citations are correct. File reply.	2.20
3/17/2017 CM	Telephone call with client to discuss case.	0.10
3/17/2017 CM	Begin to draft motion for oral argument. Review Rules 34 and 35.	0.40
3/18/2017 CM	Research memorandum decision involving diabetes on a extraschedular basis. Continue to draft motion for oral argument.	2.10
3/21/2017 CM	Continue to draft motion for oral argument.	2.30
3/22/2017 BJC	Review motion for oral argument and suggest edits to same - re organize page one,suggest to add reference to arguments from the briefs.	0.80
3/26/2017 CM	Email VA about position on motion for oral argument.	0.10
3/27/2017 CM	Review record of proceedings. Compare to all record citations in all filed briefs. Draft and file letter accepting ROP.	0.30

Exhibit A

		<u>Hours</u>
3/27/2017 CM	Make final edits to and file motion for oral argument.	0.50
3/29/2017 CM	Receive and review judicial assignment. Update client file.	0.10
5/24/2017 CM	Telephone call with client to discuss case.	0.10
7/3/2017 CM	Review favorable mem dec. Compare to all filed briefs. Update client file.	0.40
7/11/2017 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.	0.80
7/17/2017 CM	Draft and send letter to client.	0.10
7/17/2017 CM	Telephone call with client to discuss status of case.	0.20
7/21/2017 CM	Receive and review VA's motion for reconsideration. Update client file.	0.40
9/29/2017 CM	Telephone call with client to discuss status of case.	0.20
10/3/2017 CM	Draft and send email to VA about position on renewed motion for oral argument.	0.10
10/3/2017 CM	Telephone call with client to discuss status of case.	0.20
10/5/2017 CM	Receive and review Court's order to stay case pending King. Update client file.	0.10

Exhibit A

		<u>Hours</u>	
12/28/2017	CM	Email VA to ascertain position on motion to renew motion for oral argument.	0.10
12/28/2017	CM	Redraft parts of motion for oral argumnet.	0.30
12/28/2017	CM	Review all pleadings filed in case. Review King case. Draft 30(b) letter.	0.50
1/2/2018	BJC	Review 30(b) letter and edit to omit argument and add additional theory	0.20
1/2/2018	CM	Receive and review VA's notice of appearance. Update client file.	0.10
1/3/2018	CM	Email VA again on position on renewed motion for oral argument.	0.10
1/5/2018	CM	Discuss with VA position on renewed motion for oral argument.	0.20
1/12/2018	CM	Receive and review Court's oral argumnet order. Update client file. Update client calendar.	0.10
1/12/2018	CM	Receive and review VA's motion to stay case pending King. Update client file. Calculate response deadline.	0.10
1/12/2018	CM	Receive and review VA's email about position on motion to stay pending decision on motion for reconsideration in King. Read King motion for recon. Respond unopposed.	0.20
1/18/2018	CM	Receive and review VA's motion for clarification.	0.20
1/18/2018	CM	Research case law on dicta and precedential decision. Draft form draft of opposition to motion to stay case.	2.50

Exhibit A

		<u>Hours</u>	
1/19/2018	CM	Continue to draft and revise opposition motion. Add section distinguishing King and Petermann on the merits.	1.50
1/22/2018	CM	Telephone call with client to discuss status of case.	0.20
1/22/2018	CM	Continue to draft motion in opposition.	0.30
1/22/2018	CM	Perform final proofread and file motion in opposition to VA's motion to stay case.	0.30
1/23/2018	AD	Reviewed pleadings in preparation for oral argument walk through; attended oral argument walk through	0.70
1/23/2018	ME	Reviewed case notes and pleadings in preparation for oral argument walk-through, participated in oral argument walk-through	1.20
1/23/2018	AG	Read pleadings and BVA decision to prepare for walk through of oral argument. Participated in walk through of oral argument.	1.30
1/23/2018	CM	Prepare for walkthrough of oral argumentt - review pleadings. Participate in walk through of oral argument.	1.80
1/23/2018	ZMS	Reviewed pleadings and conducted legal research concerning extraschedular evaluations. Participated in oral argument walk through	2.90
1/24/2018	AD	Prepared and e-filed notice of appearance; updated client file	0.10
1/25/2018	CM	Receive and review Court's order denying motion for stay. Update client file.	0.10

Exhibit A

		<u>Hours</u>	
1/29/2018	CM	Begin to prepare for first moot. Review case law involving extraschedular.	1.10
1/29/2018	CM	Continue prepare for first moot. Continue to review case law involving extraschedular. Review cases preceeding Thun.	2.60
1/30/2018	CM	Continue to prepare for first moot. Outline theory of severity in 3.321 cases.	2.30
1/31/2018	CM	Continue to review opening brief and relevant records in case to prepare for first moot. Review probative finding pled in brief. Outline argument on that issue in preparation for the first moot.	2.50
1/31/2018	CM	Review record in preparation for oral argument. Continue to review applicable case law. Review opening brief extraschedular section. Begin to draft argument outline for that section.	2.80
2/1/2018	NP	Reviewed notes in file to prepare to view VBMS & CAPRI files	0.10
2/1/2018	NP	Reviewed Client's VBMS file	0.10
2/1/2018	CM	Participate in first moot	1.20
2/1/2018	BH	Mooting CMC to prep for oral argument. Researched federal register change.	1.20
2/1/2018	ME	Prepared for and participated in first moot argument	1.30
2/1/2018	AD	Reviewed case materials in preparation for moot oral argument; attended moot oral argument	1.50

Exhibit A

		<u>Hours</u>	
2/1/2018	AG	Review pleadings and prepare for first moot of oral argument. Participate in moot oral argument and case strategy discussions.	2.50
2/1/2018	CM	Continue to prepare for first moot. Review VA. Gen. Con. Op. Add to oral argument outline.	2.50
2/1/2018	ZMS	Conducted legal research concerning diabetes ratings and extraschedular evaluations. Participated in first formal moot court.	2.80
2/2/2018	CM	Telephone call with client to discuss status of case.	0.10
2/2/2018	CM	Continue to review caselaw and develop distinctions between symptomless RC and RC with symptoms.	1.50
2/5/2018	CM	Receive and review most recent rating decision sent by client.	0.20
2/5/2018	CM	Research change in 7913. Draft Solze letter informing Court of 7913 regulation change.	0.40
2/6/2018	BJC	Review Solze letter, suggest combining and adding combined rating info	0.10
2/6/2018	CM	Finalize and file Solze notice.	0.30
2/6/2018	CM	Draft three Solze letters for submission.	0.80
2/6/2018	CM	Review VA's 30(b) submission. Review Wagner and Winguard carefully. Review Fed. Reg. citations carefully. Incorporate them into argumnet preparations.	1.40
2/6/2018	CM	Prepare for second moot. Outline responses to all argumnets presented in VA's brief.	2.10

Exhibit A

		<u>Hours</u>	
2/6/2018	CM	Continue to prepare for second moot. Review changes to 3.321. Add to argument. Review and revise argument outline.	2.30
2/7/2018	CM	Continue to prepare for second moot and argumnet. Continue to review cases. Review clarified 3.321 and Fed. Reg. Construct arugment about effect of clarified 3.321.	2.30
2/8/2018	CM	Review record to memorize pertinent facts. Continue to prepare for oral argument.	2.50
2/8/2018	CM	Continue to prepare for argument and second moot. Refine argument outline. Create case law chart with important quotations. Craft argument why this case is distinguishable from other cases.	2.80
2/9/2018	ME	Participated in second moot	1.30
2/9/2018	CM	Participate in final moot	1.30
2/9/2018	AG	Participate in second moot oral argument.	1.30
2/9/2018	AD	Attended second moot oral argument	1.30
2/9/2018	BH	Participated in second moot of CMC.	1.30
2/12/2018	CM	Cab from National airport to hotel.	0.30
2/12/2018	CM	Flight from Boston to DC.	1.70
2/13/2018	CM	Cab from hotel to CAVC.	0.20
2/13/2018	CM	Cab from CAVC to National airport.	0.30
2/13/2018	CM	Final preparations for argument.	1.20

Exhibit A

		<u>Hours</u>	
2/13/2018	CM	Arrive at Court house at requested time. Participate in short brief. Participate in argument.	1.40
2/13/2018	CM	Flight from National to Boston.	1.70
2/13/2018	AD	Travel to Providence airport; flight to Washington DC; travel from DC airport to courthouse	3.00
2/14/2018	CM	Email correspondence with client about oral argumnet.	0.20
2/14/2018	AD	Attended pre-argument conference with Clerk of Court; made final preparations for argument; attended argument	1.50
2/14/2018	AD	Travel from courthouse to DC airport; flight to Providence; travel from Providence airport	3.00
5/8/2018	CM	Review and review email from client asking about status of case. Respond.	0.10
7/24/2018	CM	Receive and review email from client requesting status of case. Respond.	0.30
7/30/2018	CM	Returned client's call - left message. Made a note to the file.	0.10
7/30/2018	CM	Telephone call with client to discuss status of case.	0.20
8/10/2018	CM	Receive and review precedential decision.	0.40
8/10/2018	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	0.70

Exhibit A

		<u>Hours</u>
	so that client could be properly informed of case progress, disposition, and next steps.	
8/15/2018 CM	Telephone call with client to discuss precedential decision.	0.20
8/17/2018 CM	Receive and review Court's order of small amendment to decision. Update client file.	0.10
8/30/2018 CM	Receive and review email from VA about motion to stay the precedential effect of the case pending Morgan. Respond that we are opposed and will repond in writing.	0.30
9/5/2018 CM	Continue to draft motion in opposition to VA's motion to stay precedential effect of case.	2.00
9/5/2018 CM	Begin to draft motion in opposition to VA's motion to stay precedential effect of case.	2.10
9/6/2018 CM	Finalize and file motion in opposition to the VA's motion to stay precedential effect of Petermann.	0.40
9/6/2018 CM	Continue to draft motion in opposition to the VA's motion to stay precedential effect of case.	2.20
9/18/2018 CM	Receive and review Judge's stamp denying VA's motion to stay precedential effect of case.	0.10
9/18/2018 CM	Receive and review Judgment. Ensure filed for proper client. Update client case file.	0.10
9/19/2018 CM	Telephone call with client to discuss status of case.	0.20
9/24/2018 ZMS	Prepared letter to client concerning entry of Court's judgment.	0.30

Exhibit A

	<u>Amount</u>
	129.10 \$25,367.30
Expenses	
Airfare for oral argument - AD	392.29
Airfare for oral argument - CM	297.72
Filing Fee	50.00
Travel for Oral Arg - CM	314.61
Total Expenses	<u>\$1,054.62</u>

	<u>Amount</u>
	129.10 \$26,421.92

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alyse Galoski	5.10	196.63	\$1,002.82
April Donahower	11.10	196.63	\$2,182.60
Barbara J. Cook	3.60	191.73	\$690.23
Bradley Hennings	2.50	196.63	\$491.58
Christian McTarnaghan	94.30	196.63	\$18,542.20
Danielle M. Gorini	0.40	196.63	\$78.66
Matthew Ilacqua	0.40	196.63	\$78.65
Megan Ellis	3.80	196.63	\$747.20
Nicholas Phinney	0.40	196.63	\$78.64
Zachary M. Stolz	7.50	196.63	\$1,474.72

11/28/2018

Exhibit A

Time from 10/1/2018 to 11/28/2018

Case No. 230468

Client: Petermann, Mr. Wolfgang A.

			<u>Hours</u>
11/7/2018	CMC	Telephone call with client to discuss case.	0.10
11/7/2018	CMC	Receive and review mandate. Update client file.	0.10
11/28/2018	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
11/28/2018	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.10
11/28/2018	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.30

Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
CMC	0.20	\$ 196.63	\$ 39.33
DANIELLE	1.30	\$ 196.63	\$ 255.62
ZACH	0.30	\$ 196.63	\$ 58.99
Totals:	1.80		\$ 353.93

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.