

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOSEPH SPELLERS	)	
Appellant,	)	
	)	
v.	)	CAVC No. 16-4053
	)	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 **\$28,383.47**.

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*, 30 Vet.App. 61 (2018), No. 15-1844(E), 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 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 set aside and remanded the Board's November 17, 2016 decision based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-12 of the Decision. The mandate was issued on December 3, 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. Spellers 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. Spellers 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 Elcyzyn*, 7 Vet. App. at 176-177).

Twelve attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Shatilla Shera Cairns, Danielle M. Gorini, Jenna Zellmer, Lauren Robbins, Bradley Hennings, Alyse Galoski, Angela Bunnell, Megan Ellis, Dana Weiner, Tessa Stillings, Barbara Cook, and Zachary Stolz.<sup>1</sup> Attorney Shatilla

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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

Shera Cairns graduated from Northeastern University Law School in 2012 and the *Laffey* Matrix establishes that \$352.00 is the prevailing market rate for an attorney with her experience.<sup>2</sup> Danielle Gorini graduated from Roger Williams University

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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 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.

<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.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).

Law School in 2005 and the *Laffey* Matrix establishes that \$483.00 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. Lauren Robbins graduated from Boston College Law School in 2016 and the *Laffey* Matrix establishes that \$334.00 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. 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. Angela Bunnell graduated from Northeastern 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. 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. Tessa Stillings graduated from Boston University Law School in

2017 and the *Laffey* Matrix establishes that \$302.00 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* 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 \$199.25 per hour for Ms. Cairns, Ms. Gorini, Ms. Zellmer, Ms. Robbins, Mr. Hennings, Ms. Galoski, Ms. Bunnell, Ms. Ellis, Ms. Weiner, Ms. Stillings, 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 eleven attorneys (132.40) results in a total attorney's fee amount of \$26,381.14.

Appellant seeks attorney's fees at the rate of \$193.83 per hour for Ms.

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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 August 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.



Cook's representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (3.00) results in a total attorney's fee amount of \$581.49.

In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Washington DC – DW: \$198.80

Airfare to and from Washington DC – AG: \$198.80

Hotel in Washington DC – DW: \$320.29

Hotel in Washington DC – AG: \$320.29

Travel in Washington DC– DW: \$101.85

Travel in Washington DC – AG: \$40.91

Expenses in DC for oral argument – AG: \$195.90

Parking at the Providence Airport – DW: \$44.00

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$28,383.47.**

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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 for the EAJA rate), to August 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.

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,  
Joseph Spellers  
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>	
11/26/2016	SSC	Reviewed BVA decision. Gave opinion and recommendation for an appeal to Court.	0.60
12/13/2016	DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Zachary Stolz 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 file.	0.20
12/14/2016	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 Zachary Stolz as lead counsel, Fee Agreement, and Declaration of Financial Hardship were properly docketed. Updated case information and case file.	0.20
1/17/2017	AB	Prepared and e-filed notice of appearance. Updated file.	0.10
1/31/2017	LR	Prepared and filed notice of appearance, updated file.	0.10
2/9/2017	LR	Received and reviewed RBA notice, updated file.	0.10
4/11/2017	LR	Review and outline BVA decision for issues and arguments on appeal, procedural history of claim, case law and regulations cited by the Board, and for evidence relied on in board's decision to prepare case map of RBA for appeal.	1.50
4/11/2017	LR	Case map and review RBA	2.60
4/14/2017	LR	Draft status letter to client re: review and acceptance of RBA	0.10

## Exhibit A

		<u>Hours</u>
4/17/2017 LR	Receive and review Court's notice to file appellant's opening brief, calculate brief deadline, and update client's case file.	0.10
4/18/2017 LR	Receive and review Court's email re: PBC Order; review PBC Order, calculate PBC memo deadline, and update client's case file.	0.10
5/1/2017 LR	Drafting PBC memo, adding case law, regulations, record evidence, and legal arguments	0.70
5/2/2017 LR	Prepare and submit e-mail to CLS and OGC attorneys with finalized PBC memo and additional documents; prepare Rule 33 Certificate of Service and e-file with the court; update client's case file.	0.10
5/2/2017 AB	Reviewed draft PBC memo for LR. Suggested edits.	0.70
5/2/2017 LR	Prepare revisions to PBC Memo and ensure accuracy of case law and record citations	0.90
5/2/2017 LR	Finish drafting PBC Memo	1.00
6/8/2017 LR	Call client to discuss PBC conference and case status; prepare memo to file summarizing contact with client.	0.10
6/8/2017 LR	Participate in pre-briefing conference with CLS and VA counsel.	0.10
6/8/2017 LR	Draft post-PBC memo summarizing issues and arguments	0.10
6/8/2017 LR	Review file, including Board's decision, evidence of record, and our submitted PBC memo, and prepare short outline for PBC	0.60

## Exhibit A

		<u>Hours</u>
6/13/2017 DNW	Prepared and filed notice of appearance. Updated file.	0.10
6/26/2017 LR	Review case materials, record evidence, and BVA decision to outline arguments in preparation for drafting the opening brief	1.20
7/6/2017 LR	Conduct legal research of case law and regulations re extraschedular consideration to prepare opening brief	0.70
8/9/2017 LR	Begin drafting statement of the case for opening brief and review relevant evidence of record	0.40
8/9/2017 LR	Continue drafting statement of the case for opening brief and review relevant evidence of record	2.00
8/10/2017 LR	Begin drafting opening brief argument section, add relevant case law, statutes, and regulations, and review relevant supporting evidence in the record.	1.80
8/11/2017 LR	Continue drafting opening brief argument section, add relevant case law, statutes, and regulations, and review relevant supporting evidence in the record.	1.80
8/11/2017 LR	Continue drafting opening brief argument section, add relevant case law, statutes, and regulations, and review relevant supporting evidence in the record.	3.00
8/15/2017 LR	Continue drafting opening brief argument section, add relevant case law, statutes, and regulations, and review relevant supporting evidence in the record.	0.70

## Exhibit A

		<u>Hours</u>
8/15/2017 LR	Continue drafting opening brief argument section, add relevant case law, statutes, and regulations, and review relevant supporting evidence in the record.	1.30
8/15/2017 LR	Continue drafting opening brief argument section, add relevant case law, statutes, and regulations, and review relevant supporting evidence in the record.	1.90
8/16/2017 DNW	Continued review of opening brief; suggested edits to strengthen argument.	0.30
8/16/2017 DNW	Continued to review opening brief; suggested additional edits	0.40
8/16/2017 DNW	Began review of opening brief.	1.90
8/17/2017 LR	Prepare revisions to brief arguments and statement of the case	2.70
8/18/2017 LR	Continue to prepare revisions to brief arguments and statement of the case	1.30
8/24/2017 LR	Performed final proofread of opening brief and made final edits. E filed.	1.50
10/12/2017 TS	Drafted and filed notice of appearance; updated file.	0.10
10/23/2017 TS	Received Aee motion to extend brief, reviewed for accuracy. Updated file.	0.10
11/27/2017 TS	Received and reviewed notice with Aee brief, saved file. Updated file.	0.10
11/28/2017 TS	Reviewed opening brief, Board dec, and Aee brief to determine arguments for reply	2.00

## Exhibit A

		<u>Hours</u>
12/4/2017 TS	Continued work on reply brief. extraschedular argument, and combined effects argument.	2.80
12/4/2017 TS	Started to draft the reply brief, credibility argument and extraschedular argument	3.00
12/5/2017 TS	Continued making edits, cite checked	0.70
12/5/2017 JZ	Reviewed Aee brief and Tessa's draft reply. Made suggestions for edits	1.50
12/5/2017 TS	Edited reply brief.	3.00
12/11/2017 TS	Performed final review of reply, made final edits, e-filed.	0.50
1/2/2018 TS	Received and reviewed notice with ROP. Updated file.	0.10
1/2/2018 TS	reviewed ROP to ensure had all the right documents. drafted response, e-filed.	0.60
1/9/2018 TS	received and reviewed judge order, updated file	0.10
2/6/2018 TS	Received order moving for panel, reviewed for accuracy, memo to the file	0.20
2/6/2018 JZ	Reviewed panel order, pleadings, memo to file re: oral argument topics	0.50
2/9/2018 DNW	Reviewed draft of motion for clarification. Suggested edits. Updated file.	0.30
2/9/2018 TS	Drafted motion for clarification	1.10
2/12/2018 TS	Made edits to motion	0.50

## Exhibit A

		<u>Hours</u>
2/13/2018 TS	Received oral argument schedule, reviewed, updated file	0.10
2/13/2018 TS	Called client - left voice mail. Note to the file.	0.10
2/13/2018 TS	Emailed VA requesting position on motion for clarification	0.10
2/13/2018 TS	Client called back, discussed oral argument	0.10
2/13/2018 TS	Made additional edits to motion for clarification	0.40
2/14/2018 TS	Performed final proofread of motion, e-filed motion for clarification.	0.20
2/15/2018 TS	Received and reviewed clarification from court, saved, updated file.	0.20
2/20/2018 AG	Prepared and e-filed entry of appearance. Updated client file.	0.10
3/21/2018 TS	Conducted research for the oral argument walk through and moots in preparation of playing VA	3.00
3/26/2018 BH	Reviewed Board decision and all pleadings in preparation for oral argument case strategy meeting.	0.50
3/26/2018 TS	Participated in oral argument strategy meeting.	0.80
3/26/2018 AG	Participated in case strategy meeting.	0.80
3/26/2018 DNW	Participated in oral argument strategy meeting.	0.80
3/26/2018 BH	Case strategy meeting and walkthrough in preparation for oral argument. Discussed potential pitfalls and arguments to counter.	0.80



## Exhibit A

			<u>Hours</u>
3/26/2018	DNW	Reviewed case in preparation for case strategy meeting for oral argument.	1.10
3/26/2018	ME	Reviewed case notes and pleadings in preparation for oral argument walk-through, participated in oral argument walk-through with co-counsel	1.30
4/3/2018	DNW	Began to draft argument outline for oral argument's first moot.	1.00
4/3/2018	DNW	Began to review pleadings in preparation for oral argument.	3.00
4/3/2018	DNW	Continued to review materials for oral argument in preparation for first moot. Researched potential Brambley issue. Reviewed ROP. Reviewed relevant mem decs re: assistive devices.	3.00
4/5/2018	DNW	Prepared for first oral argument moot - reviewed outline of arguments	0.80
4/5/2018	DNW	Discussed oral argument strategy with co-counsel. Updated file.	1.50
4/6/2018	BJC	Participated in first moot	1.20
4/6/2018	TS	Participated in first moot	1.00
4/6/2018	DNW	Participated in first moot.	1.00
4/6/2018	BH	Participated in first moot in preparation for oral argument. Made a number of suggestions of ways to approach argument.	1.00
4/6/2018	ME	Reviewed case notes and pleadings in preparation for moot argument, participated in first moot argument	1.20

## Exhibit A

		<u>Hours</u>
4/6/2018 AG	Prepared for and participated in first moot for oral argument.	1.20
4/6/2018 TS	Prepared for first oral argument moot	2.00
4/6/2018 ZMS	Prepared for and participated in first formal moot. Preparation included research concerning extraschedular evaluations and practical effects of assistive devices.	2.80
4/9/2018 DNW	Researched SSA regulations. Prepared motion re: supplemental authorities. Updated file.	0.80
4/10/2018 DNW	Implemented edits to supplemental authority. Updated file.	0.30
4/10/2018 DNW	Researched more SSA regs re: use of walkers and revised supplemental authorities. Updated oral argument documents	0.40
4/11/2018 BJC	Reviewed supplemental authority and suggested edits	0.10
4/11/2018 DNW	Reviewed and implemented suggested edits to supplemental authorities. Updated file.	0.10
4/11/2018 DNW	Finalized supplemental authorities and filed document. Updated file.	0.20
4/11/2018 DNW	Reviewed and revised notes for oral argument binder re: client's issues with assistive devices.	0.20
4/11/2018 DNW	Telephone call with client re: functional effects of his walker and cane in preparation for oral argument. Note to file re: conversation.	0.30
4/11/2018 DNW	Revised oral argument outline.	1.10

## Exhibit A

		<u>Hours</u>
4/11/2018 DNW	Worked on oral argument strategy - devised possible response to questions	1.80
4/12/2018 DNW	Revised oral argument outline. Practiced oral argument in preparation for second moot. Drafted questions and responses anticipated from the Court. Updated file.	2.90
4/13/2018 BJC	Participated in second moot	1.00
4/13/2018 TS	Participated in second moot	1.00
4/13/2018 BH	Participated in second moot in preparation for Oral Argument.	1.00
4/13/2018 DNW	Participated in second moot.	1.00
4/13/2018 AG	Prepare for and participate in second moot for oral argument.	1.20
4/13/2018 ZMS	Conducted further legal research concerning rule of prejudicial error and use of assistive device ratings in SSA context. Participated in second full moot	2.50
4/16/2018 DNW	Reviewed BVA decision to make misapp. of law argument concise. Updated file.	0.40
4/16/2018 DNW	Revised notes and reviewed documents in preparation for oral argument.	3.00
4/17/2018 BJC	Participated in final walk through	0.70
4/17/2018 TS	Final walkthrough for oral argument. Addressed misinterpretation argument, amputation rule case and misc. matters.	0.70

## Exhibit A

		<u>Hours</u>
4/17/2018 AG	Participated in final walk through for oral argument	0.70
4/17/2018 DNW	Participated in final walk through prior to oral argument. Discussed case strategy re: expected questions at oral argument and how to frame misinter. of law with co-counsel. Updated file.	0.70
4/17/2018 DNW	Revised documents for oral argument after meeting with co-counsel. Researched section 4.120. Updated file.	0.70
4/17/2018 ZMS	Participated in final walk through in preparation for oral argument	0.70
4/17/2018 BH	Final walthrough for oral argument. Addressed misinterpretation argument, amputation rule case and misc. matters.	0.70
4/18/2018 AG	Travel to airport for oral argument.	0.50
4/18/2018 AG	Travel from DC airport to DC hotel.	0.50
4/18/2018 DNW	Travel to airport.	0.50
4/18/2018 DNW	Travel from airport to hotel.	0.50
4/18/2018 AG	Reviewed pleadings, RBA, and board decision in preparation of oral argument.	1.20
4/18/2018 AG	flight from providence to DC, including wait time at airport.	1.70
4/18/2018 DNW	Reviewed materials in preparation for oral argument.	2.00
4/19/2018 AG	Travel to Court for oral argument from hotel.	0.40

## Exhibit A

		<u>Hours</u>
4/19/2018 AG	Travel from Court to hotel.	0.40
4/19/2018 DNW	Travel from hotel to court.	0.40
4/19/2018 DNW	Travel from court to hotel.	0.40
4/19/2018 AG	Travel from airport.	0.50
4/19/2018 DNW	Travel from hotel to airport.	0.50
4/19/2018 DNW	Travel back from airport.	0.50
4/19/2018 DNW	Final review of materials for oral argument in preparation for argument.	1.50
4/19/2018 AG	Participated in Court preparatory meeting, participated in oral argument as second chair.	2.00
4/19/2018 AG	Travel back to RI	2.00
4/19/2018 DNW	Arrive at court; participate in preparatory meeting; prepare for argument in court room and review materials; participate in oral argument.	2.00
4/19/2018 DNW	Arrive at airport; travel to RI.	2.00
4/24/2018 DNW	Received Court's order for memoranda of law. Reviewed and updated file. Calculated due date and updated case calendar.	0.10
4/24/2018 DNW	Began to research to respond to Court's order after oral argument. Updated file.	0.10
4/26/2018 TS	Called client to discuss oral argument	0.10
4/26/2018 AG	Participate in case strategy discussion regarding supplemental pleading order.	0.50

## Exhibit A

		<u>Hours</u>
5/9/2018 DNW	Received OGC's motion for an extension of time to respond to the Court's order; reviewed for accuracy; updated file.	0.10
5/11/2018 DNW	Received Court's order granting an extension for both parties to submit supplemental memoranda of law; updated file and case calendar.	0.10
5/21/2018 DNW	Drafted response to Court's order for supp. mem. of law. Updated file.	1.50
5/24/2018 DNW	Reviewed and implemented suggested edits to supplemental memorandum of law. Updated file.	0.10
5/24/2018 BH	Reviewed and made drafting suggestions for supplemental briefing regarding the DC and how the use of an assistive device may be contemplated.	0.30
5/25/2018 TS	Called client re: status	0.10
6/4/2018 DNW	Revised supplemental memorandum of law second argument. Updated file.	0.30
6/6/2018 DNW	Revised supplemental memorandum of law's second argument to include more information regarding VA's rating schedule, social security, and instructions for the board. Updated file.	0.40
6/7/2018 DNW	Reviewed and implemented suggested edits to supplemental memorandum of law. Updated file.	0.30
6/8/2018 DNW	Finalized and filed supplemental memorandum of law. Updated file.	0.20
6/11/2018 DNW	Received notice OGC filed their supplemental pleading; reviewed to ensure it was received for the correct client; updated file.	0.10

## Exhibit A

			<u>Hours</u>
6/11/2018	DNW	Reviewed OGC's supplemental pleading for content; updated file.	0.10
6/12/2018	DNW	Received and reviewed e-mail from OGC re: position on supplementing ROP. Updated file.	0.10
6/12/2018	DNW	E-mailed response to OGC noting no opposition to their supplementing the ROP. Updated file.	0.10
6/25/2018	DNW	Received notice OGC filed the supplemental ROP; reviewed notice for accuracy; updated file.	0.10
6/25/2018	DNW	Received notice OGC filed a motion for leave to file the ROP supplement; reviewed for accuracy; updated file.	0.10
6/25/2018	DNW	Received judge's stamp order granting OGC's motion for leave to file a supplement to the ROP. Reviewed for accuracy. Updated file.	0.10
6/25/2018	TS	Reviewed ROP supp, drafted and e-filed response, updated file.	0.20
9/7/2018	TS	Received decision, reviewed, wrote post decision summary, updated file.	0.60
9/11/2018	ZMS	Reviewed Court's precedential 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.	0.90
9/12/2018	DNW	Reviewed memorandum decision in light of arguments made in appeal; updated file.	0.40

# Exhibit A

		<u>Hours</u>	
9/13/2018	DNW	Reviewed and implemented suggested edits to motion for clarification. Updated file.	0.20
9/13/2018	BH	Reviewed draft motion for clarification. made suggestions for edits.	0.20
9/13/2018	DNW	Drafted motion for clarification of decision after reviewing pleadings in case. Updated file.	0.80
9/17/2018	DNW	Reviewed and implemented additional edits to motion for clarification. Updated file.	0.20
9/19/2018	TS	Called client, memo to file	0.10

	<u>Amount</u>
133.50	\$26,584.05

## Expenses

Airfare for Oral Arg- AG	198.80
Airfare for oral argument- DW	198.80
Hotel - Oral Argument - AG	320.29
Hotel- Oral Argument- DW	320.29
Parking at airport - DW	44.00
Travel for Oral Arg - DW	101.85
Travel in DC for Oral Arg - AG	236.81
Total Expenses	\$1,420.84

	<u>Amount</u>
133.50	\$28,004.89



## Exhibit A

### Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alyse Galoski	13.70	199.25	\$2,729.76
Angela Bunnell	0.80	199.25	\$159.41
Barbara J. Cook	3.00	193.83	\$581.49
Bradley Hennings	4.50	199.25	\$896.64
Dana Weiner	44.90	199.25	\$8,946.49
Danielle M. Gorini	0.40	199.25	\$79.70
Jenna Zellmer	2.00	199.25	\$398.51
Lauren Robbins	28.50	199.25	\$5,678.72
Megan Ellis	2.50	199.25	\$498.13
Shatilla Shera Cairns	0.60	199.25	\$119.55
Tessa Stillings	25.70	199.25	\$5,120.81
Zachary M. Stolz	6.90	199.25	\$1,374.84

# Exhibit A

Time from 10/1/2018 to 12/17/2018

**Case No. 238889**

**Client: Spellers, Mr. Joseph**

			<b><u>Hours</u></b>
11/1/2018	TSTILLIN	Call with client, memo to file.	0.10
12/3/2018	TSTILLIN	Received Mandate, reviewed for accuracy, updated file.	0.10
12/17/2018	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
12/17/2018	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.00
12/17/2018	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	<b>1.20</b>	<b>\$ 199.25</b>	<b>\$ 239.10</b>
TSTILLIN	<b>0.20</b>	<b>\$ 199.25</b>	<b>\$ 39.85</b>
ZACH	<b>0.50</b>	<b>\$ 199.25</b>	<b>\$ 99.63</b>
<b>Totals:</b>	<b>1.90</b>		<b>\$ 378.58</b>

## 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.