

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BARRY C. WITHERS	)	
Appellant,	)	
	)	
v.	)	CAVC No. 16-1543
	)	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 **\$24,052.05**.

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 vacated and remanded the Board's March 24, 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. Withers 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. Withers 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: Megan Ellis, Danielle M. Gorini, Christian McTarnaghan, April Donahower, Nicholas Phinney, Sarah Barr, Layi Oduyingbo, Robert Chisholm, Barbara Cook, and Zachary Stolz.<sup>1</sup> Attorney Megan Ellis graduated from Boston

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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

College Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience.<sup>2</sup> Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey*

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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).

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. 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. Layi Oduyingbo 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 his experience.

Robert Chisholm graduated from Boston College Law School in 1988 and the *Laffey* Matrix establishes that \$563.00 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 \$196.89 per hour for Ms. Ellis, Ms. Gorini, Mr. McTarnaghan, Ms. Donahower, Mr. Phinney, Ms. Barr, Mr. Oduyingbo, Mr. Chisholm, 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 nine attorneys (89.80) results in a total attorney's fee amount of \$17,680.83.

Appellant seeks attorney's fees at the rate of \$191.73 per hour for Ms. Cook's representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (25.60) results in a total attorney's fee

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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 December 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.

<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 December 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.



amount of \$4,908.30.

In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Providence to DC – LO: \$298.96

Airfare to DC from Cincinnati; from DC to Providence – BC: \$606.00

Hotel in Washington DC – LO: \$234.60

Hotel in Washington DC – BC: \$259.00

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$24,052.05**.

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,

Barry C. Withers

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>
4/4/2016 NP	Reviewed BVA decision. Gave opinion and recommendation for an appeal to Court.	0.70
5/4/2016 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 file	0.20
5/5/2016 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 file	0.20
6/17/2016 ME	Prepared and filed notice of appearance; reviewed docket for procedural status and updated file.	0.20
6/20/2016 OO	Prepared and e filed notice of appearance. Updated file.	0.10
6/30/2016 OO	Received and reviewed RBA certificate of service and updated file of deadline to dispute.	0.10
7/5/2016 OO	Received and reviewed notice that RBA was received and uploaded to the file. Ensured correct BVA decision was included. Updated file.	0.10
8/31/2016 OO	Reviewed BVA decision and outlined legal arguments to include in PBC memo	0.80
8/31/2016 OO	Began casemapping and reviewing RBA (pages 1 to 450).	0.90

## Exhibit A

		<u>Hours</u>
9/1/2016 OO	Drafted status letter to client.	0.10
9/1/2016 OO	Continued casemapping and reviewing RBA (pages 451 to 1245).	1.60
9/1/2016 OO	Casemapped and reviewed RBA (pages 1246 to 2500).	2.10
9/7/2016 OO	Received notice to file brief, reviewed and saved to file. Calculated briefing deadline. Updated file of 60-day deadline.	0.10
9/8/2016 OO	Received PBC order, reviewed and saved to file. Calculated memo due date and updated file and calendar	0.10
9/26/2016 OO	Outlined multiple TDIU arguments for PBC memo.	0.50
9/26/2016 OO	Began drafting arguments 1 through 4 of PBC memo.	3.00
9/27/2016 OO	Edited memo	0.10
9/27/2016 OO	Emailed OGC and CLS PBC memo with message and document attached.	0.10
9/27/2016 OO	Prepared and e-filed rule 33 certificate of service	0.10
9/27/2016 NP	Proofread PBC memo & reviewed memo for legal accuracy; suggested edits prior to sending to OGC and CLS	0.20
9/27/2016 OO	Completed third argument of memorandum and completed conclusion.	2.10
10/11/2016 OO	Memo to file detailing OGC's position and explanation at PBC.	0.10

## Exhibit A

		<u>Hours</u>
10/11/2016 OO	PBC with OGC and CLS	0.20
10/11/2016 OO	Preparation for today's PBC - reviewed PBC memo and BVA decision.	0.30
12/20/2016 OO	Outlined multiple arguments to be made in brief.	0.80
12/20/2016 OO	Completed drafting statement of the case	1.90
12/20/2016 OO	Began drafting statement of the case for opening brief.	2.00
12/21/2016 OO	Drafted summary of argument, issues, standard of review and conclusion.	0.50
12/21/2016 OO	Drafted second argument of opening brief (3 pages)	1.50
12/21/2016 OO	Drafted fourth argument of opening brief (5 pages).	1.80
12/21/2016 OO	Drafted first argument of opening brief (3 pages)	1.90
12/21/2016 OO	Drafted third argument of opening brief (6 pages).	2.30
12/22/2016 BJC	Prepared and filed notice of appearance; updated file.	0.10
12/22/2016 BJC	Review opening brief and suggest edits to facts, review certain RBA pages for additional info to be added to facts, suggest addition for basis for SSD award.	0.40
12/22/2016 BJC	Continue review of opening brief and suggest edits to arguments - adding misinterpretation of law, failure to follow SSD finding, SGO and 4.16; clarifying legal errors	1.30

## Exhibit A

		<u>Hours</u>
12/26/2016 OO	Made additional revisions to opening brief - argument section	0.90
12/26/2016 OO	Began revisions to opening brief - statement of facts	1.30
12/26/2016 OO	Added additional reversal argument to opening brief.	2.10
12/27/2016 OO	Performed final proofread of opening brief. Made final edits. E-filed opening brief with Court and updated file of submission.	1.50
2/23/2017 OO	Receive and review email from OGC requesting position on motion for extension of time to file brief. Drafted and sent response email with position.	0.10
2/23/2017 OO	Receive and review email with Aee's motion to extend time to file brief. Reviewed motion and updated file.	0.10
2/23/2017 OO	Receive and review clerk's stamp order granting Aee motion for extension of time to file brief. Updated file.	0.10
4/17/2017 ME	Received and reviewed notice of filing of Appellee brief, updated client file and calendar to reflect receipt and new deadline	0.10
5/16/2017 ME	Client called, discussed Appellee brief and next steps in case	0.10
6/5/2017 OO	Drafted second argument of reply brief.	1.30
6/5/2017 OO	Reviewed Aee brief and outlined arguments for reply.	1.40

## Exhibit A

		<u>Hours</u>
6/5/2017	OO	Completed draft of Argument I of reply. 1.50
6/6/2017	OO	Drafted Argument IV of reply brief 0.70
6/6/2017	OO	Drafted third argument for reply brief. 1.50
6/6/2017	OO	Drafted 5th and 6th arguments of reply brief. 1.80
6/6/2017	OO	Made changes to argument I. Revised, edited, Arguments 2 & 3. 2.60
6/7/2017	OO	Revised and edited Argument I, parts a and b (4 pages) 1.20
6/7/2017	OO	Revised and edited Arguments IV, V, and VI. 2.80
6/8/2017	OO	Made additional edits to reply brief 0.70
6/8/2017	AD	Reviewed draft reply brief; checked citations to record and authority; suggested revisions and edits 1.50
6/12/2017	OO	Added additional argument to reply regarding standard of review. 1.00
6/12/2017	OO	Performed final proofread of reply and made final edits. Filed reply brief. 1.30
6/14/2017	OO	Receive and review email from Court with link to ROP filed. Updated file with ROP and calculated deadline to respond. 0.10
6/26/2017	OO	Drafted ROP letter. E-filed document with the Court. 0.10
6/26/2017	OO	Reviewed ROP for accuracy. 0.40
6/28/2017	OO	Received and reviewed Judge assignment (Schoelen) and updated file 0.10

## Exhibit A

		<u>Hours</u>
9/18/2017 OO	Received and reviewed order assigning Judge Toth to replace Schoelen's assignment. Updated file of new assignment.	0.10
9/21/2017 OO	Received and reviewed CAVC email and order from Court submitting case to panel. Made note to file.	0.10
9/22/2017 BJC	Reviewed motion for clarification and suggested edits and changes to motion	0.20
9/22/2017 OO	Drafted and sent email to OGC regarding position on motion for clarification of the issues.	0.10
9/22/2017 OO	Received and reviewed email from OGC regarding the Secretary's position on motion for clarification.	0.10
9/22/2017 OO	Reviewed issues argued in preparation of drafting motion for clarification.	0.20
9/22/2017 OO	Completed draft of motion for clarification	0.60
9/22/2017 OO	Made necessary revisions to motion.	0.70
9/26/2017 OO	Made final edits to motion for clarification. E-filed document with the Court.	0.40
9/27/2017 OO	Reviewed Court's Per Curiam Order clarifying the issues.	0.10
10/18/2017 OO	Received and reviewed email from OGC regarding extension of time to respond to Court's order.	0.10
10/18/2017 OO	Drafted and sent response to OGC with position regarding their extension.	0.10

## Exhibit A

		<u>Hours</u>
10/19/2017 OO	Reviewed CAVC email and Court's order regarding oral argument. Updated calendar and case file.	0.10
10/23/2017 OO	Reviewed Judge's stamp order granting Appellee's extension of time and updated file of new deadline date.	0.10
11/2/2017 OO	Reviewed CAVC email regarding Appellee's response to Court's order and calendared 14-day deadline to respond.	0.10
11/2/2017 OO	Reviewed Appellee's 15-page memorandum of law and reconciled with our legal arguments.	0.60
11/3/2017 BJC	Start to draft response	2.00
11/3/2017 OO	Began review of caselaw cited in OGC's brief in preparation of drafting response.	0.60
11/7/2017 SKB	continued researching applicable regulatory history and caselaw to assist in drafting appellant response to appellee response to court order; memo to file re: findings	2.20
11/7/2017 SKB	reviewed research questions in preparation for assisting in draft of response to appellee response to court order; reviewed pleadings in case and case notes; researching applicable regulations, legislative history, and caselaw	3.00
11/9/2017 BJC	Continue to draft response	2.10
11/10/2017 BJC	Review and edit draft - add Chevron	0.40
11/10/2017 BJC	Continue to draft response, review Beaty	1.30



## Exhibit A

		<u>Hours</u>
11/13/2017 BJC	final edits to response, reviewed White and added it, edit relief	0.40
11/13/2017 RVC	Reviewed response to Court order prior to filing	0.20
11/14/2017 BJC	Review final draft of response for typos, make final edits, add specific cite for McGee	0.40
11/14/2017 OO	Called client and discussed scheduled oral argument.	0.10
11/15/2017 BJC	File response and update file.	0.10
11/17/2017 OO	Began researching BVA decisions involving BVA defining protected work environment after Cantrell in preparation for oral argument	1.50
11/17/2017 OO	Completed research and drafted research summary document regarding BVA decisions handling TDIU protected work environment cases without VA making a definition.	1.50
11/19/2017 BJC	draft outline for oral argument	0.50
11/21/2017 BJC	Participate in oral argument walk through re: case strategy	0.50
11/21/2017 CM	Participate in walkthrough discussing oral argument strategy.	0.50
11/21/2017 ME	Reviewed case notes and pleadings, participated in oral argument walkthrough	1.50
11/24/2017 OO	Finalized Appendix after adding the 7 PDF documents of BVA decisions cited.	0.40
11/24/2017 OO	Drafted letter regarding supplemental authorities and cover and citation page for Appendix.	1.50

## Exhibit A

		<u>Hours</u>
11/25/2017 BJC	Review and revise draft of supp letter: pull citations from all pleadings	1.70
11/27/2017 OO	E-filed document with the Court.	0.10
11/27/2017 OO	Finalized letter, Appendix cover, table of contents, and BVA decisions as one 70-page PDF document	0.40
11/27/2017 OO	Made revisions to PDF Appendix to be printed and numbered (in compliance with Court rule).	0.60
11/27/2017 OO	Reviewed all pleading and memos of law submitted and case law notes for preparation for first oral argument moot. Drafted document to be used summarizing opposing counsel potential legal arguments to be made at moot.	1.80
11/28/2017 BJC	participated in first moot	1.00
11/28/2017 BJC	prepare for first moot, added to argument outline	1.40
11/28/2017 OO	Played part of VA in first moot of oral argument.	1.00
11/28/2017 ME	Prepared for and participated in first moot argument	1.10
11/28/2017 OO	Drafted mock written argument for first moot. Researched caselaw in Appellee's response to Court's order.	2.50
11/30/2017 BJC	Participate in second moot	0.50
11/30/2017 BJC	Review OGC cases and add to oral argument outline	0.70

## Exhibit A

		<u>Hours</u>	
11/30/2017	OO	Reviewed CAVC email with Appellee's response to supplemental authority. Reviewed document and made notes to file.	0.20
11/30/2017	OO	Participate in second moot	0.50
11/30/2017	OO	Research for oral argument regarding the Veteran's work history.	0.60
11/30/2017	CM	Prepare for second moot. Participate in second moot.	0.60
11/30/2017	ME	Prepared for and participated in second moot argument	1.00
12/1/2017	BJC	Start to review ROP	1.30
12/2/2017	BJC	Complete rev of ROP	0.60
12/2/2017	BJC	Review RBA, get materials ready for oral argument	0.90
12/3/2017	BJC	Review oral argument outline and add points to make, consider theory of deference	0.30
12/3/2017	BJC	Review additional cases from briefs and add to oral argument outline	0.40
12/3/2017	BJC	research and assess deference	0.80
12/4/2017	BJC	review ratings, exams, BVA decision, ogranize facts in accessible way	1.50
12/4/2017	BJC	Participate in oral argument	1.50
12/4/2017	BJC	travel to DC for oral argument	1.50

## Exhibit A

		<u>Hours</u>
12/4/2017 BJC	continue to prep for oral argument - review cases, review RBA and briefs, review outline	1.80
12/4/2017 OO	Reviewed case materials and made notes for oral argument as second chair	1.00
12/4/2017 OO	Participate in oral argument	1.50
12/4/2017 OO	Total flight time round trip flight time from PVD to DC and from DC back to PVD.	2.50
1/5/2018 OO	Called client and discussed oral argument. Made note to file.	0.20
4/27/2018 ME	Called client, provided status update	0.10
8/6/2018 ME	Called client to touch base, gave status update and answered questions, note to file	0.10
8/10/2018 ME	Received memorandum decision, reviewed decision against arguments in briefs, updated client file and calendar to reflect Court remand and new deadline	0.70
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 so that client could be properly informed of case progress, disposition, and next steps.	0.70
8/14/2018 ME	Called client and discussed decision and next steps in appeal	0.20
8/27/2018 ME	Called client, discussed decision and explained next steps, note to file	0.10

## Exhibit A

		<u>Hours</u>
9/11/2018 ME	Received notice of entry of judgment, updated client file and calendar to reflect receipt	0.10
9/11/2018 ME	Received and reviewed notice from the Court recalling judgment, updated client file and calendar to reflect recall	0.10
		<u>Amount</u>
	112.80	\$22,077.22
Expenses		
Airfare for Oral Arg- LO		298.96
Airfare for oral argument - BC		606.00
Hotel - Oral Argument - BC		259.00
Hotel - Oral Argument - LO		298.96
Total Expenses		<u>\$1,462.92</u>
		<u>Amount</u>
	112.80	\$23,540.14

### Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
April Donahower	1.50	196.89	\$295.34
Barbara J. Cook	25.60	191.73	\$4,908.30
Christian McTarnaghan	1.10	196.89	\$216.58
Danielle M. Gorini	0.40	196.89	\$78.76
Layi Oduyingbo	71.80	196.89	\$14,136.79
Megan Ellis	5.40	196.89	\$1,063.22
Nicholas Phinney	0.90	196.89	\$177.20
Robert V. Chisholm	0.20	196.89	\$39.38
Sarah K. Barr	5.20	196.89	\$1,023.83

Exhibit A

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Zachary M. Stolz	0.70	196.89	\$137.82

# Exhibit A

Time from 10/1/2018 to 12/21/2018

**Case No. 231404**

**Client: Withers, Mr. Barry C.**

			<b><u>Hours</u></b>
10/1/2018	MEGAN	Recieved notice of entry of judgment, reviewed for accuracy, updated client file and calendar to reflect receipt and new deadline	0.10
10/5/2018	MEGAN	Called client to discuss Court decision on rehearing, left message, note to file	0.10
10/5/2018	MEGAN	Spoke with client regarding status, explained next steps in appeal and answered questions, note to file	0.10
10/10/2018	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.30
12/4/2018	MEGAN	Called client to discuss mandate and next steps in case, left message, note to file	0.10
12/4/2018	MEGAN	Client called, explained final steps in appeal and answered questions, note to file	0.10
12/14/2018	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
12/14/2018	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.10
12/14/2018	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>1.30</b>	<b>\$ 196.89</b>	<b>\$ 255.96</b>
MEGAN	<b>0.50</b>	<b>\$ 196.89</b>	<b>\$ 98.45</b>
ZACH	<b>0.80</b>	<b>\$ 196.89</b>	<b>\$ 157.51</b>
<b>Totals:</b>	<b>2.60</b>		<b>\$ 511.91</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.