

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIE S. JOHNSON,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 16-3808
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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APPELLANT’S APPLICATION FOR AWARD OF REASONABLE 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 U.S. Vet. App. Rule 39, Appellant, Willie S. Johnson, applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$ 13,093.35.**

PROCEDURAL HISTORY

On August 10, 2016, the Board of Veterans’ Appeals (“Board”) issued a decision that denied entitlement to an initial rating higher than 30 percent for mixed headaches. Appellant filed a timely notice of Appeal with this Court on November 15, 2016.

On January 9, 2017, the Secretary served on Appellant’s counsel the 633-page Record Before the Agency (“RBA”). On January 31, 2017, the Court issued an Order file Appellant’s brief within sixty days. Also on January 31, 2017, the Court issued an Order scheduling a Rule 33 Staffing Conference for March 9, 2017. The Staffing Conference was subsequently rescheduled for March 30, 2017.

Pursuant to the Court's Order, Appellant's counsel prepared a detailed Rule 33 Summary of the Issues addressing the legal errors committed by the Board in the decision on appeal, which he served on counsel for the Secretary and Central Legal Staff ("CLS") counsel on March 16, 2017. On March 30, 2017, the Rule 33 Staffing Conference was held, but the parties failed to arrive at a joint resolution.

On May 5, 2017, Appellant filed, and the Court granted, a motion to extend time to file his initial brief until June 12, 2017. On June 12, 2017, Appellant filed his 12-page initial brief (hereinafter: "App. Br.") with the Court. In his brief, Appellant argued that the Board erred by providing an inadequate statement of reasons or bases for its decision. See 38 U.S.C. 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). App. Br. at 6. Specifically, Appellant argued that the Board did not address relevant legal provisions from VA's adjudication manual that indicate his symptoms entitle him to a higher rating, without any explanation, in violation of the law. See 38 U.S.C. § 7104(c); see also *Fugere v. Derwinski*, 1 Vet. App. 103, 108 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992). App. Br. at 8-9. Appellant also argued that the Board did not address favorable evidence that he continued to take medical leave, indicating that his bouts of headaches lasted long enough that leave from work was required. App. Br. at 9. Lastly, Appellant argued that the Board did not address the fact that the evidence fits the definition of "completely prostrating" set forth in the M21-1. See M21-1, III.iv.4.G.7.b. App. Br. 9-11.

On August 10, 2017, the Secretary filed his responsive brief (hereinafter: “Sec. Br.”) with the Court. In his brief, the Secretary argued that the Board provided an adequate statement of reasons or bases. Sec. Br. at 4-11.

On August 24, 2017, Appellant filed a motion to extend the time to file his reply brief until October 10, 2017, which the Court granted on August 25, 2017. On October 10, 2017, Appellant filed his 7-page Reply Brief (hereinafter: “App. Rep. Br.”) with the Court. In his brief, Appellant argued that the Secretary’s argument that the Board had no legal obligation to address the portions of the M21-1 that are applicable to evaluating headache disabilities under DC 8100 had no merit. Rep. Br. at 1-2. Additionally, Appellant argued that the Secretary’s assertion that even if the M21-1 provisions at issue in this case were applicable, that the Board’s findings concerning whether Mr. Johnson’s headaches were “completely prostrating” and “prolonged” would not change and are adequately supported was without merit. App. Rep. Br. at 3-6.

On October 23, 2017, the Secretary filed the Record of Proceedings with the Court. On February 6, 2018, the Court set oral argument for April 24, 2018. On February 22, 2018, Appellant filed his Supplemental Brief. On February 22, 2018, Appellee filed the Secretary’s Supplemental Memorandum of Law. On March 5, 2018, Appellant filed his Amended Supplemental Brief. On April 24, 2018, the case was argued before Chief Judge Davis and Judges Schoelen and Allen. On September 19, 2018, the Court issued its opinion (hereinafter “Op.”). In the decision, the Court remanded the relevant part of the August 2016 Board decision

because the Board erred by failing to explain how its conclusions regarding whether a higher rating was warranted were consistent with the evidence of record, failed to adequately address the subjective terms of degree in DC 8100, and failed to explain how headaches were not prolonged in light of evidence including that leave was required.

The Court entered Judgment on October 11, 2018. The Court entered Mandate under Rule 41(b) of the Court's Rules of Practice and Procedure on December 11, 2018.

ARGUMENT

I. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.

Under 28 U.S.C. § 2412(d), a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain "prevailing party" status, a party need only to have obtained success "on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989)).

In this case, Appellant is a prevailing party entitled to an award of fees and costs because the Court vacated the Board's August 10, 2016 decision that denied entitlement to an initial rating higher than 30 percent for mixed headaches based on administrative error and remanded the case for further development and

adjudication in accordance with its decision. See *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (en banc). The Court-ordered relief creates the “material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Garland Indep. Sch. Dist.*, 489 U.S. at 792).

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2 million (two million dollars) at the time this civil action was filed. As an officer of the Court, the undersigned counsel hereby states that Appellant’s net worth did not exceed \$2 million (two million dollars) at the time this civil action was filed, nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7 million (seven million dollars) and which had more than 500 employees. See *Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). In addition, Appellant submitted a Declaration of Financial Hardship, which was accepted for filing by the Court on November 15, 2016. See *Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

II. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary can defeat Appellant’s application for fees and costs only by demonstrating that the government’s position was substantially justified. See *Brewer v. American Battle Monument Comm’n*, 814 F.2d 1564, 1566-67 (Fed. Cir.

1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); accord *Beta Sys. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary’s administrative and litigation positions were not substantially justified. As described in the “Procedural History,” *supra*, the Court remanded the Board’s August 10, 2016 decision because the Board erred by failing to provide adequate reasons or bases for its decision. This error, and others committed by the Board, had no reasonable basis in fact or in law.

In addition, the litigation position of the Secretary, defending the agency action despite the aforementioned errors, had no basis in fact or law.

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

An itemized statement of the services rendered and the reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Included in Exhibit A is a certification that lead counsel has “(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). In the exercise of billing judgment, Appellant has eliminated 8.3 hours of attorney time and 0.7 hours of paralegal and law clerk time from this itemized statement and this fee petition.

Appellant seeks attorneys' fees at the following rates for representation in the Court of Appeals for Veterans Claims:¹

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Barton F. Stichman (1974 law graduate)	\$ 202.07	1.7	\$343.52
Christine Cote Hill (1996 law graduate)	\$ 202.07	2.5	\$505.18
Amy F. Odom (2006 law graduate)	\$ 202.07	6.8	\$1,374.08

¹ A rate in excess of \$125 per hour for the attorneys for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Washington Metropolitan Area, was \$202.07 in June 2017, the month Appellant filed the initial brief. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the Washington-Baltimore-DC-MD-VA area for inflation between March 1996 and November 1996 and by using the CPI-U for Washington-Baltimore-D.C.-MD-VA-W.VA area for inflation between November 1996 and June 2017 (using the average of the data of the months prior to and after the initial brief was filed). See Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999); see also *Apodackis v. Nicholson*, 19 Vet.App. 91, 95 (2005). The market rates for Appellant's attorneys exceeded the requested rate per hour during the relevant time period. See *Covington v. District of Columbia*, 839 F. Supp. 894, 904-05 (D.D.C. 1993), *aff'd*, 58 F.3d 1101 (D.C. Cir. 1995). The prevailing market rate for the work done by paralegals and law clerks was at least \$164.00 from June 1, 2017 to May 31, 2018, and at least \$166.00 from June 1, 2018, to the present. See USAO Attorney's Fees Matrix, 2015-2019 (Exhibit C) ("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 . . . area."); see also *Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008).

Patrick Berkshire (2009 law graduate)	\$ 202.07	30.1	\$6,082.31
Raymond J. Kim (2014 law graduate)	\$ 202.07	20.1	\$4,061.61
L. Michael Marquet (2017 law graduate)	\$ 202.07	0.7	\$141.45
Angela Nedd (paralegal)	\$ 157.00	1.4	\$219.80
	\$ 164.00	0.6	\$98.40
	\$ 166.00	1.0	\$166.00
			SUBTOTAL: \$ 12,992.35

The reasonable expenses for which Appellant seeks compensation are:

<u>Nature of Expense</u>	<u>Expense Amount</u>
Federal Express and USPS Charges	\$ 51.00
Duplication Charges	\$ 50.00
	SUBTOTAL: \$ 101.00

TOTAL: \$ 13,093.35

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$ 13,093.35.**

Respectfully submitted,

FOR APPELLANT:

Date: January 9, 2019

/s/ Christine Cote Hill
Christine Cote Hill
Barton F. Stichman
National Veterans Legal

Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006-2833
(202) 621-5674

Counsel for Appellant

EXHIBIT A

**NVLSP Staff Hours for Johnson, Willie
Vet. App. No. 16-3808**

Date: 10/14/2016 0.2 Staff: Amy F. Odom
Review and analyze BVA decision and identify issues to raise on appeal.

Date: 10/14/2016 0.2 Staff: Angela Nedd
Draft letter to client regarding BVA decision and issues to raise on appeal.
Provide to attorney to finalize.

Date: 10/18/2016 0.0 Staff: Angela Nedd
Prepare mailing of letter to client regarding BVA decision and issues to raise on
appeal. **[0.3 eliminated in the exercise of billing judgment]**

Date: 10/25/2016 0.3 Staff: Amy F. Odom
Telephone conference with client regarding status of appeal, BVA decision, and
case initiation.

Date: 10/26/2016 0.3 Staff: Angela Nedd
Draft letter to client regarding case initiation. Draft documents for client to
execute and return. Provide to attorney to finalize.

Date: 11/1/2016 0.0 Staff: Angela Nedd
Prepare mailing of letter to client regarding case initiation, with documents for
client to execute and return. **[0.2 eliminated in the exercise of billing
judgment]**

Date: 11/15/2016 0.3 Staff: Angela Nedd
Review correspondence from client regarding appeal. Finalize retainer
documents executed by client for attorney. Draft Notice of Appeal and Notices of
Appearance. Provide to attorney to finalize. Draft email to Clerk of the Court
regarding case initiation, with attachments.

Date: 11/17/2016 0.2 Staff: Angela Nedd
Review correspondence from client regarding appeal. Finalize VA consent to release of information. Draft email to VA GC regarding same, with attachment.

Date: 3/2/2017 2.9 Staff: Patrick Berkshire
Review and analyze Record Before the Agency (“RBA”) for preparation of Rule 33 Summary of the Issues (2.5); Continue with RBA Review (0.3).

Date: 3/16/2017 4.0 Staff: Patrick Berkshire
Finalize review and analysis of RBA (0.6); Draft Rule 33 summary of the issues (3.1); Draft email to VA counsel and Court Central Legal Staff regarding same; Rule 33 certificate of service, finalize same (0.3).

Date: 3/29/2017 0.3 Staff: Patrick Berkshire
Prepare for conference, including review of Rule 33 Summary of the Issues (0.1); Participate in conference (0.2).

Date: 4/25/2017 0.4 Staff: Angela Nedd
Draft letter to client requesting the client telephone attorney with current contact information. Provide to attorney. Prepare mailing.

Date: 6/6/2017 4.4 Staff: Patrick Berkshire
Review RBA for outstanding issues for preparation of initial brief, draft notes regarding same (2.0); Draft chronology for brief for preparation of statement of facts (2.0); Continue (0.4.).

Date: 6/7/2017 6.9 Staff: Patrick Berkshire
Draft statement of facts for brief (2.5); Continue drafting statement of facts (1.0); Draft brief argument (2.4); Add inserts to brief argument (1.0).

Date: 6/7/2017 0.3 Staff: Angela Nedd
Review draft initial brief. Draft letter to client regarding initial brief for review, with

enclosures. Provide to attorney to finalize.

Date: 6/12/2017 1.2 Staff: Barton F. Stichman
Review of and preparation of inserts to draft brief for P. Berkshire; legal advice to him regarding final argument to be added by him.

Date: 6/12/2017 1.5 Staff: Patrick Berkshire
Add argument based on B. Stichman recommendation (1.0)**[Additional 1.0 eliminated in the exercise of billing judgment]**; Finalize inserts to brief argument for persuasive value (0.5)**[Additional 0.5 eliminated in the exercise of billing judgment]**.

Date: 8/24/2017 0.0 Staff: Patrick Berkshire
Draft motion for extension of time, reply brief. **[0.3 eliminated in the exercise of billing judgment]**

Date: 10/2/2017 2.0 Staff: Patrick Berkshire
Review responsive brief and outline same in order to outline reply brief argument (1.0); Outline reply brief (1.0).

Date: 10/5/2017 6.7 Staff: Patrick Berkshire
Draft reply brief preliminary statement (0.4); Draft argument section I (2.5); Draft section II (1.8); Review and add inserts to argument (2.0).

Date: 10/5/2017 0.3 Staff: Angela Nedd
Draft letter to client regarding reply brief for review, with enclosures. Provide to attorney to finalize (0.3); Prepare mailing. **[0.2 eliminated in the exercise of billing judgment]**

Date: 10/9/2017 0.5 Staff: Barton F. Stichman
Review of VA's brief and Berkshire's draft reply brief and preparation of inserts to reply brief for P. Berkshire. (0.5)**[Additional 0.7 eliminated in the exercise of billing judgment]**

Date: 10/10/2017 0.5 Staff: Patrick Berkshire
Finalize reply brief argument, including adding final insert to legal argument for persuasive value. (0.5)[**1.0 eliminated in the exercise of billing judgment**]

Date: 12/19/2017 0.1 Staff: Patrick Berkshire
Review Panel Order in order to provide update to client.

Date: 1/8/2018 0.5 Staff: Patrick Berkshire
Draft motions for leave and oral argument (0.5)[**Additional 0.7 eliminated in the exercise of billing judgment**].

Date: 1/11/2018 0.3 Staff: Patrick Berkshire
Teleconference with client about panel referral and questions regarding same.

Date: 1/25/2018 0.2 Staff: Raymond J. Kim
Draft and finalize Notice of Appearance.

Date: 2/7/2018 1.5 Staff: Raymond J. Kim
Review parties' briefs and Court Order for preparation of supplemental brief.

Date: 2/12/2018 0.0 Staff: Raymond J. Kim
Review DC 8100 and relevant materials regarding successive criteria for preparation of supplemental brief (0.4). Review Memorandum Decisions in *Lunceford* (09-2413), *Penn* (16-3053), *Sergi* (13-2120), and *Waites* (16-2801) (0.4). Review Court and Federal Circuit decisions in *Camacho*, *Middleton*, *Pierce*, and *Tatum* (0.7). Draft Introduction for Supplemental Brief (0.8). Draft argument regarding relevant factors in determining successive criteria. [**Entire 5.0 eliminated in the exercise of billing judgment**]

Date: 2/14/2018 0.8 Staff: Raymond J. Kim
Complete draft of supplemental brief.

Date: 2/21/2018 0.0 Staff: Raymond J. Kim
Teleconference with and legal advice from B. Stichman regarding arguments to raise in supplemental brief (0.3). Revise supplemental brief with respect to en banc decision (1.2); with respect to DC 8100 (1.1). **[Entire 2.6 eliminated in the exercise of billing judgment]**

Date: 2/22/2018 1.2 Staff: Raymond J. Kim
Teleconference with B. Stichman regarding final revisions to supplemental brief (0.3). Revise final draft supplemental brief (0.6). Finalize Table of Authorities (0.3).

Date: 4/4/2018 0.1 Staff: Raymond J. Kim
Teleconference with client regarding status of appeal, advise awaiting oral argument.

Date: 4/18/2018 3.0 Staff: Raymond J. Kim
Draft outline for oral argument.

Date: 4/19/2018 0.5 Staff: Amy F. Odom
Prepare for and participate in conference with R. Kim and J. Davenport regarding issues to raise during oral argument; provide legal advice regarding same.

Date: 4/19/2018 3.3 Staff: Raymond J. Kim
Conference with J. Davenport and A. Odom regarding arguments to raise at oral argument, evaluate same (0.5). Preparation for moot (2.8).

Date: 4/20/2018 2.5 Staff: Raymond J. Kim
Revise outline for oral argument (0.8). Participate in moot (1.5). Review initial brief (0.2).

Date: 4/20/2018 0.0 Staff: Jill C. Davenport
Oral argument moot. **[1.3 eliminated in the exercise of billing judgment]**

Date: 4/20/2018 1.7 Staff: Amy F. Odom
Prepare for and participate in first moot court and conference regarding same.

Date: 4/22/2018 1.5 Staff: Raymond J. Kim
Revise outline for oral argument.

Date: 4/23/2018 2.1 Staff: Amy F. Odom
Prepare for and participate in second moot court and conference regarding same.

Date: 4/23/2018 3.3 Staff: Raymond J. Kim
Participate in moot (1.8). Finalize materials for oral argument (1.5).

Date: 4/24/2018 2.0 Staff: Amy F. Odom
Prepare for and participate in oral argument as second chair.

Date: 4/24/2018 2.4 Staff: Raymond J. Kim
Travel to and from Court (0.8). Participate in pre-argument meeting (0.3).
Participate in oral argument (1.3).

Date: 4/25/2018 0.1 Staff: Raymond J. Kim
Teleconference with client regarding oral argument.

Date: 9/25/2018 0.8 Staff: Angela Nedd
Draft letter to client regarding decision. Provide to attorney to finalize.

Date: 9/27/2018 0.2 Staff: Angela Nedd
Finalize letter to client regarding decision, with enclosures.

Date: 9/28/2018 0.2 Staff: Raymond J. Kim
Teleconference with client regarding Court Memorandum Decision and next

steps.

Date: 1/4/2019 0.7 Staff: L. Michael Marquet
Draft application for reasonable attorneys' fees and expenses under EAJA including recitation of relevant procedural history (0.4); Prepare list of itemized hours to be attached as exhibit to EAJA application (0.3).

Date: 1/9/2019 2.5 Staff: Christine Cote Hill
Finalize application (2.5).

CERTIFICATION

As lead counsel in this appeal, I have reviewed the combined billing statement above and I am satisfied that it accurately reflects the work performed by all counsel and others entitled to be included above and I have considered and eliminated all time that I believe could be considered excessive or redundant.

Date: January 9, 2019

/s/ Christine Cote Hill
Christine Cote Hill

EXHIBIT B

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Area: Washington-Baltimore, DC-MD-VA-WV

Item: All items

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Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996											100.0				
1997	100.4		100.8		100.5		101.1		101.4		100.5		100.8	100.6	101.0
1998	101.0		101.6		101.5		102.8		102.9		102.4		102.1	101.5	102.7
1999	102.8		103.2		103.6		104.6		105.4		105.0		104.2	103.4	105.1
2000	105.4		107.1		106.7		108.4		108.7		108.5		107.6	106.6	108.6
2001	108.9		109.7		110.1		110.8		111.7		110.9		110.4	109.7	111.1
2002	110.9		111.9		112.8		113.4		114.0		114.0		113.0	112.1	113.9
2003	114.6		115.9		115.7		116.8		117.2		116.7		116.2	115.6	116.9
2004	117.1		118.1		118.9		120.2		120.8		120.9		119.5	118.3	120.7
2005	121.3		122.7		123.6		125.0		126.7		125.4		124.3	122.8	125.8
2006	126.3		126.8		128.8		130.7		130.2		129.3		128.8	127.7	130.0
2007	129.956		131.945		132.982		134.442		134.678		135.151		133.464	132.000	134.927
2008	136.293		138.090		139.649		142.065		142.036		138.547		139.499	138.490	140.509
2009	137.598		138.620		139.311		140.810		140.945		140.718		139.814	138.777	140.850
2010	141.124		141.741		142.025		141.966		142.738		142.915		142.218	141.700	142.736
2011	144.327		146.044		147.554		147.747		147.658		147.565		146.975	146.259	147.691
2012	148.163		150.074		150.155		149.838		151.732		150.646		150.212	149.603	150.822
2013	150.845		152.188		151.908		152.657		153.532		153.160		152.500	151.798	153.203
2014	153.700		154.600		155.198		155.220		155.522		154.926		154.847	154.626	155.069
2015	153.376		154.984		155.880		155.546		156.278		155.820		155.353	154.886	155.820
2016	155.519		156.493		157.770		157.674		157.572		157.706		157.180	156.770	157.591
2017	158.086		158.558		158.844		158.850		160.293		160.157			158.666	

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EXHIBIT C

USAO ATTORNEY'S FEES MATRIX — 2015-2019*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	2018-19
31+ years	568	581	602	613
21-30 years	530	543	563	572
16-20 years	504	516	536	544
11-15 years	455	465	483	491
8-10 years	386	395	410	417
6-7 years	332	339	352	358
4-5 years	325	332	346	351
2-3 years	315	322	334	340
Less than 2 years	284	291	302	307
Paralegals & Law Clerks	154	157	164	166

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*, 142 F. Supp. 3d 1 (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, numerous 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*, 266 F. Supp. 3d 162, 171 (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 recalculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), 2017 WL 3669617, at *5 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"); *Gatore v. United States Dep't of Homeland Security*, 286 F. Supp. 3d 25, 37 (D.D.C. 2017) (although plaintiff had submitted a "'great deal of evidence regarding [the] prevailing market rates for complex federal litigation' to demonstrate that its requested [*Salazar*] rates are entitled to a presumption of reasonableness, . . . the Court nonetheless concludes that the defendant has rebutted that presumption and shown that the current USAO Matrix is the more accurate matrix for estimating the prevailing rates for complex federal litigation in this District"); *DL v. District of Columbia*, 267 F. Supp. 3d 55, 70 (D.D.C. 2017) ("the USAO Matrix ha[s] more indicia of reliability and more accurately represents prevailing market rates" 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. The United States recently submitted an appellate brief that further explains the reliability of the USAO Matrix vis-à-vis the *Salazar* matrix. See Br. for the United States as *Amicus Curiae* Supporting Appellees, *DL v. District of Columbia*, No. 18-7004 (D.C. Cir. filed July 20, 2018).