

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

STUART BURNS)	
Appellant,)	
)	
v.)	CAVC No. 17-1468
)	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 **\$18,148.07**.

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), 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 67, *citing Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016).

In this case, the parties agreed to a joint motion for remand based upon the Board's error in its determination that the Secretary's duty to assist was satisfied. See pages 1-7 of the JMR. The mandate was issued on February 7, 2019. 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. Burns 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. Burns is 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 error in its determination that the Secretary's duty to assist was satisfied. 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).

Fifteen attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Christian McTarnaghan, Danielle M. Gorini, Sarah McCauley, Megan Ellis, Jenna Zellmer, Angela Bunnell, Shawn Murray, Emma Peterson, Bradley Hennings, Nicholas Phinney, Alyse Galoski, Amy Odom, Barbara Cook, Christian Collins, and Zachary Stolz.¹ Attorney Christian

¹"There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th

McTarnaghan graduated from Suffolk University Law School in 2014 and the Laffey Matrix establishes that \$351.00 is the prevailing market rate for an attorney with his experience.² Danielle Gorini graduated from Roger Williams University

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.

²The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part by* 746 F.2d.4 (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 \$491.00 is the prevailing market rate for an attorney with her experience. Sarah McCauley graduated from Suffolk University Law School in 2018 and the *Laffey* Matrix establishes that \$307.00 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 \$351.00 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 \$358.00 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 \$351.00 is the prevailing market rate for an attorney with her experience. Shawn Murray graduated from Boston College Law School in 2014 and the *Laffey* Matrix establishes that \$351.00 is the prevailing market rate for an attorney with his experience. Emma Peterson graduated from Roger Williams University Law School in 2011 and the *Laffey* Matrix establishes that \$417.00 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 \$491.00 is the prevailing market rate for an attorney with his experience. Nicholas Phinney graduated from Roger Williams University Law

School in 2007 and the *Laffey* Matrix establishes that \$491.00 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 \$351.00 is the prevailing market rate for an attorney with her experience. Amy Odom graduated from University of Florida Law School in 2006 and the *Laffey* Matrix establishes that \$491.00 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 \$613.00 is the prevailing market rate for an attorney with her experience. Christina Collins graduated from Harvard University Law School in 1999 and the *Laffey* Matrix establishes that \$544.00 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 \$491.00 is the prevailing market rate for an attorney with his experience.

Elizabeth Rowland is a 2014 graduate from Vassar College and began working as a paralegal for Chisholm Chisholm & Kilpatrick in November 2016. Ms. Rowland was admitted to practice as a non attorney practitioner on January 16, 2018. In *McDonald v. Nicholson*, 21 Vet.App. 257 (2007), this Court indicated that non attorney practitioners are entitled to an EAJA award at a lesser rate than

the \$125.00 per hour statutory rate for attorneys, plus the cost of living adjustment.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$201.31 per hour for Mr. McTarnaghan, Ms. Gorini, Ms. McCauley, Ms. Ellis, Ms. Zellmer, Ms. Bunnell, Mr. Murray, Ms. Peterson, Mr. Hennings, Mr. Phinney, Ms. Galoski, and Mr. Stolz for representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for these twelve attorneys (81.90) results in a total attorney's fee amount of \$16,487.29.

Appellant seeks attorney's fees at the rate of \$193.83 per hour for Ms. Cook's representation services before the Court.⁴ This rate per hour, multiplied by the number of hours billed for Ms. Cook (0.90) results in a total attorney's fee

³ 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 January 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

⁴ This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Cincinnati. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to January 2018 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 \$174.45.

Appellant seeks attorney's fees at the rate of \$199.80 per hour for Ms. Odom and Ms. Collin's representation services before the Court.⁵ This rate per hour, multiplied by the number of hours billed for these two attorneys (4.30) results in a total attorney's fee amount of \$859.14.

Appellant seeks attorney's fees at the rate of \$164.00 per hour for Ms. Rowland's representation services before the Court. This rate per hour, multiplied by the number of hours billed for Ms. Rowland (1.00) results in a total attorney's fee amount of \$164.00.

In addition, Appellant seeks reimbursement for the following expense:

Airfare to and from DC for oral argument - JZ: \$231.60

Airfare to and from DC for oral argument - AG: \$231.60

Based upon the foregoing, the total fee amount sought is **\$18,148.07**.

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have

⁵ 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 Washington-Arlington-Alexandria, DC-MD-VA-WV. *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 January 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

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,
Stuart Burns
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>
3/16/2017 AB	Reviewed BVA decision. Recommended case for appeal.	0.50
5/30/2017 AB	Discussed case with client.	0.10
5/30/2017 AB	Prepared and e-filed notice of appearance. Updated file.	0.10
7/13/2017 AB	Received and reviewed aee notice of appearance. Updated client file.	0.10
7/21/2017 EP	Prepared and filed notice of appearance. Saved and updated client file.	0.10
7/24/2017 EP	Received and reviewed amended RBA notice, saved, and updated client file.	0.10
7/29/2017 NP	Reviewed RBA to determine need for dispute; emailed VA atty. re: RBA	2.20
8/4/2017 NP	Drafted motion to dispute RBA	0.20
8/10/2017 NP	Email from VA atty. re: RBA dispute; reviewed docket per email; called Court re: briefing order; checked docket again per review of notes; made a note to the file; emailed VA atty. re: revoking of briefing order	0.50
8/14/2017 NP	Prepared & filed notice of appearance & filed motion to dispute RBA	0.20
8/16/2017 NP	EMail from VA atty. re: RBA; reviewed RBA & emailed reply	0.20
8/17/2017 NP	Email from VA atty. re: RBA; emailed reply	0.10

Exhibit A

			<u>Hours</u>
8/19/2017 NP	Reviewed RBA & notes to prepare to review VBMS file		0.20
8/23/2017 NP	Received & reviewed order staying case; updated client file		0.10
8/30/2017 NP	Reviewed RBA & notes to prepare to view VBMS file		0.10
8/30/2017 NP	Checked client's VBMS & CAPRI files for missing info		0.10
8/30/2017 NP	Reviewed RBA per email from VA atty. & review of CAPRI & VBMS files; emailed reply		0.30
9/8/2017 NP	Received & reviewed VA's latest response to RBA dispute; updated client file		0.10
9/11/2017 EP	Received and reviewed notice to file brief, saved, calculated brief due date, and updated client file.		0.10
9/18/2017 EP	Received and reviewed PBC order, saved, calculated memo due date, and updated client file.		0.10
9/18/2017 EP	Drafted letter to client regarding the status of his appeal.		0.10
10/3/2017 EP	Casemapped and reviewed pages 1 to 1047 of the RBA for memo and briefing purposes.		1.30
10/3/2017 EP	Drafted PBC memorandum and prepared for submission. Sent memo to OGC and CLS. Prepared and filed Rule 33 Certificate of service.		3.00
10/17/2017 EP	PBC held with OGC and CLS.		0.10
10/19/2017 EP	email to OGC re client's decision on JMR		0.10

Exhibit A

			<u>Hours</u>
10/19/2017 EP	Telephone call with client to present and explain offer for JMR.		0.50
10/27/2017 EP	Telephone call to client regarding the status of his appeal.		0.10
1/1/2018 EP	Started drafting opening brief, statement of the case and first argument		2.90
1/2/2018 ER	Reviewed Brief for proofreading purposes and corrected typos and grammatical errors		0.30
1/2/2018 EP	Made final edits to opening brief, prepared for submission and efiled the same with the Court.		0.80
1/2/2018 CM	Review Board decision. Review opening brief for legal accuracy. Review Golden case. Suggest edits to brief.		0.90
1/2/2018 EP	Continued drafting opening brief, summary of the argument, second argument, and conclusion.		1.50
3/5/2018 EP	Email to OGC re extension of time to file the Secretary's brief		0.10
3/27/2018 EP	Received Secretary's brief, reviewed arguments, saved and updated client file.		0.20
4/5/2018 BH	Reviewed pleadings in preparation for case strategy meeting. Looked closely at Cohen v. Brown. Participated in case strategy meeting and made argument suggestions, including BVA practice, for reply brief.		0.50
5/11/2018 ME	Reviewed case notes, pleadings, and evidence of record in preparation for drafting reply brief, researched DSM issues		0.90

Exhibit A

			<u>Hours</u>
5/16/2018 ME	Began drafting reply brief		3.00
5/17/2018 ME	Continued drafting reply brief, researched retroactivity case law		3.00
5/17/2018 ME	Continued drafting reply brief		3.00
5/18/2018 ME	Finished drafting reply brief		1.00
5/21/2018 BJC	Review draft reply brief and suggest edits, suggest additional case cites		0.60
5/21/2018 ME	Began reviewing and incorporating Barb's edits into draft of reply brief		0.60
5/23/2018 ME	Finished incorporating Barb's edits into draft of reply brief		1.50
5/24/2018 ME	Prepared and filed notice of appearance; updated file.		0.10
5/24/2018 ME	Incorporated additional edits into reply brief		0.30
5/24/2018 C	Review and edit CAVC reply brief in preparation for filing with the Court, including revising text and citations, and incorporating legal research. Prepare explanatory comments for attorney review.		1.50
5/25/2018 ME	Finished incorporating final edits into draft reply brief, e-filed reply brief, updated client file and calendar to reflect submission and new deadline		0.50
6/4/2018 ME	Received notice of filing of record of proceedings, reviewed record against evidence cited in briefs, prepared and filed a response to record of proceedings		0.30

Exhibit A

		<u>Hours</u>
6/12/2018 ME	Received notice of judicial assignment, reviewed for accuracy, updated client file and calendar to reflect receipt and judge assigned	0.10
7/3/2018 ME	Received Court order submitting case to panel, reviewed for accuracy, updated file to reflect order, reviewed pleadings to determine issue for panel, memo to file re: moving for oral argument	0.20
7/6/2018 ME	Emailed VA counsel regarding position on motion for leave and motion for argument	0.10
7/6/2018 ME	Drafted motion for leave to file motion for argument and motion for argument	0.60
7/7/2018 BJC	review and suggest edits to motion for oral argument: suggest to reorganize facts and add re: parties' positions	0.30
7/9/2018 ME	Received and reviewed email from VA counsel regarding position on motions, updated client file to reflect response	0.10
7/9/2018 ME	Incorporated edits and VA's position into draft motions, filed motion for leave to file and motion for oral argument, updated client file and calendar to reflect submission	0.20
7/12/2018 ME	Received supplemental pleading order, reviewed order for accuracy, updated client file and calendar to reflect receipt and new deadline	0.10
7/12/2018 SDM	prepare and e-file notice of appearance, update client file	0.10
7/13/2018 SDM	Review board decision and file, begin review of pleadings to prepare to draft supplemental pleadings in response to Court order	1.40

Exhibit A

			<u>Hours</u>
7/16/2018	SDM	continue review of pleadings, take notes on pleadings to prepare to draft response to supplemental questions	0.80
7/30/2018	SDM	Review pleadings, perform legal research, prepare notes and outline for response to supplemental pleading	2.80
7/31/2018	SDM	e-mail opposing counsel re: position on extension for supplemental pleadings	0.10
8/1/2018	SDM	e-mail opposing counsel draft of motion to extend time to respond to Court's order	0.10
8/1/2018	SDM	receive and review e-mail with aee position on joint extension, draft motion to extend time to respond to Court's order	0.30
8/2/2018	SDM	receive and review e-mail from opposing counsel on joint motion to extend time to respond to Court order, e-file motion	0.10
8/2/2018	SDM	continue performing legal research in preparation for drafting supplemental pleadings	0.80
8/2/2018	SDM	perform legal research pertaining to draft of supplemental pleadings	3.00
8/2/2018	SDM	begin draft of response to Court's order for supplemental briefing	3.00
8/6/2018	SDM	receive and review e-mail with Court order granting motion to extend supplemental briefing, review and save order, update client file	0.10
8/6/2018	SDM	Continue drafting supplemental briefing in response to Court's order	2.20

Exhibit A

			<u>Hours</u>
8/9/2018	SDM	review and make edits to draft supplemental briefing	0.80
8/12/2018	BH	Reviewed supplemental pleading. Made additional comments and suggestions, including Haas v. Peake, explanation of DSM vs. treatment and legal accuracy.	0.50
8/22/2018	SDM	review comments from BJC and BWH on draft supplemental brief, perform additional legal research, make edits to brief	3.00
8/27/2018	AG	Prepared and e-filed entry of appearance. Updated client file.	0.10
8/27/2018	SDM	make additional edits to supplemental brief	1.30
8/28/2018	ER	Reviewed supplemental brief for proofreading purposes and corrected grammatical errors	0.70
8/28/2018	SDM	e-file supplemental brief, update client file	0.10
8/28/2018	SDM	receive e-mail with aee supplemental brief, save and review brief, update file	0.10
8/28/2018	SDM	make final edits to draft supplemental pleading	0.20
			<u>Amount</u>
			57.50 \$11,529.01
Expenses			
Airfare for oral argument - AG			231.60
Airfare for oral argument - JZ			231.60
Total Expenses			<u>\$463.20</u>

Exhibit A

	<u>Amount</u>
57.50	\$11,992.21

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alyse Galoski	0.10	201.31	\$20.13
Angela Bunnell	0.80	201.31	\$161.05
Barbara J. Cook	0.90	193.83	\$174.45
Bradley Hennings	1.00	201.31	\$201.32
Christian McTarnaghan	0.90	201.31	\$181.18
Christina Collins	1.50	199.80	\$299.70
Elizabeth Rowland	1.00	164.00	\$164.00
Emma Peterson	11.10	201.31	\$2,234.54
Megan Ellis	15.60	201.31	\$3,140.44
Nicholas Phinney	4.30	201.31	\$865.62
Shawn D. Murray	20.30	201.31	\$4,086.58

Exhibit A

Time from 10/1/2018 to 2/14/2019

Case No. 247794

Client: Burns, Mr. Stuart

				<u>Hours</u>
10/12/2018	AGALOSKI	Left voicemail for client and scheduled time to make follow up call. Updated client file.		0.10
10/18/2018	AGALOSKI	Spoke with client via telephone regarding case status.		0.10
11/8/2018	AGALOSKI	Received and reviewed email from Court with order scheduling oral argument. Reviewed order. Update case calendar.		0.10
12/11/2018	AGALOSKI	Spoke with client via telephone regarding case status. Updated client file.		0.10
1/10/2019	SMCCAULE	Reviewed BVA decision and all pleadings to prepare for moot.		1.30
1/11/2019	AGALOSKI	Drafted and sent email to VA counsel re: remand. Updated client file.		0.10
1/11/2019	AGALOSKI	Reviewed pleadings and conducted extensive legal research to prepare for oral argument strategy meeting. Attended and participated in case strategy meeting with SM, JZ, ZS, and AO.		2.90
1/11/2019	AGALOSKI	Received and reviewed email from VA counsel re: remand. Responded to email and updated client file.		0.10
1/11/2019	AODOM	Review supplemental pleadings and participate in oral argument strategy meeting.		1.30
1/11/2019	JENNA	Reviewed pleadings, researched law, and participated in first oral argument strategy meeting.		1.80
1/11/2019	SMCCAULE	Participated in oral argument strategy meeting.		1.00
1/21/2019	AGALOSKI	Continued preparations for oral argument, reviewing appeal reform documents.		0.50
1/21/2019	AGALOSKI	Conducted legal research to prepare for oral argument.		2.70
1/21/2019	SMCCAULE	Reviewed pleadings and conducted legal research to prepare for moot oral argument.		2.10
1/22/2019	AGALOSKI	Prepared for and attended first moot oral argument. Discussed case strategy after argument.		2.40
1/22/2019	AODOM	Participated in moot and post-moot conference.		1.50
1/22/2019	JENNA	Reviewed case file notes and pleadings, participated in moot and post-moot discussion		1.90
1/22/2019	SMCCAULE	Continued to review pleadings and relevant case law in preparation for moot.		1.20
1/22/2019	SMCCAULE	Participated in moot and post-moot conference.		1.50
1/22/2019	ZACH	Prepared for and participated in first full moot. Preparation included research of relevant issues and review of all pleadings.		3.00
1/23/2019	AGALOSKI	Received and reviewed email from VA counsel with remand offer. Responded to email. Updated client file. Left voicemail for client.		0.30
1/23/2019	AGALOSKI	Reviewed BVA decision and correspondence in file to prepare for review of the JMR. Reviewed and revised document for legal and grammatical accuracy. Updated client file.		0.40
1/24/2019	AGALOSKI	Left voicemail for client and scheduled time to make follow up call. Updated client file.		0.10
1/24/2019	AGALOSKI	Spoke with client regarding remand and answered questions. Drafted and sent email to VA counsel and updated client file.		0.20
1/24/2019	AGALOSKI	listened to VA's voicemail. Drafted email to VA and updated client file.		0.20
1/24/2019	AGALOSKI	Received and reviewed VA's counter suggestions on JMR draft. Reviewed pleadings. Posted case strategy note to file.		0.30
1/24/2019	AGALOSKI	Spoke with client on telephone second time. Responded to VA's email. Updated client file.		0.30
1/24/2019	JENNA	Reviewed case file notes and draft JMR, made minor edits and suggestions.		0.40
1/25/2019	AGALOSKI	Received and reviewed email from VA counsel and updated client file.		0.10
1/25/2019	AGALOSKI	Drafted and sent email to VA counsel re: remand. Updated client file.		0.10
1/25/2019	AGALOSKI	Received and reviewed email from Court with JMR. Review document for accuracy. Updated client file. Reviewed client file and posted final case strategy note to file.		0.40

Exhibit A

Time from 10/1/2018 to 2/14/2019

Case No. 247794

Client: Burns, Mr. Stuart

			<u>Hours</u>
1/25/2019	AGALOSKI	Received and reviewed email from VA counsel with final draft of JMR. Responded to email.	0.10
1/25/2019	AGALOSKI	Drafted and sent email to VA counsel re: remand. Updated client file.	0.10
1/28/2019	AGALOSKI	Received and reviewed Court's order that entered on November 8, 2018, scheduling oral argument for Tuesday, February 5, 2019, at 10:00 a.m. is revoked. Updated client file.	0.10
2/7/2019	AGALOSKI	Received and reviewed email from Court with JMR order and mandate. Reviewed order for accuracy. Updated client file.	0.10
2/14/2019	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
2/14/2019	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.00
2/14/2019	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>
AGALOSKI	11.90	\$ 201.31	\$ 2,395.59
AODOM	2.80	\$ 199.80	\$ 559.44
DANIELLE	1.20	\$ 201.31	\$ 241.57
JENNA	4.10	\$ 201.31	\$ 825.37
SMCCAULE	7.10	\$ 201.31	\$ 1,429.30
ZACH	3.50	\$ 201.31	\$ 704.59
Totals:	30.60		\$ 6,155.86

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
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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).