

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CATHIE TOLLIVER)	
Appellant,)	
)	
v.)	CAVC No. 16-3465
)	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 **\$25,234.59**.

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).

The Appellant in the instant matter is a prevailing party. After oral argument, the Court vacated and remanded that part of the Board's August 22, 2016 decision based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-7 of the Memorandum Decision. The mandate was issued on February 12, 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 her net worth at the time her appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Ms. Tolliver 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, Ms. Tolliver 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 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*).

Nine attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Nicholas Phinney, Danielle M. Gorini, Jenna Zellmer, April Donahower, Bradley Hennings, Christian McTarnaghan, Megan Ellis, Barbara Cook, and Zachary Stolz.¹ Attorney Nicholas Phinney graduated from Roger

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

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.² Danielle Gorini graduated from Roger Williams University Law School in 2005 and the

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.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).

Laffey Matrix establishes that \$491.00 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. April Donahower graduated from Temple University Law School in 2013 and the *Laffey* Matrix establishes that \$358.00 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. Christian 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. 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. 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. 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.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$199.16 per hour for Mr. Phinney, Ms. Gorini, Ms. Zellmer, Ms. Donahower, Mr. Hennings, Mr. McTarnaghan, Ms. Ellis, and Mr. Stolz for representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for these eight attorneys (118.80) results in a total attorney's fee amount of \$23,660.35.

Appellant seeks attorney's fees at the rate of \$192.91 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 (2.40) results in a total attorney's fee amount of \$462.98.

³This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to May 2017 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

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 May 2017 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

In addition, Appellant seeks reimbursement for the following expenses:

Filing Fee:	\$50.00
Airfare for oral argument - AD:	\$193.98
Hotel for oral argument - AD:	\$322.60
Airfare for oral argument – BH:	\$158.97
Hotel for oral argument – BH:	\$385.71

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$25,234.59**.

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,
Cathie Tolliver
By Her 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>
8/29/2016 NP	Reviewed BVA decision and made recommendation for appeal.	0.60
10/12/2016 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Zachary Stolz as lead counsel, and Fee Agreement with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case file.	0.10
10/19/2016 AD	Was assigned to case; prepared and e-filed notice of appearance; reviewed docket for procedural status; updated case file	0.20
12/2/2016 AD	Received email from court with OGC's notice of appearance; reviewed document for accuracy; saved document to client's file; updated client file	0.10
12/9/2016 AD	Received email from court with RBA certificate of service; reviewed document for accuracy and saved to client's file; updated client calendar	0.10
12/13/2016 AD	Received and reviewed notice of RBA upload; ensured correct BVA decision was included; updated client calendar	0.10
12/27/2016 AD	Reviewed BVA decision; casemapped and reviewed pp. 1-438 of RBA	2.00
12/28/2016 AD	Casemapped and reviewed pp. 439-1604 of RBA; prepared status letter to send to client; updated client file	3.00
12/29/2016 AD	Received email from court with notice to file brief; reviewed notice for accuracy; saved to client's file; calculated brief due date; updated client calendar	0.10

Exhibit A

		<u>Hours</u>
1/9/2017 AD	Received email from court with PBC order; reviewed order for accuracy; calculated memo due date; saved to client's file; updated client calendar	0.10
1/23/2017 AD	Drafted PBC memo	1.80
1/30/2017 AD	Made final edits to PBC memo; emailed memo to VA and CLS; prepared and e-filed certificate of service; updated client calendar	0.30
2/14/2017 AD	Updated client re: PBC	0.10
2/14/2017 AD	Received email from court with new OGC notice of appearance; reviewed notice for accuracy; saved notice to client file; updated casefile	0.10
2/14/2017 AD	Reviewed PBC memo and BVA decision; conference held; prepared summary of PBC for the file; updated client calendar	0.50
4/4/2017 AD	Began drafting statement of the case	1.10
4/4/2017 AD	Began drafting argument section	2.80
4/13/2017 AD	Continued drafting statement of the case	0.90
4/14/2017 AD	Researched SC cause of death decisions in preparation of continuing to draft the argument section in the opening brief	1.60
4/14/2017 AD	Completed drafting statement of the case and began drafting third argument section	2.10
4/17/2017 AD	Drafted first and second argument sections	2.70
4/17/2017 AD	Drafted third and fourth argument sections	3.00

Exhibit A

			<u>Hours</u>
4/18/2017 AD	Drafted fifth argument section		1.00
4/18/2017 AD	Completed draft of opening brief		3.00
4/19/2017 AD	Edited brief		0.40
4/25/2017 CM	Review opening brief and suggested edits		1.30
5/1/2017 AD	Made final edits to brief; checked citations to record and authority; e-filed; updated client file		1.80
5/1/2017 AD	Made additional edits to brief		2.90
5/24/2017 BJC	Prepare and file appearance; update file.		0.10
6/2/2017 AD	Received client's call; provided status update; updated client file		0.10
6/26/2017 AD	Received emails from court with VA counsel's motion to extend time to file brief and clerk's stamp granting motion; reviewed motion and saved to client file; updated client calendar		0.10
6/26/2017 ZMS	Email exchange with VA counsel. Indicated no opposition to motion for extension of time to file brief.		0.10
8/15/2017 AD	Received email from court with Appellee's brief; reviewed document for accuracy and saved to client's file; updated client calendar		0.10
8/17/2017 AD	Received call from client and discussed appellee's brief		0.10
8/22/2017 AD	Reviewed and annotated Appellee's arguments in brief; began outlining arguments for reply brief		3.00

Exhibit A

		<u>Hours</u>
10/11/2017 AD	Drafted reply brief	2.40
10/12/2017 JZ	Reviewed opening brief, Ace brief and reply. Suggested edits and made comments on areas to clarify.	0.50
10/12/2017 AD	Made final revisions and edits to reply brief; checked citations to record and authority; e-filed brief; updated client file; updated client calendar	1.00
10/12/2017 AD	Revised reply brief	1.40
10/12/2017 AD	Completed draft of reply brief	3.00
10/24/2017 AD	Received email from court with record of proceedings filed by VA counsel; reviewed document for accuracy and saved to client's file; updated client calendar	0.10
10/27/2017 AD	Reviewed record of proceedings against citations in opening and reply briefs; prepared and e-filed response to record of proceedings; updated client file	0.20
10/31/2017 AD	Received email from court with assignment of case to judge; reviewed email for accuracy and saved to client's file; updated client calendar	0.10
11/29/2017 AD	Received email from court with order calling case to panel; reviewed order for accuracy and saved to client's file; reviewed pleadings to ascertain possible basis for order	0.30
12/5/2017 AD	Prepared initial drafts of motions for leave, oral argument, and clarification	1.20
12/6/2017 AD	Revised draft motion for clarification and oral argument	0.60

Exhibit A

		<u>Hours</u>
12/8/2017 AD	Drafted and sent email to VA counsel seeking position on motions for leave and for oral argument; updated client file	0.10
12/8/2017 AD	Edited motion for oral argument	0.20
12/11/2017 JZ	Reviewed April's motion for oral argument and suggested edits	0.40
12/12/2017 AD	Corresponded with VA counsel regarding Secretary's position on motion for oral argument; updated client file	0.10
12/12/2017 AD	Began revising draft motion for oral argument	0.20
12/12/2017 AD	Read and annotated decisions cited in supplemental briefing order	0.70
12/13/2017 BJC	Review edited draft of motion for oral argument and commented on same.	0.20
12/13/2017 AD	Made final edits to motions for leave and for oral argument; e-filed motions	0.40
12/13/2017 AD	Completed edits to oral argument motion	0.70
12/15/2017 AD	Received email from court with order scheduling oral argument; reviewed order for accuracy and saved to client's file; updated client file; updated client calendar	0.10
12/27/2017 AD	Received email from court with order revoking oral argument scheduling order; reviewed order for accuracy and saved to client's file; updated client calendar	0.10

Exhibit A

		<u>Hours</u>
1/4/2018 AD	Corresponded with VA counsel regarding position on VA's motion to extend time to file supplemental pleading; updated client file	0.10
1/5/2018 AD	Received email from court with order scheduling oral argument; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
1/5/2018 AD	Received email from court with VA counsel's motion to extend time to respond to supplemental briefing order; reviewed order for accuracy and saved to client's file	0.10
1/5/2018 AD	Received email from court with panel's grant of VA's motion for extension of time to respond to supplemental briefing order; reviewed grant for accuracy and saved to client's file; updated client calendar	0.10
1/24/2018 AD	Called client to provide status update and discuss oral argument; updated client file to document conversation; updated client calendar to reflect status update	0.20
1/24/2018 AD	Researched issues presented in supplemental pleading order	0.50
2/1/2018 AD	Drafted outline of supplemental pleading	1.10
2/2/2018 AD	Received email from court with order staying case pending outcome of Gray at Federal Circuit; reviewed order and saved to client's file; updated client calendar to reflect stay of proceedings	0.20
3/12/2018 AD	Received email from court with order revoking order scheduling oral argument; reviewed order for accuracy and saved to client's file; updated client calendar	0.10

Exhibit A

		<u>Hours</u>
3/23/2018	ME Reviewed draft 30b letter for proofreading purposes	0.10
3/23/2018	AD Made final edits to 30(b) notice; e-filed notice; updated client calendar for follow up	0.20
3/23/2018	AD Reviewed Federal Circuit order denying petition for recon/en banc review; prepared draft of 30(b) letter advising court of Federal Circuit Order	0.70
3/29/2018	AD Received email from court with order lifting stay and directing parties to file supplemental pleadings; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
4/2/2018	AD Conducted reasearch of case law pertaining to M21	2.60
4/3/2018	AD Researched case law governing nature of agency action	1.60
4/6/2018	AD Researched regulations and case law pertaining to presumptions	0.70
4/9/2018	AD Drafted response to court's supplemental briefing order	1.40
4/10/2018	AD Drafted first portion of supplemental pleading	2.30
4/10/2018	AD Continued drafting first portion of supplemental pleading	2.70
4/11/2018	AD Drafted second and third portions of supplemental pleading	3.00
4/11/2018	AD Continued drafting second and third portions of supplemental pleading	3.50

Exhibit A

			<u>Hours</u>
4/12/2018	BJC	Reviewed supplemental pleading and made minor edits prior to filing	0.30
4/12/2018	AD	Made final revisions and edits to draft of supplemental pleading; conducted final proofread; e-filed pleading; updated client file	1.10
4/12/2018	AD	Completed draft of supplemental pleading	2.50
4/12/2018	AD	Made additional revisions to draft supplemental pleading	3.00
4/12/2018	AD	Made additions to supplemental pleading	3.00
4/13/2018	AD	Received email from court with VA counsel's supplemental pleading; reviewed arguments in pleading; saved document to client's file	0.30
4/27/2018	AD	Called client to notify of oral argument; documented call in client's file	0.10
4/27/2018	AD	Received email from court with order scheduling oral argument; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
5/8/2018	AD	Received emails from court with VA counsel's motion for leave to file amended record of proceedings and amended ROP; reviewed documents for accuracy and saved to client's file; updated client calendar	0.10
5/15/2018	AD	Received emails from court with judge's stamp granting VA counsel's motion for leave to file amended ROP and amended ROP; reviewed grant for accuracy and saved to client's file; updated client calendar	0.10

Exhibit A

		<u>Hours</u>
5/22/2018 AD	Reviewed amended record of proceedings against original record of proceedings; prepared and e-filed response to record of proceedings; updated client file	0.20
5/31/2018 BH	Reviewed Board decision, opening Br., Sec.'s Br., Reply and both supplemental briefs in preparation to be second chair at oral argument.	1.20
6/1/2018 BH	Prepared and filed notice of appearance. Updated file.	0.10
6/1/2018 BH	Legal research into substantive rules per circulars and M-21, including McGinty v. Brown and Ennis v. Brown in preparation for oral argument.	0.40
6/4/2018 AD	Received email from court with order revoking scheduling of oral argument; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
7/17/2018 AD	Received emails from court with order scheduling oral argument and VA counsel's notice of appearance; reviewed documents for accuracy and saved to client's file; updated client calendar	0.20
7/31/2018 AD	Called client to provide status update; no answer; updated client calendar for follow up call	0.10
8/1/2018 AD	Provided status update and discussed upcoming oral argument substance and procedure with client; documented call in client's file	0.30
8/1/2018 BH	Case strategy discussion in preparation for oral argument.	0.30
8/1/2018 AD	Reviewed supplemental pleadings to prepare for preliminary oral argument discussion	0.50

Exhibit A

			<u>Hours</u>
8/3/2018 AD	Researched case law governing distinction between substantive and interpretive rules		1.10
8/6/2018 AD	Researched federal register and case law regarding substantive vs. procedural rules		1.30
8/7/2018 BH	Review of all pleadings and case strategy meeting in preparation for oral argument walkthrough.		0.80
8/7/2018 AD	Reviewed research and pleadings in preparation to discuss preliminary oral argument outline		1.00
8/7/2018 AD	Organized research materials, record of proceedings, and pleadings into preliminary oral argument binder		1.00
8/8/2018 BH	Case strategy walkthrough in preparation for oral argument.		0.40
8/8/2018 AD	Reviewed record of proceedings and preliminary argument outline in preparation for walk through of oral argument; held walkthrough and discussion		1.00
8/8/2018 ZMS	Reviewed pleadings and notes on case, took notes to improve oral argument strategy. Conducted legal research on recent Gray and DAV matters to possible include in oral argument. Participated in oral argument walk through		2.50
8/10/2018 AD	Organized westlaw research into folders by subject; researched case law governing agency characterization of its action and requirements for agency action to have force and effect of law		2.70
8/28/2018 BH	Research regarding points to emphasize to CAVC during oral argument regarding the non-m21 arguments. Scoured record, developed approach		1.00

Exhibit A

			<u>Hours</u>
8/29/2018	BJC	Review pleadings in preparation for first moot to develop possible questions to be asked during argument.	0.30
8/29/2018	BJC	First moot held, asked potential questions to be asked at oral argument	1.50
8/29/2018	BH	Participated in first oral argument moot as second chair	1.50
9/4/2018	ZMS	Reviewed 30(b) letter for proofreading purposes	0.60
9/4/2018	AD	Prepared draft submission of supplemental authorities under rule 30(b)	1.80
9/6/2018	AD	Began preparing table of substantive vs interpretive provisions	0.60
9/7/2018	BH	Participated in second oral argument moot as second chair. Made arguments as opposing counsel.	1.00
9/7/2018	AD	Prepared for and held second moot oral argument and discussion	2.70
9/10/2018	BH	Travel from home to hotel for oral argument as second chair.	2.20
9/17/2018	AD	Called client to provide status update; updated client file	0.10
9/17/2018	AD	Discussed oral argument with client; documented call in client's file	0.10
9/19/2018	BH	Oral argument at CAVC, sitting second chair.	2.30
9/19/2018	BH	Travel from DC to home from oral argument.	2.30

Exhibit A

	<u>Amount</u>
	116.60 \$23,207.19
Expenses	
Airfare for oral argument - AD	193.98
Airfare for Oral Argument - BH	158.97
Filing Fee	50.00
Hotel - Oral Argument - AD	322.60
Hotel - Oral Argument - BH	385.71
Total Expenses	<u>\$1,111.26</u>

	<u>Amount</u>
	116.60 \$24,318.45

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
April Donahower	94.50	199.16	\$18,820.74
Barbara J. Cook	2.40	192.91	\$462.98
Bradley Hennings	13.50	199.16	\$2,688.66
Christian McTarnaghan	1.30	199.16	\$258.91
Danielle M. Gorini	0.10	199.16	\$19.92
Jenna Zellmer	0.90	199.16	\$179.24
Megan Ellis	0.10	199.16	\$19.92
Nicholas Phinney	0.60	199.16	\$119.50
Zachary M. Stolz	3.20	199.16	\$637.32

Exhibit A

Time from 10/1/2018 to 2/27/2019

Case No. 236133

Client: Tolliver, Ms. Cathie

			<u>Hours</u>
11/8/2018	APRIL	Received email from court reassigning case from panel to single judge; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
11/21/2018	APRIL	Received email from court with memorandum decision; reviewed decision against issues argued; drafted and distributed summary of decision to co-counsel; updated client calendar	0.30
11/25/2018	ZACH	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
11/28/2018	APRIL	Called client to discuss court's decision; answered client questions; documented call in client's file	0.30
12/13/2018	APRIL	Received email from court with order entering judgment; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
12/14/2018	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.30
1/23/2019	APRIL	Received phone call from client; provided status update	0.20
2/12/2019	APRIL	Received email from court with order entering mandate; reviewed order for accuracy and saved to client's file; called client to discuss entry of mandate; left voice mail requesting call back; updated client calendar	0.10
2/14/2019	APRIL	Received phone call from client; provided status update and answered client questions; sent follow-up email	0.30
2/27/2019	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
2/27/2019	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.50
2/27/2019	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>
APRIL	1.40	\$ 199.16	\$ 278.82
DANIELLE	1.70	\$ 199.16	\$ 338.57
ZACH	1.50	\$ 199.16	\$ 298.74
Totals:	4.60		\$ 916.14

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. Holzmänn*, 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).