

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT L. MARTIN	)	
Appellant,	)	
	)	
v.	)	CAVC No. 17-2773
	)	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 **\$15,440.64.**

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 failure to provide an adequate statement of reasons or bases. See pages 1-5 of the JMR. The mandate was issued on February 22, 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. Martin 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. Martin 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 Elcyzyn*, 7 Vet. App. at 176-177).

Eleven attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Emma Peterson, Danielle M. Gorini, Nicholas Phinney, Jenna Zellmer, Amy Odom, Andrew Blais, Barbara Cook, Kevin Medeiros, April Donahower, Christian McTarnaghan, and Zachary Stolz.<sup>1</sup> Attorney Emma Peterson

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<sup>1</sup>"There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); *see also Baldridge v. Nicholson*, 19 Vet.App. 227, 237-38 (2005) ("the fees sought must be 'based on the distinct contribution of each individual

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.<sup>2</sup> Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$491.00 is the prevailing

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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 Baldridge*, 19 Vet.App. at 237 (“An application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct contribution of each counsel.”). The Exhibit A in this case is separated into two documents as our firm is transitioning to a new time keeping program beginning October 1, 2018.

<sup>2</sup>The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part by* 746 F.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).

market rate for an attorney with her experience. Nicholas Phinney graduated from Roger Williams University Law School in 2007 and the *Laffey* Matrix establishes that \$491.00 is the prevailing market rate for an attorney with his 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. 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. Andrew Blais graduated from Roger Williams University Law School in 2016 and the *Laffey* Matrix establishes that \$340.00 is the prevailing market rate for an attorney with his experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$613.00 is the prevailing market rate for an attorney with her experience. Kevin Medeiros graduated from Suffolk University Law School in 2015 and the *Laffey* Matrix establishes that \$351.00 is the prevailing market rate for an attorney with his experience. April Donahower graduated from Temple University Law School in 2013 and the *Laffey* Matrix establishes that \$358.00 is the prevailing market rate for an attorney with her 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. 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 \$203.22 per hour for Ms. Peterson, Ms. Gorini, Mr. Phinney, Ms. Zellmer, Mr. Blais, Mr. Medeiros, Ms. Donahower, Mr. McTarnaghan, and Mr. Stolz for representation services before the Court.<sup>3</sup> This rate per hour, multiplied by the number of hours billed for these

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<sup>3</sup> This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. See *Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to April 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.



eight attorneys (72.40) results in a total attorney's fee amount of \$14,713.04.

Appellant seeks attorney's fees at the rate of \$195.93 per hour for Ms. Cook's representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (0.50) results in a total attorney's fee amount of \$97.97.

Appellant seeks attorney's fees at the rate of \$199.65 per hour for Ms. Odom's representation services before the Court.<sup>5</sup> This rate per hour, multiplied by the number of hours billed for Ms. Odom (2.30) results in a total attorney's fee amount of \$459.20.

Appellant seeks attorney's fees at the rate of \$164.00 per hour for Ms.

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<sup>4</sup> This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Midwest and using the starting point 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 April 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elcyszyn v. Brown*, 7 Vet. App. 170, 181 (1994).

<sup>5</sup> This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for 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 April 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elcyszyn v. Brown*, 7 Vet. App. 170, 181 (1994).

Rowland's representation services before the Court. This rate per hour, multiplied by the number of hours billed for Ms. Rowland (0.70) results in a total attorney's fee amount of \$114.80.

In addition, Appellant seeks reimbursement for the following expenses:

Filing Fee: \$50.00

Postage: \$5.63

Based upon the foregoing, the total fee amount sought is **\$15,440.64.**

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,  
Robert L. Martin  
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>
7/21/2017 EP	Reviewed Board decision and provided a recommendation for an appeal to Court.	0.30
8/23/2017 DMG	Reviewed and filed appeal documents. Filed Notice of Appeal, Notice of Appearance for Zachary Stolz as lead counsel, and Fee Agreement. Updated case information and case file.	0.20
8/24/2017 DMG	Reviewed docketed appeal documents and ensured proper filing and docketing. Updated file.	0.10
8/29/2017 AD	Prepared and e-filed notice of appearance; updated client file	0.10
9/7/2017 AB	Prepare and e-file Notice of Appearance. Update file.	0.10
9/21/2017 AB	Review the BVA decision transmittal and Decision. Update files.	0.10
10/19/2017 AB	Received and reviewed VA Attorney Notice of Appearance. Update file.	0.10
10/20/2017 AB	Received and reviewed for accuracy RBA Certificate of Service. Update file.	0.10
10/23/2017 AB	Received and reviewed notice that the RBA was received and uploaded. Ensured correct BVA decision was included and noted length. Updated file accordingly.	0.10
10/27/2017 NP	Reviewed RBA to determine need for dispute	0.80
11/7/2017 NP	Email from VA atty. re: RBA; emailed reply	0.10

## Exhibit A

			<u>Hours</u>
11/7/2017 NP	Drafted & filed appearance & motion to dispute RBA		0.20
11/14/2017 NP	Reviewed amended RBA; drafted & filed supplemental response		0.40
11/14/2017 AB	Received and reviewed Notice to file Brief within 60 days. Calculate brief due date. Update file accordingly.		0.10
11/22/2017 AB	Draft status letter to the client.		0.10
12/6/2017 AB	Receive and review for accuracy PBC Order. Calculate memo due date. Update file.		0.10
1/17/2018 AB	Outline PBC Memorandum.		0.90
1/18/2018 AB	Finalize PBC Memorandum. Email PBC Memorandum to CLS and OGC. Prepared and file Rule 33 Certification of Service. Update file accordingly.		0.20
1/18/2018 AB	Complete further edits to PBC Memorandum.		0.70
1/18/2018 AD	Reviewed BVA decision for legal errors; reviewed draft PBC memo for legal and factual accuracy and suggested edits		1.00
1/18/2018 AB	Edited memo		1.70
1/18/2018 AB	Draft PBC Memorandum.		2.70
2/1/2018 AB	Speak with VA attorney regarding case. Update team and file accordingly.		0.20
2/1/2018 AB	Participate in PBC. Update file accordingly.		0.50

## Exhibit A

			<u>Hours</u>
2/1/2018 AB	Prepare for PBC.		0.60
2/5/2018 AB	Call client. Update file accordingly.		0.20
2/20/2018 AB	Receive, review, and respond to VA attorney email re: stay. Update file accordingly.		0.10
2/28/2018 AB	Outline and draft Opposition to VA's Motion to Stay Pending Ward.		0.90
3/2/2018 AD	Reviewed draft opposition to VA counsel's motion for stay of proceedings for legal and factual accuracy; suggested revisions and edits		0.40
3/2/2018 AB	Implement edits to Opposition to Stay. Finalize and file Opposition.		0.60
3/7/2018 AB	Receive and review Court order denying VA's Motion to Stay the case. Updated file accordingly.		0.10
4/9/2018 AB	Begin drafting outline of Opening Brief argument.		1.10
4/10/2018 AB	Complete outline for Opening Brief.		0.40
4/18/2018 AB	Review record and case map for briefing purposes pgs. 1 - 1255.		1.00
4/18/2018 AB	Review record and case map for briefing purposes pages 1256 - End.		1.30
4/19/2018 ER	Reviewed Brief for proofreading purposes and corrected typos and grammatical errors		0.70
4/19/2018 AB	Made final revisions to brief, checked citations to record and authority, and e-filed.		0.70

## Exhibit A

		<u>Hours</u>
4/19/2018	CM	Review pages 8 through the end of the opening brief for legal accuracy. Suggest adding NAS update argumentt.
4/19/2018	AB	Begin editing opening brief
4/19/2018	AB	Complete draft of Opening Brief.
4/19/2018	AB	Draft Argument section of Opening Brief.
4/20/2018	AB	Spoke with Veteran. Updated file accordingly.
5/7/2018	KM	Prepared and e-filed notice of appearance; reviewed case status and issues on appeal; updated file.
6/14/2018	KM	Received, reviewed, and responded to VA counsel's request for position on motion for extension of time to file brief; updated file.
6/14/2018	KM	Received notice of VA counsel's filing of motion for extension of time to file brief; reviewed motion for accuracy and content; updated client's file.
6/15/2018	KM	Received and reviewed Court order granting VA counsel's motion for extension of time to file brief for accuracy; updated file.
8/8/2018	KM	Received notice of filing of Appellee brief; reviewed brief for accuracy; updated file and filing deadline calendars.
8/14/2018	KM	Veteran called to discuss VA's brief; memo to file.
8/14/2018	KM	Conducted initial review of Appellee brief to determine review track/need for enhanced review; memo to file.

# Exhibit A

		<u>Hours</u>
9/12/2018 KM	Reviewed VA's brief against opening brief, BVA decision, and relevant VA examination; outlined VA's brief; and prepared outline of reply brief arguments.	1.70
9/21/2018 KM	Continued draft of reply brief; completed legal research and began argument section re: permanent worsening.	1.20
9/21/2018 KM	Began draft of reply brief; completed argument sections re: reasons or bases and DTA re: VAO update; began legal research regarding Secretary's argument re: permanent worsening.	3.00
9/24/2018 KM	Continued and completed draft of reply brief; completed argument re: permanent worsening and conclusion section; conducted initial review for accuracy of spelling, grammar, legal, and record citations; made all necessary revisions.	1.70
9/28/2018 AD	Reviewed draft reply brief for legal and factual accuracy; suggested revisions and edits	1.60
		<u>Amount</u>
		35.50 \$7,186.78
Expenses		
Filing Fee		50.00
Postage		5.63
Total Expenses		<u>\$55.63</u>
		<u>Amount</u>
		35.50 \$7,242.41

## Exhibit A

### Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Andrew Blais	20.10	203.22	\$4,084.68
April Donahower	3.10	203.22	\$629.98
Christian McTarnaghan	0.90	203.22	\$182.90
Danielle M. Gorini	0.30	203.22	\$60.96
Elizabeth Rowland	0.70	164.00	\$114.80
Emma Peterson	0.30	203.22	\$60.97
Kevin Medeiros	8.60	203.22	\$1,747.66
Nicholas Phinney	1.50	203.22	\$304.83



# Exhibit A

Time from 10/1/2018 to 3/6/2019

**Case No. 252708**

**Client: Martin, Mr. Robert L.**

			<b><u>Hours</u></b>
10/1/2018	KEVIN	Received notice of VA counsel's filing of ROP; reviewed for accuracy; and updated file.	0.10
10/1/2018	KEVIN	Final revisions to reply brief, checked citations to record and authority, and e-filed.	0.60
10/2/2018	KEVIN	Reviewed ROP to ensure inclusion of all records cited in opening, VA, and reply briefs; prepared letter to Court accepting ROP and e-filed; received and reviewed confirmation of filing for accuracy; updated file.	0.50
10/3/2018	KEVIN	Received and reviewed notice of assignment of case to Judge Falvey for accuracy; updated file.	0.10
11/7/2018	KEVIN	Received notice from Court of case called to panel for decision; reviewed order and updated file; drafted e-mail to team summarizing case and likely issues for panel; updated file.	0.40
11/7/2018	KEVIN	Reviewed pleadings and prepared draft of motion for oral argument; e-mailed VA counsel for Secretary's position on motion; updated file.	1.40
11/8/2018	JENNA	Reviewed and suggested edits to Kevin's motion for oral argument	0.20
11/8/2018	KEVIN	Edited motion for oral argument - removing permanent worsening issue and adding single-judge dispositions	0.90
11/8/2018	KEVIN	Follow up e-mail to VA counsel for position of motion for oral argument, and position on motion for leave to file motion for OA out of time; updated file.	0.10
11/13/2018	KEVIN	Reviewed and finalized motion for oral argument; e-filed; updated file.	0.40
11/13/2018	KEVIN	Received and reviewed Secretary's positions on motions for leave and oral argument; updated file	0.10
11/16/2018	KEVIN	Received and reviewed Court order granting motion for oral argument; and updated file.	0.10
12/6/2018	KEVIN	Prepared draft of motion to submit supplemental pleadings.	0.90
12/7/2018	BARBARA	Review and edit motion to file supp pleading	0.30
12/10/2018	AODOM	Prepared and filed notice of appearance; updated file.	0.10
12/13/2018	KEVIN	Finalized motion for supplemental pleadings; e-filed motion and received confirmation of filing; reviewed for accuracy and updated file.	0.30
12/13/2018	KEVIN	prepared edits for permission to file a supplemental pleading; e-mailed VA counsel for position and updated file upon receipt of response.	0.30
12/20/2018	KEVIN	Received Court order scheduling oral argument; reviewed for accuracy and updated file; drafted memo to file re: oral argument order.	0.20
1/3/2019	KEVIN	Received Court order granting motion for supplemental pleadings; reviewed for accuracy and content; drafted memo to file re: order and next steps; updated file.	0.30
1/8/2019	ZACH	Email exchange with Clerk of Court concerning oral argument reschedule.	0.10
1/9/2019	KEVIN	Prepared status letter to client with Court's orders and post-brief pleadings as enclosures explaining panel, oral argument, and process.	0.60
1/15/2019	KEVIN	Continued legal research re: Court's supplemental pleading order.	3.00
1/15/2019	KEVIN	Began legal research re: Court's supplemental pleading order.	3.00
1/16/2019	KEVIN	Continued legal research and began drafting supplemental brief.	3.00
1/16/2019	KEVIN	Continued drafting supplemental brief.	3.00
1/18/2019	KEVIN	Received and reviewed order replacing Judge Pietsch with Chief Judge Davis for accuracy and content; updated file.	0.10
1/22/2019	AODOM	Reviewed draft supplemental brief, and prepared edits.	2.20
1/23/2019	KEVIN	Made final edits to supplemental pleading	0.60
1/23/2019	KEVIN	Continued editing supplemental pleading.	1.10
1/23/2019	KEVIN	e-filed supplemental pleading; updated file.	0.10

# Exhibit A

Time from 10/1/2018 to 3/6/2019

**Case No. 252708**

**Client: Martin, Mr. Robert L.**

			<u>Hours</u>
1/23/2019	KEVIN	began revising supplement brief	3.00
1/24/2019	KEVIN	Phone call with Veteran to discuss case developments and next steps re: OA; memo to file.	0.60
1/24/2019	KEVIN	Prepared explanatory letter with supplemental pleading enclosure for client; updated file.	0.20
2/7/2019	KEVIN	Received and reviewed VA counsel's motion for extension of time to file supplemental pleading for accuracy and content; updated file.	0.10
2/7/2019	KEVIN	Phone call with VA counsel re: position on motion for extension for VA to file supplemental pleading; updated file.	0.10
2/11/2019	KEVIN	Received Court order granting VA counsel's motion for ext to file supp pleading and reviewed for accuracy; updated file.	0.10
2/12/2019	BARBARA	review 30(b) letter and suggest edits	0.20
2/12/2019	KEVIN	Edited to 30(b); e-filed 30(b) with attachment; updated file.	0.60
2/12/2019	KEVIN	Phone call from VA counsel re: remand offer; drafted memo to file re: remand offer; updated file.	0.30
2/12/2019	KEVIN	Reviewed relevant purple book provision; e-mailed VA counsel re: intent to file 30(b); and prepared draft of 30(b).	1.60
2/12/2019	KEVIN	Phone call with VA counsel re: position on stay; memo to file about discussion; updated file.	0.40
2/12/2019	KEVIN	E-mail correspondence with VA counsel re: timeline for JMR draft; memo to file; updated file.	0.10
2/13/2019	KEVIN	Discussed case/JMR strategy with with client.	0.90
2/13/2019	KEVIN	Received and reviewed VA counsel's motion to stay for accuracy and content; updated file.	0.10
2/13/2019	KEVIN	Received and reviewed Court order granting VA counsel's motion to stay for accuracy and content; updated file.	0.10
2/13/2019	ZACH	Telephone conversation with Carolyn Washington in advance of joint stipulation language being sent to appellant's counsel.	0.40
2/13/2019	ZACH	Reviewed entire record and pleadings. Conducted legal research on binding nature of JMRs and other Court orders given the policy implications of this case.	3.00
2/14/2019	KEVIN	Received e-mail from VA counsel serving draft JMR; reviewed draft for accuracy; updated client's case file.	0.10
2/14/2019	KEVIN	Series of e-mail correspondence with VA counsel re: JMPR and settlement.	0.20
2/15/2019	APRIL	Reviewed draft JMR for Kevin; suggested edits for clarity/citation accuracy	0.40
2/15/2019	KEVIN	Edited JMPR draft; e-mailed VA counsel draft for review.	0.20
2/15/2019	KEVIN	Received and reviewed e-mail from VA counsel re: aggravation language; reviewed case notes	0.40
2/15/2019	KEVIN	Edited draft JMPR aggravation section and e-mailed VA counsel updated draft for review.	0.10
2/15/2019	KEVIN	Phone call with Veteran to discuss remand offer and next steps; reviewed JMPR for accuracy and content; made necessary revisions; updated file.	1.20
2/19/2019	KEVIN	Received final draft JMPR from VA counsel and reviewed for accuracy and content; updated file.	0.20
2/19/2019	KEVIN	Received and reviewed Appellee's Notice of Appearance for accuracy, reviewed docket, and updated file.	0.10
2/19/2019	KEVIN	Received and reviewed court e-mail with notice of Appellee's e-filing of the JMR; reviewed VA's e-filed motion for accuracy; updated client's case file.	0.10
2/22/2019	KEVIN	Received and reviewed court e-mail with order granting JMR; reviewed court's order for accuracy and content; received and reviewed court e-mail with mandate for accuracy; updated client's case file.	0.10
3/6/2019	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

# Exhibit A

Time from 10/1/2018 to 3/6/2019

**Case No. 252708**

**Client: Martin, Mr. Robert L.**

			<u><b>Hours</b></u>
3/6/2019	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	0.90
3/6/2019	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.30

## Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
AODOM	<b>2.30</b>	<b>\$ 199.65</b>	<b>\$ 459.20</b>
APRIL	<b>0.40</b>	<b>\$ 203.22</b>	<b>\$ 81.29</b>
BARBARA	<b>0.50</b>	<b>\$ 195.93</b>	<b>\$ 97.97</b>
DANIELLE	<b>1.10</b>	<b>\$ 203.22</b>	<b>\$ 223.54</b>
JENNA	<b>0.20</b>	<b>\$ 203.22</b>	<b>\$ 40.64</b>
KEVIN	<b>32.10</b>	<b>\$ 203.22</b>	<b>\$ 6,523.36</b>
ZACH	<b>3.80</b>	<b>\$ 203.22</b>	<b>\$ 772.24</b>
<b>Totals:</b>	<b>40.40</b>		<b>\$ 8,198.23</b>

## 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. Holzmahn*, 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).