

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

| | | |
|-------------------|---|------------------|
| KATIE DEMERY |) | |
| Appellant, |) | |
| |) | |
| v. |) | CAVC No. 17-3469 |
| |) | EAJA |
| |) | |
| ROBERT L. WILKIE, |) | |
| SECRETARY OF |) | |
| VETERANS AFFAIRS, |) | |
| Appellee |) | |

APPELLANT'S APPLICATION FOR AN
AWARD OF ATTORNEYS FEES AND EXPENSES
PURSUANT TO 28 U.S.C. 2412(d)

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$24,043.06**.

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 to determine whether the Notice of Appeal was valid, whether the Court had jurisdiction over the appeal, and whether there was a live case or controversy to be decided, the Court granted the motion for leave to amend or supplement the Notice of Appeal and amended the case caption to reflect the appellant as Katie Demery. Subsequently, 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 July 29, 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. Demery 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. Demery 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 *Elczynyn*, 7 Vet. App. at 176-177).

Six attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Nicholas Phinney, Danielle M. Gorini, Christian McTarnaghan, Amy Odom, Barbara Cook, and Zachary Stolz.¹ Attorney 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.² Danielle Gorini graduated from Roger Williams University Law

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 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

School in 2005 and the *Laffey* Matrix establishes that \$491.00 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. 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. 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.

Dalton Chapman is a paralegal for the law firm of Chisholm Chisholm & Kilpatrick who worked on this case. The Court has found that "the Laffey Matrix

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).

. . . is a reliable indicator of fees and is far more indicative of the prevailing market rate in the jurisdiction, particularly as to cases involving fees to be paid by government entities" *Wilson v. Principi*, 16 Vet.App. 509, 513 (2002). The U.S. Supreme Court in *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 590 (2008), held "...that a prevailing party that satisfies EAJA other requirements may recover its paralegal fees from the Government at prevailing market rates." According to the Laffey Matrix, the prevailing market rate for paralegals from June 1, 2016 and after is \$166.00 per hour. Therefore, Appellant seeks fees at the rate of \$166.00 per hour for representation services before the Court for Mr. Chapman's time as a paralegal.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$207.41 per hour for Mr. Phinney, Ms. Gorini, Mr. McTarnaghan, and Mr. Stolz for representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for these four attorneys (62.90) results in a total attorney's fee amount of \$13,046.07.

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 July 2019 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).

Appellant seeks attorney's fees at the rate of \$196.35 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 (11.40) results in a total attorney's fee amount of \$2,238.41.

Appellant seeks attorney's fees at the rate of \$204.21 per hour for Ms. Odom's representation services before the Court.⁵ This rate per hour, multiplied by the number of hours billed for Ms. Odom (32.00) results in a total attorney's fee amount of \$6,534.72.

Appellant seeks attorney's fees at the rate of \$166.00 per hour for Mr.

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 the Midwest and using the starting point as determined by the Consumer Price Index-U for the Midwest. *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 July 2019 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). This rate is not an indication of counsel's view of the merits as to the rate in *Bradley v. Wilkie*, 17-3797.

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 July 2019 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).

Chapman's representation services before the Court. This rate per hour, multiplied by the number of hours billed for Mr. Chapman (3.60) results in a total attorney's fee amount of \$597.60.

In addition, Appellant seeks reimbursement for the following expenses:

| | |
|---|----------|
| Filing Fee: | \$50.00 |
| Federal Express: | \$50.94 |
| Postage: | \$21.98 |
| Airfare to and from Oral Argument – AO: | \$176.40 |
| Airfare to and from Oral Argument – CM: | \$266.52 |
| Hotel in Tampa, FL – AO: | \$627.61 |
| Hotel in Tampa, FL – CM: | \$242.40 |
| Travel in Tampa, FL - CM: | \$190.41 |

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$24,043.06**.

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,
Katie Demery
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> |
|---------------|--|--------------|
| 7/7/2017 NP | Reviewed BVA decision; made recommendation to accept case for appeal. | 0.60 |
| 10/30/2017 NP | Reaerched obtaining death certificates from Arkansas Govt. | 0.20 |
| 10/30/2017 NP | Reviewed file and appeal documents and docket for appeal. Filed Notice of appearance for Zachary Stolz as lead counsel, and Fee Agreement with the Court. Updated case file. | 0.20 |
| 10/30/2017 NP | Drafted & filed appearance & notice of death | 0.20 |
| 11/13/2017 NP | Received & reviewed Court order re: Vet's death; updated client file | 0.10 |
| 11/22/2017 NP | Recacted death cert; drafted motion for sub; emailed VA atty. re: motion for sub | 0.80 |
| 11/27/2017 NP | Called client's widow re: motion to sub & drafted letter to her commemorating conversarion | 0.40 |
| 11/28/2017 NP | Email from VA atty. re: substitution; emailed reply; finalized & filed motion to substitute party | 0.40 |
| 12/4/2017 NP | Call from Veteran's widow re: accrued benefits | 0.10 |
| 1/5/2018 NP | Received & reviewed VA's response to motion for sub; updated client file | 0.10 |
| 1/17/2018 NP | Drafted response to Court's Order | 1.30 |
| 1/24/2018 NP | Finalized & filed response to Court order | 0.20 |
| 1/24/2018 NP | Discussed response to Court order with ZMS; edited draft response per discussion | 0.30 |

Exhibit A

| | | <u>Hours</u> |
|---------------|--|--------------|
| 1/24/2018 ZMS | Conducted legal research concerning substitution at the agency and Court. Suggested revisions to response to Court order. Approved for filing. | 2.00 |
| 3/23/2018 NP | Received & reviewed Court's order re: motion for sub; updated client file | 0.10 |
| 4/5/2018 NP | Received & reviewed VA's latest response to Court order re: sub; updated client file | 0.10 |
| 4/11/2018 NP | Reviewed Court's order for supplemental memo; reviewed file re: same; updated client file | 0.50 |
| 4/11/2018 NP | Research for supplemental brief re: substitution | 0.80 |
| 4/11/2018 NP | Research for supplemental brief re: Court's jurisdiction | 3.00 |
| 4/12/2018 NP | Research re: zone of substitution for supplemental brief | 0.60 |
| 4/13/2018 NP | Reviewed notes in file to ascertain course of appeal to prepare for writing supplemental brief | 0.40 |
| 4/13/2018 NP | Wrote next 1.4 pages of supplemental brief | 1.30 |
| 4/13/2018 NP | Research on statutory jurisdictional limits of protective appeals for supplemental brief | 2.00 |
| 4/13/2018 NP | Research re: definition of pending for appeal purposes for supplemental brief | 2.30 |
| 4/13/2018 NP | Wrote first 2.3 pages of supplemental brief | 3.00 |
| 4/14/2018 NP | Wrote last 1.6 pages of supplemental brief | 2.20 |
| 4/18/2018 NP | Edited supplemental brief | 1.00 |

Exhibit A

| | | <u>Hours</u> |
|---------------|---|--------------|
| 4/19/2018 NP | Call from VA atty. re: supplemental memo; emailed reply; received and reviewed follow up email & emailed response | 0.30 |
| 4/19/2018 ZMS | Reviewed draft of response done by Nick Phinney. Conducted legal research on case or controversies. Made suggestions for significant edits to response. | 3.00 |
| 4/20/2018 NP | Reviewed VA's motion for extension as filed; updated file. | 0.10 |
| 4/20/2018 NP | Received and reviewed email & listened to voicemail from VA atty. re: supplemental brief; emailed reply | 0.20 |
| 5/6/2018 BJC | Begin to draft response to court order | 1.60 |
| 5/7/2018 BJC | Add court rule about content of NOA to supplemental pleading | 0.30 |
| 5/7/2018 BJC | complete draft of response to Court order: organize and add details from Breedlove, find case on standing, explain why client has standing and Court has jurisdiction | 3.00 |
| 5/7/2018 NP | Emailed VA atty. re: supplemental brief | 0.20 |
| 5/8/2018 BJC | review and make additional edits for clarity and grammar to draft response | 0.40 |
| 5/8/2018 BJC | Amend the drafts with revised caption | 0.40 |
| 5/8/2018 BJC | draft affidavit based on review of case notes | 0.50 |
| 5/8/2018 BJC | add Burris to pleading | 0.70 |

Exhibit A

| | | <u>Hours</u> | |
|-----------|-----|--|------|
| 5/8/2018 | BJC | draft motion to amend NOA | 1.20 |
| 5/8/2018 | NP | Emailed VA atty. re: motion to amend NOA; received and reviewed response; emailed reply | 0.20 |
| 5/8/2018 | ZMS | Reviewed response, motion to file NOA out of time and affidavit. Conducted legal research on substitution and jurisdiction. Offered revisions and additions to response. | 3.00 |
| 5/9/2018 | BJC | prepare and file appearance; updated file. | 0.10 |
| 5/9/2018 | BJC | add more detail re: Lauigan, reorganize response | 0.40 |
| 5/9/2018 | BJC | research cases with FRC, add to both motion and response, and add and clarify Burriss, and Padgett | 2.60 |
| 5/9/2018 | NP | Emailed VA atty. re: motion to amend | 0.10 |
| 5/9/2018 | NP | Received and reviewed email with VA's supplemental brief; updated client file | 0.10 |
| 5/9/2018 | NP | Discussed motion to amend with VA atty.; note to file re: summary of conversation | 0.20 |
| 5/9/2018 | ZMS | Reviewed latest versions of pleadings. Finalized and filed with Court. | 2.20 |
| 5/11/2018 | ZMS | Reviewed Court Order for telephone conference. Called Judge Allen's chambers. | 0.20 |
| 5/17/2018 | NP | Call to client re: judge's conference | 0.10 |
| 5/17/2018 | ZMS | Reviewed pleadings and legal research in preparation for phone call with VA and Judge Allen. Participated in phone call. | 1.00 |

Exhibit A

| | | <u>Hours</u> | |
|-----------|-----|--|------|
| 5/22/2018 | NP | Drafted motion for oral argument | 0.80 |
| 5/25/2018 | BJC | change motion to show she is neither a party nor the appellant | 0.20 |
| 5/25/2018 | ZMS | Edited motion for oral argument and filed with Court. | 0.70 |
| 8/10/2018 | NP | Follow up call from Mrs. Demery re: substitution | 0.10 |
| 8/10/2018 | NP | Call with Mrs. Demery re: status of case | 0.20 |
| 8/16/2018 | NP | Drafted letter to client re: accrued benefits claim | 0.40 |
| 8/16/2018 | NP | Reviewed VBMS file & notes in file re: motion for sub/accrued benefits; memo to file | 0.60 |
| 9/6/2018 | AO | Prepare and file Notice of Appearance; update file. | 0.10 |
| 9/20/2018 | NP | Call from Mrs. Demery; drafted letter to Mrs. Demery; memo to file | 0.50 |

| <u>Amount</u> |
|---------------|
| 49.90 |
| \$10,223.34 |

Expenses

| | |
|--------------------------------|--------|
| Airfare for Oral Argument - AO | 176.40 |
| Airfare for Oral Argument - CM | 266.52 |
| Federal Express | 50.94 |
| Filing Fee | 50.00 |

Exhibit A

| | <u>Amount</u> |
|------------------------------|---------------------------------|
| Hotel for oral argument - AO | 627.61 |
| Hotel for oral argument - CM | 242.40 |
| Postage | 21.98 |
| Travel for Oral Arg - CM | 190.41 |
| Total Expenses | <u>\$1,626.26</u> |
| | <u>49.90</u> <u>\$11,849.60</u> |

Timekeeper Summary

| <u>Name</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|------------------|--------------|-------------|---------------|
| Amy Odom | 0.10 | 204.21 | \$20.42 |
| Barbara J. Cook | 11.40 | 196.35 | \$2,238.41 |
| Nicholas Phinney | 26.30 | 207.41 | \$5,454.85 |
| Zachary M. Stolz | 12.10 | 207.41 | \$2,509.66 |

8/2/2019

Exhibit A

Time from 10/1/2018 to 8/2/2019

Case No. 254044**Client: Demery, Mrs. Katie**

| | | | <u>Hours</u> |
|------------|-------|--|--------------|
| 10/3/2018 | AODOM | Receive and review OGC notice of appearance; update file regarding same. | 0.10 |
| 10/9/2018 | AODOM | Email OGC regarding status of appeal; update file. | 0.10 |
| 10/11/2018 | NICK | Reviewed client's VBMS file | 0.20 |
| 10/11/2018 | NICK | Reviewed notes in file to prepare to view VBMS file | 0.10 |
| 10/22/2018 | AODOM | Review notes to file in preparation for oral argument; telephone conference with client regarding status of appeal. | 0.90 |
| 10/23/2018 | AODOM | Review pleadings, participate in conference regarding issues to raise during oral argument, and prepare notes to file regarding same. | 2.30 |
| 10/23/2018 | AODOM | Telephone conference with client regarding NOD. | 0.20 |
| 10/23/2018 | AODOM | Review NOD | 0.20 |
| 10/23/2018 | CMC | Participate in walkthrough of oral argument. | 1.00 |
| 10/23/2018 | CMC | Review pleadings in preparation of walkthrough for oral argument | 1.20 |
| 10/23/2018 | ZACH | Prepared for and participate in walk through of oral argument. Reviewed relevant cases and helped to outline oral argument strategy. | 2.00 |
| 10/24/2018 | AODOM | Draft oral argument intro and talking points in preparation for moot court. | 1.00 |
| 10/24/2018 | AODOM | Add response to footnote in supplemental briefing order. | 0.30 |
| 10/24/2018 | AODOM | Prepare for and participate in moot court as lead counsel and post-moot conference. | 2.70 |
| 10/24/2018 | AODOM | Telephone conference with OGC re issues Secretary intends to raise during oral argument. | 0.10 |
| 10/24/2018 | CMC | Prepare for first moot. Participate in moot - acted as opposing counsel and posed potential arguments | 2.80 |
| 10/24/2018 | ZACH | Prepared for and participate in moot. Served as mock "judge" of oral argument court. Continued to review relevant case law, statutes, and regulations. | 3.00 |
| 10/25/2018 | AODOM | Reviewed pleadings and identified pleadings, statutes, regulations, rules, and case law to be included in oral argument notebooks. | 0.60 |
| 10/27/2018 | AODOM | Travel to Gulfport Florida for oral argument. | 5.00 |
| 10/28/2018 | AODOM | Review pleadings and pertinent law in preparation for oral argument. | 1.00 |
| 10/28/2018 | CMC | Travel from the airport in Tampa to the hotel in Tampa for Oral Argument | 0.50 |
| 10/28/2018 | CMC | Travel to Logan Airport for Oral Argument | 0.80 |
| 10/28/2018 | CMC | Flight from Boston to Tampa for Oral Argument | 3.00 |
| 10/29/2018 | AODOM | Post-argument recap for the file | 0.50 |
| 10/29/2018 | AODOM | Participate in oral argument. | 1.00 |
| 10/29/2018 | AODOM | Review materials and practice intro in preparation for oral argument. | 1.00 |
| 10/29/2018 | CMC | Travel to the hotel from the Oral Argument at Stetson Law School | 0.30 |
| 10/29/2018 | CMC | Travel to the Oral Argument at Stetson Law School from the hotel in Tampa | 0.30 |
| 10/29/2018 | CMC | Participate in oral argument as second chair. | 1.00 |
| 10/30/2018 | AODOM | Return travel from Gulfport Florida. | 5.00 |
| 10/30/2018 | CMC | Travel to the airport in Tampa from the hotel | 0.50 |
| 10/30/2018 | CMC | Travel from Logan Airport in Boston to home after Oral Argument | 0.80 |
| 10/30/2018 | CMC | Flight from Tampa to Boston | 3.00 |

Exhibit A

Time from 10/1/2018 to 8/2/2019

Case No. 254044

Client: Demery, Mrs. Katie

| | | | <u>Hours</u> |
|------------|----------|--|--------------|
| 10/31/2018 | AODOM | Telephone call with client regarding oral argument and status of appeal. | 0.10 |
| 10/31/2018 | AODOM | Reviewed signed NOD received from client. | 0.10 |
| 12/19/2018 | AODOM | Returned telephone call to client and answered client's questions. | 0.10 |
| 1/17/2019 | AODOM | Received and reviewed order granting motion to amend NOA; updated file. | 0.50 |
| 1/17/2019 | NICK | Reviewed per curiam decision re: validity of appeal & memo to file | 0.30 |
| 1/23/2019 | AODOM | Received and reviewed Court's Order dissolving panel; updated file. | 0.10 |
| 1/24/2019 | AODOM | Received and reviewed Court's Order amending 1/17 Order; calculated RBA deadline; updated file. | 0.20 |
| 1/24/2019 | AODOM | Telephone conference with client regarding panel's order and next steps. | 0.20 |
| 1/28/2019 | AODOM | Telephone conference with client to answer client's questions. | 0.10 |
| 1/29/2019 | AODOM | Received and reviewed notice of appearance filed by Secretary; updated file. | 0.10 |
| 2/5/2019 | AODOM | Received and reviewed RBA Notice; updated file. | 0.10 |
| 2/5/2019 | AODOM | Telephone conference with client regarding status of appeal. | 0.10 |
| 2/11/2019 | DCHAPMAN | Reviewed RBA to R1175 | 2.10 |
| 2/12/2019 | DCHAPMAN | Reviewed RBA for completeness | 1.50 |
| 2/19/2019 | AODOM | Returned client's phone call. | 0.10 |
| 2/25/2019 | AODOM | Telephone conference with client regarding VAMC treatment records dated 2013-2016. | 0.10 |
| 2/26/2019 | AODOM | Reviewed case notes regarding status of RBA and updated file. | 0.10 |
| 3/12/2019 | NICK | Drafted & filed motion to dispute RBA | 0.20 |
| 3/13/2019 | AODOM | Telephone call with client regarding status of appeal | 0.30 |
| 3/20/2019 | NICK | Received & reviewed order staying case; updated client file | 0.10 |
| 3/21/2019 | AODOM | Telephone conference with client regarding status of appeal. | 0.10 |
| 4/4/2019 | NICK | Received & reviewed VA's latest response to RBA dispute; updated client file | 0.10 |
| 4/16/2019 | AODOM | Telephone call with client regarding status of appeal. | 0.20 |
| 4/18/2019 | NICK | Received & reviewed VA's latest response to RBA dispute; updated client file | 0.10 |
| 4/30/2019 | NICK | Examined amended RBA to determine need to continue dispute; emailed VA atty. re: RBA | 0.70 |
| 5/3/2019 | AODOM | Prepared letter to client regarding status of appeal. | 0.10 |
| 5/3/2019 | AODOM | Received and reviewed Court's Order lifting stay and briefing notice; calculated brief due date; updated file. | 0.10 |
| 5/15/2019 | AODOM | Received and reviewed PBC Order; calculated deadline for memo; updated file. | 0.10 |
| 5/23/2019 | AODOM | Reviewed casenotes and returned client's call, answered client's questions regarding status of appeal, updated file. | 0.20 |
| 5/30/2019 | AODOM | Drafted PBC memo, redacted RBA excerpts, emailed VAGC and CLS, prepared and filed certificate of service, drafted letter to client regarding status of appeal and PBC. | 1.70 |
| 5/30/2019 | AODOM | Reviewed, analyzed, and casemapped RBA in preparation for drafting PBC memo. | 2.60 |
| 6/4/2019 | AODOM | Telephone conference with client, answered questions, prepared memo to file regarding same. | 0.20 |
| 6/13/2019 | AODOM | Prepared for and participated in PBC; memo to file regarding outcome of same. | 0.50 |

Exhibit A

Time from 10/1/2018 to 8/2/2019

Case No. 254044**Client: Demery, Mrs. Katie**

| | | | <u>Hours</u> |
|-----------|----------|--|--------------|
| 6/17/2019 | AODOM | Telephone conference with client regarding status of appeal and outcome of PBC; telephone call to client's daughter regarding client's request to speak to her; drafted and emailed consent form to client's daughter. | 0.50 |
| 6/18/2019 | AODOM | Telephone conference with client's daughter regarding status of appeal and bases for remand; updated file. | 0.30 |
| 6/28/2019 | AODOM | Returned client's call regarding status of appeal; memo to file regarding same. | 0.20 |
| 7/11/2019 | AODOM | Received and reviewed draft JMR, prepared edits to same. | 0.30 |
| 7/12/2019 | CMC | Review JMR. Review JMR offer. Suggest edits. | 0.30 |
| 7/15/2019 | AODOM | Reviewed final JMR; emailed VAGC attorney regarding same. | 0.20 |
| 7/15/2019 | AODOM | Received and reviewed JMR filed by VA to ensure accuracy; updated file. | 0.20 |
| 7/29/2019 | AODOM | Received and reviewed order granting JMR and Mandate; updated file. | 0.10 |
| 7/30/2019 | 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 |
| 7/30/2019 | DANIELLE | Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review. | 1.50 |
| 7/30/2019 | 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> |
|-----------------|--------------|------------------|---------------------|
| AODOM | 31.9 | \$ 204.21 | \$ 6,514.30 |
| CMC | 15.5 | \$ 207.41 | \$ 3,214.86 |
| DANIELLE | 1.7 | \$ 207.41 | \$ 352.60 |
| DCHAPMAN | 3.6 | \$ 166.00 | \$ 597.60 |
| NICK | 1.8 | \$ 207.41 | \$ 373.34 |
| ZACH | 5.5 | \$ 207.41 | \$ 1,140.76 |
| | 60.0 | | \$ 12,193.46 |

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).