

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

HOWARD MORGAN, JR.)	
Appellant,)	
)	
v.)	CAVC No. 17-98
)	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 **\$44,200.55**.

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, in a precedential decision, the Court set aside and remanded the Board's December 8, 2016 decision based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-8 of the Decision. The mandate was issued on August 7, 2019. Based upon the foregoing, and because the three-part test promulgated in *Blue* is satisfied, Appellant is a prevailing party.

B. Appellant Is Eligible For An EAJA Award

Appellant also satisfies the EAJA requirement that his net worth at the time his appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Mr. Morgan 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. Morgan 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: Dana Weiner, Danielle M. Gorini, Jenna Zellmer, Alyse Galoski, Robert Chisholm, Matthew Pimentel, Amy Odom, Barbara Cook, and Zachary Stolz.¹ Attorney Dana Weiner graduated from Roger Williams University

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

Law School in 2015 and the *Laffey* Matrix establishes that \$351.00 is the prevailing market rate for an attorney with her experience.² Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey*

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).

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. Alyse Galoski graduated from Roger Williams University Law School in 2014 and the *Laffey* Matrix establishes that \$358.00 is the prevailing market rate for an attorney with her experience. Robert Chisholm graduated from Law School in 1988 and the *Laffey* Matrix establishes that \$613.00 is the prevailing market rate for an attorney with his experience. Matthew Pimentel graduated from Roger Williams Law School in 2013 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.

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 Ms. Weiner, Ms. Gorini, Ms. Zellmer, Ms. Galoski, Mr. Chisholm, Mr. Pimentel, and Mr. Stolz for representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for these seven attorneys (201.00) results in a total attorney's fee amount of \$40,031.24.

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 (13.60) results in a total attorney's fee amount of \$2,623.59.

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).

Appellant seeks attorney's fees at the rate of \$192.98 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 (3.40) results in a total attorney's fee amount of \$656.13.

In addition, Appellant seeks reimbursement for the following expenses:

Hotel in Washington DC – ZMS: \$267.30

Airfare to and from Washington DC – ZMS: \$522.82

Travel in Washington DC - ZMS: \$43.47

Parking at the Providence Airport – ZMS: \$56.00

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$44,200.55**.

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 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).

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,
Howard Morgan, Jr.
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>
12/15/2016 MP	Reviewed BVA decision to provide an analysis as to whether to accept case for appeal, researched law, made recommendation for appeal.	0.30
1/11/2017 DMG	Reviewed emails from Court with docketed appeal documents. Posted emails to the file. Checked Court docket sheet to ensure Notice of Appeal, Notice of Appearance for Zachary Stolz as lead counsel, Fee Agreement, and Declaration of Financial Hardship were properly docketed. Updated case information and case file.	0.20
1/18/2017 MP	Prepare and file notice of appearance. Update file	0.10
1/18/2017 AG	was assigned case, prepared and e-filed notice of appearance, reviewed docket for procedural status, updated case file	0.20
2/2/2017 AG	Receive and review Court's emails with BVA decision transmittal doc and BVA decision. Review documents. Update case file.	0.10
2/21/2017 AG	Receive and review Court's email with Aee's entry of appearance. Review document for accuracy. Update client file.	0.10
2/21/2017 AG	Received and reviewed Court's email with RBA notice. Reviewed document for accuracy. Updated client file.	0.10
2/23/2017 AG	Receive and review notice RBA was received and uploaded. Calculate deadline to file a motion for dispute if necessary. Update client file.	0.10
3/1/2017 AG	Reviewed BVA decision for potential arguments. Reviewed RBA and case mapped pages 1-159.	0.40

Exhibit A

		<u>Hours</u>
3/12/2017 AG	Review RBA and case map pp. 1006-1337.	1.10
3/12/2017 AG	Review RBA and case map pages 160-1005.	3.00
3/13/2017 AG	Prepare status letter for client.	0.10
3/14/2017 AG	Receive and review Court's email with notice to file brief. Review document. Calculate deadline to file brief. Update client file.	0.10
3/21/2017 AG	Receive and review Court's email with PBC order. Review document. Calculate deadline to file PBC memo. Update client file.	0.10
3/22/2017 AG	Reviewed client's file and spoke with client via telephone regarding case status.	0.20
4/4/2017 AG	Review MP's comments on PBC memo. Make final edits to PBC memo. Finalize and submit PBC memo to CLS and OGC counsel. Prepare and e-file Rule 33 certification of service.	0.40
4/4/2017 MP	Review PBC memo for AG. Suggest edits prior to filing.	0.40
4/4/2017 AG	Research new precedential case law in bilateral hearing loss cases. Draft PBC memo.	2.80
4/19/2017 AG	Review case file, PBC memo, and RBA to prepare for PBC. Attend PBC. Post case strategy note to file. Update client's file.	0.70
4/20/2017 AG	Reviewed client's file. Spoke with client via telephone regarding case status.	0.20

Exhibit A

		<u>Hours</u>
5/8/2017 AG	Continue to draft statement of the case. Research additional case law re: bilateral hearing loss cases and Bryant case. Outlining and begin drafting argument sections for opening brief.	2.80
5/8/2017 AG	Begin draft of statement of the case for opening brief.	3.00
5/9/2017 AG	Finish drafting argument section of opening brief. Draft issue presented, summary of the argument, standard of review, and conclusion sections	1.50
5/9/2017 AG	Continue to draft argument sections of opening brief.	1.60
5/9/2017 AG	Continue drafting argument sections II and III of opening brief.	3.00
5/11/2017 AG	Revise opening brief	0.60
5/12/2017 JZ	Prepared and e filed notice of appearance. Updated file.	0.10
5/12/2017 MP	Review Apellant's opening brief for Alyse. Review BVA decision and record evidence. Suggest edits prior to filing brief.	1.50
5/16/2017 AG	Performed final proofread of and made final edits to opening brief. E-file opening brief.	1.10
6/6/2017 AG	Spoke with client via telephone regarding case status.	0.20
6/15/2017 AG	Receive and review Court's email with Secretary's brief. Review document for accuracy. Calculate deadline to file reply brief. Update client file.	0.10

Exhibit A

		<u>Hours</u>
6/30/2017 AG	spoke with client via telephone regarding case status.	0.10
8/10/2017 AG	Review opening brief and Secretary's brief. Review BVA decision and conduct legal research for reply brief. Draft reply brief.	2.90
8/11/2017 DNW	Reviewed reply brief and suggested edits to strengthen argument and fix grammar and clarity.	1.00
8/11/2017 AG	Review DW's suggestions and edits on reply brief. Conduct legal research on new caselaw in extraschedular consideration. Make additions and revisions to reply brief.	1.20
8/14/2017 AG	Make additional revisions and additions to reply brief. Citecheck reply brief. E-file reply brief.	1.10
8/23/2017 AG	Receive and review email from Court with ROP. Calculate deadline to respond. Update client file.	0.10
8/24/2017 AG	Review opening brief, Secretary's Brief, and reply brief to prepare for review of ROP. Review ROP for content and accuracy. Prepare and e-file response to ROP. Receive and review email from Court with response from ROP. Review document for accuracy. Update client file.	0.40
8/28/2017 AG	Receive and review email from Court with Judge assignment. Update client file.	0.10
8/31/2017 AG	Spoke with client via telephone regarding status update.	0.10
9/15/2017 AG	Receive and review from Court with memorandum decision. Review pleadings and memorandum decision for legal analysis. Post detailed note to client's file.	0.40

Exhibit A

		<u>Hours</u>
9/18/2017 ZMS	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
9/20/2017 AG	Spoke with client via telephone regarding case status.	0.10
9/20/2017 AG	Conduct review of Court's decision as compared to Veteran's legal arguments. Post detailed note to client's file.	0.30
10/3/2017 AG	Receive and review Court's email with VA's motion for reconsideration. Review document and arguments advanced by VA as compared to memorandum decision and pleadings. Post case strategy note to file.	0.40
10/5/2017 AG	Received and reviewed email from Court with order granting motion for reconsideration, withdrawing memorandum decision, and calling case to panel. Posted detailed note to client's file.	1.10
10/6/2017 AG	Discussed motion for reconsideration and withdrawal of favorable mem dec with client. Answered client's questions. Posted case note to file.	0.20
10/10/2017 AG	Received and reviewed email from Court with order submitting case to panel. Reviewed document for accuracy. Updated client file.	0.10
10/24/2017 AG	Receive and review email from Court with order requesting supplemental briefing. Review order for content and accuracy. Post case strategy note	0.20

Exhibit A

		<u>Hours</u>
	to file. Calculate deadline to file supplemental briefing. Update client file.	
10/25/2017 AG	Received and reviewed order from Court scheduling oral argument. Reviewed document for accuracy. Updated client file.	0.10
10/27/2017 AG	Reviewed pleadings and supplemental pleading order to prepare for case strategy discussion meeting. Participated in case strategy discussion. Updated client file.	0.70
10/30/2017 JZ	Reviewed draft of supplemental brief, added additional case cites and rearranged for clarity.	0.50
10/30/2017 JZ	Conducted legal research on extraschedular referral, Yancy, Doucette, and Thun, as well as mem decs. Finished drafting answer to first question, continued drafting answers to second and third questions.	3.00
10/30/2017 JZ	Finished drafting answers to questions 2 and 3 of supplemental briefing order.	3.00
11/2/2017 BJC	start to review supp pleading and suggest preliminary edits	0.50
11/2/2017 BJC	analyze case law and outline edits to supplemental pleadng	1.60
11/3/2017 JZ	Reviewed BJC suggested edits, conducted additional research and edited answer to question 1.	2.30
11/6/2017 JZ	Continued legal research on E-S, due process, steps 1 and 2 of Thun. Finished editing question 2 and began outline of new answer to question three.	2.00

Exhibit A

		<u>Hours</u>
11/6/2017 JZ	Conducted additional legal research and revised answer to second question per BJC comments and edits	3.00
11/7/2017 BJC	start review of edited draft, reviewed Doucette and cases on fact finding	1.10
11/17/2017 BJC	complete review of draft and suggested additional revisions	0.40
11/17/2017 JZ	Began working on additional edits to supp pleading.	1.60
11/18/2017 JZ	Researched questions of law and added to the the first answer. Began making additional edits to second and third answers.	3.00
11/19/2017 JZ	Finished draft of supplemental pleading - adding to and expanding answers to questions	2.90
11/20/2017 JZ	Reviewed ZMS edits to supplemental pleading, finalized draft	1.00
11/20/2017 ZMS	Reviewed response to Court order. Reviewed notes on case. Made suggested edits prior to filing.	1.70
11/21/2017 JZ	Reviewed CAVC email re: Aee supplemental pleading filed. Reviewed and compared to Apa pleading, updated client file.	0.20
11/21/2017 AG	Spoke with client via telephone regarding oral argument scheduled and answered questions.	0.20
11/21/2017 JZ	Performed final proofread of and filed supplemental pleading.	1.00

Exhibit A

		<u>Hours</u>
12/6/2017 JZ	Reviewed case file notes and began preparing for oral argument and moot	0.30
12/7/2017 JZ	Reviewed CAVC email re: Aee notice of appearance. Updated client file.	0.10
12/11/2017 JZ	Reviewed CAVC email re: supplemental authorities submitted by Aee. Reviewed doc and updated client file.	0.20
12/12/2017 BJC	Prepared for and participated in oral argument discussion - discussed potential questions and answers	1.40
12/12/2017 RVC	Participated in oral argument discussion re: issues to be raised and potential questions and answers	0.80
12/12/2017 AG	Reviewed pleadings and RBA to prepare for case strategy discussion in preparation of oral argument. Participated in oral argument case strategy meeting.	1.60
12/12/2017 JZ	Reviewed case file notes and pleadings. Participated in oral argument discussion. Discussed framework of oral argument, potential questions and answers	1.70
12/12/2017 ZMS	Began preparations for oral argument. Reviewed all pleadings and began review of cases cited.	3.00
12/12/2017 ZMS	Continued preparations for oral argument including case review. Participated in discussion of the argument	3.00
12/13/2017 ZMS	Continued oral argument preparation. Continued legal research. Continued review of pleadings and caselaw.	3.00

Exhibit A

		<u>Hours</u>
12/14/2017 ZMS	Continued outline of entire argument and oral argument strategy discussion	2.90
12/14/2017 ZMS	Began outline of entire argument and oral argument strategy.	3.00
12/15/2017 BJC	prep for and conduct oral argument moot - acted as judge with mock questions and answers	1.50
12/15/2017 JZ	Researched pleadings and Rossy decision. Drafted 30(b) letter.	0.90
12/15/2017 AG	prepared for and participated in moot oral argument as VA attorney	1.30
12/15/2017 JZ	Reviewed pleadings and caselaw in preparation for oral argument moot - prepared questions and answers as judge	1.90
12/15/2017 ZMS	Finalized draft opening statement and assembled oral argument materials.	2.00
12/15/2017 ZMS	Reviewed recent cases discussion Bryant. Revised opening statement.	2.60
12/15/2017 ZMS	Prepared for and participate in moot court as Appellant attorney	2.80
12/16/2017 BJC	draft outline to add to oral argument materials; reviewed and assessed Doucette in line with theories, reviewed and incorporated OGC supplemental pleading in Crowell	2.30
12/17/2017 ZMS	Continued preparation for oral argument. Continued review of recent caselaw. Edited opening statement and outline.	2.40

Exhibit A

		<u>Hours</u>
12/17/2017 ZMS	Continued preparation for oral argument. Reviewed most recent Martinak decisions and decisions citing Barringer (cited by Secretary).	2.80
12/18/2017 BJC	Participated in second moot at judge - proposed potential questions	0.70
12/18/2017 AG	Prepare for and participate in second moot oral argument as VA attorney	0.60
12/18/2017 JZ	Reviewed pleadings and materials for oral argument, and participated in second moot as judge	0.80
12/18/2017 JZ	Travelled to DC from PVD for Oral Argument	3.00
12/19/2017 JZ	Final preparations for oral argument re: regulations, caselaw, and oral argument positions.	1.50
12/19/2017 AG	Dicussed case strategy and assisted in preparation for oral argument.	1.60
12/19/2017 ZMS	Traveled to Court and participate in oral argument.	2.00
12/19/2017 JZ	Travel to Courthouse, participate in pre-oral argument conference, and participate in oral argument.	2.00
12/19/2017 ZMS	Finalized preparations for oral argument including last reviews and adding to outline	3.00
12/19/2017 ZMS	Traveled to airport flew back to Providence, RI (3 hour delay).	5.50
12/19/2017 JZ	Travel to airport (3hr flight delay), flight to PVD.	5.50

Exhibit A

		<u>Hours</u>
12/21/2017 AG	Spoke with client via telephone regarding oral argument.	0.10
1/31/2018 JZ	Reviewed order for supplemental pleading, compared versions of reg, and reviewed Fed reg. Drafted response	2.20
2/1/2018 BJC	review draft supp pleading and suggested edits	0.60
2/1/2018 JZ	Implemented further edits to supp pleading	0.30
2/1/2018 JZ	Reviewed BJC suggested edits to supplemental pleading. Incorporated edits, researched rule challenge petition.	0.40
2/1/2018 ZMS	Reviewed Court order. Reviewed and revised response.	0.80
2/6/2018 JZ	Finalized draft supplemental briefing and filed.	0.40
2/14/2018 JZ	Reviewed CAVC email re: Aee supplemental pleading filed, updated client file and calendar.	0.10
2/27/2018 AG	Spoke with client via telephone and provided status update.	0.10
4/16/2018 JZ	Reviewed CAVC email re: order for en banc review. Updated client file.	0.20
6/15/2018 AG	Left voicemail for client and scheduled time to make follow up call.	0.10
6/15/2018 AG	Spoke with client via telephone regarding case status.	0.10
8/1/2018 AG	Spoke with client via telephone regarding case status.	0.10

Exhibit A

		<u>Hours</u>
8/6/2018 JZ	Reviewed supplemental order for en banc, participated in case strategy discussion	1.00
8/6/2018 ZMS	Began preparation for response to Court's en banc oral argument order. Conducted initial legal research.	2.00
8/7/2018 JZ	Conducted preliminary research and oral argument preparation	0.30
8/8/2018 JZ	Discussed oral argument prep and extra scheduler framework with ZMS in preparation of oral argument	0.50
8/8/2018 ZMS	Began drafting of supplemental memo as guide through Court's questions. Conducted initial research on the practical effects of Thun and Yancy. Reviewed recent mem decs addressing both cases. Drafted page 1 of memorandum.	3.00
8/9/2018 ZMS	Continued preparation of answers to Court's questions for memorandum purposes. Focused on second question and read current cases dealing with Doucette and King.	2.50
8/10/2018 ZMS	Continued preparation of memo and answers to Court's questions for oral argument. Focused on questions 2 and 3 in light of Court's recent decision in Petermann.	3.00
8/24/2018 JZ	Reviewed CAVC email re: order scheduling en banc oral argument. Updated client file and calendar	0.10
		<u>Amount</u>
		152.10 \$30,229.20

Exhibit A

Expenses

	<u>Amount</u>
Airfare - oral argument - ZMS	522.82
Hotel - Oral Argument - ZMS	267.30
Parking at airport - ZMS	56.00
Travel in DC - Oral Arg - ZMS	43.47
Total Expenses	<hr/> \$889.59
	<hr/> 152.10 \$31,118.79

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alyse Galoski	39.00	199.16	\$7,767.32
Barbara J. Cook	10.10	192.91	\$1,948.40
Dana Weiner	1.00	199.16	\$199.16
Danielle M. Gorini	0.20	199.16	\$39.83
Jenna Zellmer	47.00	199.16	\$9,360.52
Matthew Pimentel	2.30	199.16	\$458.07
Robert V. Chisholm	0.80	199.16	\$159.33
Zachary M. Stolz	51.70	199.16	\$10,296.57

Exhibit A

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

Case No. 240576

Client: Morgan, Jr., Mr. Howard

			<u>Hours</u>
11/2/2018	ZACH	Continued oral argument preparation. Prep included continued legal research and review of cases cited in pleadings.	2.90
11/2/2018	ZACH	Began preparation for oral argument including review of recent decisions concerning extraschedular evaluations. Added to portions of previous memorandum outlining oral argument approach and strategy.	3.00
11/5/2018	AGALOSKI	Prepared for and participated in oral argument walk through - participated as attorney for VA	1.20
11/5/2018	BARBARA	Participated in oral argument walk through - participated as judge	0.80
11/5/2018	JENNA	Reviewed case file notes, and researched case law in preparation for oral argument walkthrough. Participated in oral argument walkthrough as judge and conducted subsequent research to answer questions posed during walkthrough.	2.40
11/5/2018	ZACH	Reviewed cases cited in pleadings and participate in walk through of oral argument - participated as attorney for Appellant	3.00
11/6/2018	AGALOSKI	Prepared for and attended first moot oral argument as VA attorney. Made edits to supplemental pleading.	1.30
11/6/2018	AGALOSKI	Reviewed pleadings and recent case law to prepare to file supplemental pleading to the Court regarding new precedent. Prepared supplemental pleading.	2.20
11/6/2018	BARBARA	Participated in first moot as judge - posed possible questions and gave input on answers to same.	1.20
11/6/2018	JENNA	Researched law in preparation for moot and participated in moot as judge - posed possible questions.	1.90
11/6/2018	ZACH	Continued preparation and reading of pleadings and most recent extraschedular case law. Participate in first full moot court as attorney for Appellant.	2.80
11/6/2018	ZACH	Continued review of cases and began assembling materials to take to Washington for oral argument.	3.00
11/7/2018	AGALOSKI	Made final edits, finalized, and filed supplemental pleading	0.30
11/13/2018	AGALOSKI	Prepared for and participated in final moot as judge.	1.10
11/13/2018	AODOM	Prepared for and participated in final moot as judge - posed possible questions.	1.00
11/13/2018	AODOM	Prepared and filed notice of appearance; updated file.	0.10
11/13/2018	BARBARA	prepared for and participate in final moot as judge	1.50
11/13/2018	JENNA	Participated in final moot as VA attorney	1.00
11/13/2018	ZACH	Participated in second full moot court as attorney for Appellant	1.00
11/13/2018	ZACH	Continued oral argument preparation. Edited and added to opening statement and continued review and outline of King, Petermann, and Sellers	3.00
11/14/2018	AGALOSKI	Spoke with client via telephone regarding case status. Updated client file.	0.10
11/14/2018	ZACH	Traveled to Washington DC for Oral Argument.	2.50
11/14/2018	ZACH	Continued oral argument preparation. Reviewed all cases cited in brief. Review opening statement and outline.	3.00
11/15/2018	AODOM	Attended oral argument and pre-argument conference.	2.30
11/15/2018	ZACH	Final review of notes prior to oral argument	1.00
11/15/2018	ZACH	Travel to Court and participated in pre-argument and oral argument.	3.00
11/15/2018	ZACH	Traveled to Providence from Washington, DC. (Including 2 hour layover.)	4.00
12/6/2018	AGALOSKI	Received and reviewed Secretary's response to court order	0.20

Exhibit A

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

Case No. 240576

Client: Morgan, Jr., Mr. Howard

			<u>Hours</u>
12/6/2018	JENNA	Reviewed CAVC emails re: motion for leave to file in excess of page limit and supplemental memo filed. Reviewed docs, saved to file, updated client calendar re: response due date.	0.30
12/10/2018	JENNA	Reviewed VA's brief and began outlining argument.	0.70
12/11/2018	JENNA	Continued listening to oral argument and finished edits to supplemental memo	0.90
12/11/2018	JENNA	Finished drafting first draft of supplemental memo, began listening to oral argument and editing memo to incorporate same	3.00
12/12/2018	JENNA	Made additional edits to supplemental pleading	0.20
12/12/2018	ZACH	Reviewed draft supplemental pleading written by Jenna Zellmer. Revised and made additions.	1.60
12/12/2018	ZACH	Reviewed Secretary's pleading and notes on case. Conducted legal research on recent cases dealing with extraschedular analysis.	3.00
12/13/2018	JENNA	Reviewed and incorporated proofreading edits, final review and finalized and filed supplemental memo	0.30
2/13/2019	AGALOSKI	spoke with client via telephone regarding case status	0.10
5/16/2019	JENNA	Reviewed CAVC email re: en banc dissolved, and panel decision issued. Reviewed decision and compared to pleadings, case notes, and record. Updated client file and calendar.	0.70
5/16/2019	ZACH	Reviewed order dissolving en banc panel. Reviewed new panel decision. Discussed with team.	1.00
5/21/2019	ZACH	Prepared letter to client concerning Court's precedential decision.	0.40
5/22/2019	AGALOSKI	Left voicemail for client and scheduled time to make follow up call. Updated client file.	0.10
5/22/2019	AGALOSKI	Spoke with client via telephone regarding case status. Updated client file.	0.10
6/7/2019	AGALOSKI	Received and reviewed email from Court with Judgment. Reviewed document for accuracy. Updated client file.	0.10
6/7/2019	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.30
8/7/2019	JENNA	Reviewed CAVC email re: mandate entered, reviewed document to ensure accuracy, updated client file and calendar	0.10
8/8/2019	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
8/8/2019	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.50
8/8/2019	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.50

Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
AGALOSKI	6.8	\$ 199.16	\$ 1,354.29
AODOM	3.4	\$ 192.98	\$ 656.13
BARBARA	3.5	\$ 192.91	\$ 675.19
DANIELLE	1.7	\$ 199.16	\$ 338.57
JENNA	11.5	\$ 199.16	\$ 2,290.34

Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
ZACH	39.0	\$ 199.16	\$ 7,767.24
	65.9		\$ 13,081.76

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).