

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

|                                |   |                                   |
|--------------------------------|---|-----------------------------------|
| <b>GARY PHILBROOK,</b>         | ) |                                   |
|                                | ) |                                   |
| Appellant,                     | ) |                                   |
|                                | ) |                                   |
| v.                             | ) | Vet. App. No. <b>18-5628</b> EAJA |
|                                | ) |                                   |
| <b>DENIS MCDONOUGH,</b>        | ) |                                   |
| Secretary of Veterans Affairs, | ) |                                   |
|                                | ) |                                   |
| Appellee.                      | ) |                                   |

**SECRETARY'S RESPONSE UNDER U.S. VET. APP. R. 39(a)  
TO APPELLANT'S APPLICATION FOR ATTORNEY FEES AND EXPENSES**

Pursuant to U.S. Vet. App. Rule 39(a), Appellee, Denis McDonough, Secretary of Veterans Affairs (Secretary), responds to Appellant's application for an award of attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

Appellant's EAJA application satisfies the essential requirements of the statute as set out by this court. See *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996) (en banc). Additionally, the Secretary concedes that Appellant has met the three predicate findings for an EAJA award: (1) Appellant is a "prevailing party"; (2) the Secretary's position was not "substantially justified"; and (3) there are no "special circumstances" which would make an award unjust. 28 U.S.C. § 2412(d).

The Secretary, for the sole purpose of avoiding further litigation and the costs related thereto, does not contest the reasonableness of Appellant's attorney fees or expenses, in the instant case, under the current case law (see

28 U.S.C. § 2412(d)(1)(C)) and is prepared to make payment to Appellant and his representative of record. The Secretary's concession here, however, in no way denotes the Secretary's position as to any issue or matter presented herein which may potentially affect the litigation or settlement of future applications for attorney fees and costs filed with this Court pursuant to 28 U.S.C. § 2412.

**WHEREFORE**, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully responds to Appellant's application for the award of attorney fees and other expenses, and advises the Court that he does not contest an award in an amount deemed reasonable by the Court, up to \$24,000.00<sup>1</sup>.

Respectfully submitted,

**CATHERINE C. MITRANO**  
Acting General Counsel

**MARY ANN FLYNN**  
Chief Counsel

/s/ Amanda M. Haddock  
**AMANDA M. HADDOCK**  
Deputy Chief Counsel

/s/ Shondriette D. Kelley  
**SHONDRIETTE D. KELLEY**  
Appellate Attorney  
Office of the General Counsel (027N)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-4348

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<sup>1</sup> Appellant has agreed to a reduction from \$27,380.20.

Attorneys for Appellee Secretary  
of Veterans Affairs