No. 08-AA-1203 and No. 08-AA-1603

DISTRICT OF COLUMBIA COURT OF APPEALS

STEVE LONEY,
Petitioner,

and

TENANTS OF 710 JEFFERSON STREET NW,
Intervenors/Cross-Petitioners,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,

Respondent.

ON PETITION FOR REVIEW FROM THE
DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

REPLY BRIEF OF INTERVENORS/CROSS-PETITIONERS, TENANTS OF 710 JEFFERSON STREET NW

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INTRODUCTION

None of the arguments by the Rental Housing Commission in its brief can salvage its rejection of the Laffey Matrix rates proffered by tenants' counsel and unopposed by the housing provider. To begin with, the Commission acknowledged in its attorney fee order that the Laffey Matrix may offer an "alternative method" of establishing an hourly rate for the tenants' counsel, but rejected the Laffey rates for the sole reason that the Commission has "traditionally" used the fee provision in the Equal Access to Justice Act ("EAJA") to determine attorney fees in the absence of customary hourly billing rate evidence. As discussed below, however, "traditional" or not, reliance on EAJA to establish "reasonable" hourly rates is groundless. EAJA does not establish, or even purport to establish, reasonable attorney rates, but instead sets a fee cap to conserve the federal public fisc. Moreover, by its plain language, the statute applies only in cases in which the United States is a party and only in the absence of another governing fee-shifting statute—such as the Rental Housing Act's fee-shifting provision, which is at issue here.

The Commission's counsel attempts to provide additional justifications for the Commission's rejection of the Laffey rates in this case—such as that the tenants failed in their attorney-fee motion to establish that Laffey rates apply to administrative proceedings in the District of Columbia—but none of these new reasons was articulated by the agency in its decision and thus the Court cannot affirm on any of these grounds. In any event, the Commission's new justifications are without merit. The Laffey Matrix establishes a presumptively reasonable measure of prevailing market rates in the District of Columbia. Its use not only has been approved by this Court and the U.S. Court of Appeals for the District of Columbia Circuit, but by courts and administrative agencies in the District in cases presenting an array of federal, local, and administrative law issues. The Commission's position in its brief that prevailing parties are not entitled to rely on (unopposed) Laffey rates to satisfy their initial

burden of establishing reasonable hourly rates would transform every request for attorney fees into a second major litigation—the very result this Court has warned against.

Finally, this Court should remand the issue of the initial hearing-level attorney's fees to the Commission so that it can either determine the fee award or remand the matter to the Office of Administrative Hearings ("OAH") for adjudication. Not only do all parties agree that a remand for this purpose is appropriate, but the Commission's refusal to award fees for work done before the Rental Accommodations and Conversion Division ("RACD") was based on a mistaken view that it lacked authority to include those fees in its fee award. Because the Commission misunderstood its own discretion to award these fees, its refusal must be reversed.

ARGUMENT

I. THERE WAS NO BASIS FOR THE COMMISSION TO RELY ON EAJA IN ESTABLISHING "REASONABLE" HOURLY RATES.

It is undisputed that the starting point for an attorney's fee award to a prevailing plaintiff under the Rental Housing Act (specifically, D.C. Code § 42-3509.02) is "the lodestar, which is the number of hours reasonably expended on a task multiplied by a reasonable hourly rate." Rental Housing Commission ("RHC") Br. 8 (quoting 14 DCMR § 3825.8(a)) (emphasis added by Commission). A "reasonable hourly rate" in turn is determined by "the prevailing market rates in the relevant community for similar services by similarly qualified lawyers." Id.

In its attorney-fee decision, the Commission acknowledged that "the Laffey Matrix may offer an alternative method of establishing an hourly attorney's fee for LAS in this case," Tenants' Appendix ("App.") A41, as is routinely accepted in federal and local tribunals in the District of Columbia. See Part II.A., infra, citing cases. Indeed, in Lively v. Flexible Packaging Ass'n, 930 A.2d 984, 990 (D.C. 2007), this Court "accept[ed] [the Laffey Matrix] as one

legitimate means of calculating attorneys' fees in those cases, such as this, where a prevailing party is statutorily entitled to attorney's fees."

Nevertheless, the Commission declined to use the Laffey Matrix as evidence of prevailing market rates because "the Commission has traditionally used the fee provision in the federal Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A)(2007)." Tenants' App. A41. "Traditional" or not, reliance on EAJA to establish "reasonable" hourly rates is wholly baseless. EAJA is a fee cap, not a measure of reasonable attorney's fees. It does not reflect a congressional judgment about prevailing market rates or about reasonable fees. Instead, it reflects a legislative decision against awarding fees based on prevailing market rates when the federal government is a party, so as to avoid using public funds to pay large fee awards. The RHC's "traditional" reliance on EAJA to set hourly lodestar rates was an error of law and therefore an abuse of discretion. See Giles v. Crawford Edgewood Trenton Terr., 911 A.2d 1223, 1225 (D.C. 2006) (a trial court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law") (citation omitted).

A. The EAJA Cap on Hourly Rates Does Not Reflect A Congressional Judgment About Market Rates or Reasonable Fees.

By its plain text, EAJA does not apply here. This is so for two reasons: First, the statute applies only in cases where the United States is a party. Second, the statute does not itself establish fee rates, but instead sets a cap on rates that would otherwise be reasonable in the prevailing market.[1] EAJA provides, in relevant part, as follows:

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[1] The RHC rightly does not contend that the EAJA fee cap actually applies in this case. Even if the United States were a party, EAJA would not apply where, as here, the underlying statute includes a fee-shifting provision. D.C. Code § 42-3509.02; see 28 U.S.C. § 2412(b) (cap inapplicable to fee awards based on other statutes authorizing fee awards); E.E.O.C. v. Consol. Serv. Sys., 30 F.3d 58, 59 (7th Cir. 1994) ("Congress made as clear as it could that the Act was inapplicable to cases in which a statute regulating awards of attorneys fees against the Government was already in place.").

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity . . . .
>
> . . .
>
> (d)(2)(A) "fees and other expenses" includes . . . reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.).

28 U.S.C. § 2412 (emphasis added). As an initial matter, therefore, EAJA does not apply where, as here, the United States is not a party to the action.

More importantly, EAJA does not—contrary to the Commission's portrayal—represent "the combined judgment of the Congress of the United States as to the fee it finds reasonable in a broad cross-section of causes of action." Tenants' App. A41 (quoting Hampton Courts Tenants Ass'n v. William C. Smith Co., CI 20,176, at 14)); see RHC Br. 17 (relying on Hampton Courts). Quite the contrary, the $125 figure is a statutory cap on fees that would *otherwise* be deemed reasonable. The sole purpose of the EAJA cap is to limit the government's liability for attorney's fees, regardless of what might be the prevailing rate for legal services. In enacting the statute, Congress recognized that reasonable fees might in fact be much higher, but determined that payment of those fees at their full rate was not an appropriate use of public dollars. See Pierce v. Underwood, 487 U.S. 552, 572 (1988) (observing that the structure of EAJA, which then capped hourly fees at $75, "suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be"); Raines v. Shalala, 44 F.3d 1355, 1360 (7th Cir. 1995) ("EAJA 'is not designed to

reimburse reasonable fees without limit.'") (quoting Pierce, 487 U.S. at 573); Sierra Club v. Secretary of Army, 820 F.2d 513, 524 (1st Cir. 1987) (distinguishing EAJA's rate cap with other fee-shifting statutes providing for "reasonable" attorney's fees).[2]

B. EAJA Is Not a Measure of Reasonable Rates in Rental Housing Cases.

Because EAJA does not purport to establish a reasonable hourly fee, it has no bearing on cases where, as here, a court or agency must determine a reasonable rate for legal services. To award fees under the Rental Housing Act, the tribunal must ascertain a reasonable fee based on market rates. See 14 D.C.M.R. § 3825.8; Blum v. Stenson, 465 U.S. 886, 895 (1984) (holding that fees must be calculated "according to the prevailing market rates in the relevant community" even for nonprofit organizations working pro bono).

EAJA has no relationship to this determination. Indeed, undersigned counsel are not aware of a single court that has used the EAJA rate cap to determine the reasonableness of an hourly rate. To the contrary, courts have been careful to distinguish EAJA-capped rates from reasonable market rates, even in cases involving similar legal issues or the same parties. For example, in Association of American Physicians and Surgeons, Inc. v. Clinton, 989 F. Supp. 8, 15-16 (D.D.C. 1997), the court awarded prevailing market rates for legal services to which EAJA

[2] Thus, as the U.S. Solicitor General has noted, "Congress recognized when it originally enacted the EAJA . . . that the statute's 'attorney fee' ceiling . . . would often reimburse less than the prevailing market rate . . . ." EAJA's rate cap "represented a compromise" between the statute's goal of encouraging challenges to regulatory action and "the cost concerns of the Administration." Brief of Respondent at 14-15 & n.6, Richlin Security Serv. Co. v. Chertoff, 128 S. Ct. 2007 (2008). In Richlin, the Court observed, as the United States argued, that because both attorneys and paralegals often charge more per hour than the EAJA cap, "[i]f EAJA reimbursed both attorney time and paralegal time at market rates, then the cap would clip more off the top of the attorney's rates than the paralegal's rates." Id. at 2018. In other words, the EAJA cap was closer to prevailing paralegal market rates than to prevailing attorney fee rates. Nonetheless, the Court held that paralegal fees are treated as attorneys' fees (awarded at prevailing market rates up to the cap) under EAJA, and not as costs awarded only at the actual amount paid by the prevailing party's attorney. 128 S. Ct. at 2012-19.

was not applicable and EAJA-capped rates for fees covered by the statute itself. See also Frazier v. Apfel, 240 F.3d 1284, 1286 (10th Cir. 2001) (distinguishing reasonable fees under the Social Security Act ("SSA"), paid out of a claimant's award, from rates available against the government under EAJA, and noting that "fees under the EAJA are statutorily limited to $125/hour, while the attorney may earn whatever fees are reasonable for the area under [the SSA]"); Anthony v. Sullivan, 982 F.2d 586, 588 (D.C. Cir. 1993) (distinguishing between fees under Title VII, which are unlimited, and capped fees under EAJA). Similarly, in Age Discrimination in Employment Act cases, courts have awarded fees against private parties at the prevailing market rates, but against the federal government only at EAJA-capped rates. See E.E.O.C. v. Clay Printing Co., 13 F.3d 813, 817-18 (4th Cir. 1994); E.E.O.C. v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872, 883-84 (7th Cir. 1994).

Because EAJA's rate cap has no bearing—and, indeed, does not purport to bear—on the rates prevailing in the District of Columbia, the RHC abused its discretion in treating the cap as establishing a "reasonable" attorney fee rate in this case.[3] And, although the District argues to the contrary, neither of the cases on which it relies here justifies the RHC's use of EAJA in this context. In Hampton Courts Tenants' Ass'n v. District of Columbia Rental Housing

[3] Tenants argued in their opening brief that, even assuming EAJA applied, the Commission miscalculated the rate. Tenants' Br. 45-47 (explaining that a proper calculation would have yielded a rate of at least $182.13). The District offers only a conclusory response at the end of its brief that the "Tenants could have but did not move for reconsideration." RHC Br. 19 n.9. This point is irrelevant, as the tenants were under no obligation to do so.
Even if this Court determines that applying EAJA was the proper approach (which it was not), it should vacate and remand for application of the 2007 rather than 1996 EAJA rate. See GasPlus, LLC v. Dep't of Interior, 593 F. Supp. 2d 80, 90-91 (D.D.C. 2009) ("The statutory cap was set over ten years ago, in 1996. As a result, courts routinely approve cost-of-living adjustments.") (citations omitted). Tenants' counsel should also be given an opportunity to demonstrate, consistent with EAJA, that they are entitled to an upward adjustment in the rate based on "special factors" such as an "identifiable practice specialty" and "knowledge of [a] foreign . . . language." Pierce, 487 U.S. at 572; see 28 U.S.C. § 2412(d)(2)(A).

Commission, 599 A.2d 1113 (D.C. 1991) (Hampton II), the fee petitioner had submitted no information at all about prevailing market rates, thereby failing to meet his initial burden of establishing a reasonable hourly fee. Id. at 1118. He did not submit the Laffey Matrix, which, as discussed infra, serves as prima facie evidence regarding the prevailing rates in the community; nor did he submit anything else beyond his own personal billing rate. Id. at 1119. Given the resulting total absence of information about prevailing market rates, the Commission "resorted" to the EAJA rate to compensate the petitioner where, because he had not met his initial burden of justifying the fees, he might not have been entitled to fees at all. Id. at 1115, 1118. Even in making that determination, however, the Court did not characterize EAJA as a reasonable measure of attorney rates, but rather as merely a last resort to measure fees in the absence of other evidence.[4] Here, by contrast, Tenants supplied ample information by way of the Laffey Matrix about prevailing market rates in the District. See infra Part II. There was, therefore, no need for the RHC to "resort" to EAJA, as in Hampton II, to identify a rate. Nor does District of Columbia v. Hunt, 525 A.2d 1015 (D.C. 1987), support the District's position here. Hunt involved litigation between the District government and a former employee who prevailed in a personnel action. Attorneys' fees were awarded pursuant to federal law because for the limited time period at issue, "the Federal Backpay Act . . . was still applicable to certain District employees." Id. at 1016 (citations omitted). In applying federal law, the Court deferred to federal precedent from the "counterpart federal civil service agency, the Merit Systems

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[4] The Court in Hampton II incorrectly observed that it had previously characterized EAJA as "closely related" to the fee-shifting provision of the Rental Housing Act. 599 A.2d at 1118 (citing Hampton Courts v. Rental Housing Comm'n, 573 A.2d 10, 12 (D.C. 1990) (Hampton I)). In Hampton I, this Court noted that the rental housing provision was similar, not to EAJA, but to the Civil Rights Act of 1964—a fee-shifting statute that awards legal fees at the prevailing market rates. See 42 U.S.C. § 2000e-5(k); Anthony, 982 F.2d at 588 ("[W]hile there is no statutory cap on the rate of reimbursement of fees under Title VII, a party may generally only receive $75 per hour plus a cost of living adjustment under EAJA.").

Protection Board" and held that because the EAJA fee cap applied in those cases, it was "an approximate benchmark" for establishing hourly rates in similar actions involving the District. Id. at 1017. The Court's statement that the EAJA-capped rate was "instructive," id. at 1017 n.2—on which the District heavily relies, RHC Br. 17—addressed only the unique circumstances of that case, in which awarding the requested rates would result in compensating attorneys litigating against the District at a much higher rate than in parallel cases against the federal government. See 525 A.2d at 1017 (noting that the requested rates are "much higher than the [mandated EAJA rate] for similar appellate services involving the counterpart federal civil service agency"); id. 1017 n.2 (identifying "several" cases that "have limited attorney's fees in similar cases involving" the federal government to the EAJA-capped rate).5

The District has identified no case in which the Court has relied on EAJA as a *per se* measure of reasonable attorney fees, as the Commission did below. That is unsurprising, given that EAJA is not a measure of prevailing rates and does not apply where, as here, the government enacts a fee-shifting provision intended to encourage private parties to enforce their rights. See H.R. Rep. No. 96-1418, at 18 (1980) (noting that EAJA was "not intended to replace or supercede any existing fee-shifting statute . . . in which Congress has indicated a specific intent to encourage vigorous enforcement"); see also supra note 1. Like the statutes Congress specifically exempted from the EAJA rate cap, the Rental Housing Act is designed to encourage vigorous enforcement of the District's housing laws by tenants who otherwise could not bring actions against their landlords. As this Court has repeatedly held, "the purposes of the attorney's fee provision are to encourage tenants to enforce their own rights, in effect acting as private

[5] For the reasons explained in text, the tenants submit that the EAJA fee cap is never a measure of reasonable rates. Because Hampton II and Hunt are distinguishable in any event, however, there is no need for the Court to revisit those decisions here.

attorneys general, and to encourage attorneys to accept cases brought under the Rental Housing Act." Ungar v. District of Columbia Rental Hous. Comm'n, 535 A.2d 887, 892 (D.C. 1987); see also Hampton I, 573 A.2d at 12 ("[I]n Ungar we adopted the 'private attorney general' analysis stated by the Supreme Court in explication of the 1964 [Civil Rights] Act"); Alexander v. District of Columbia Rental Hous. Comm'n, 542 A.2d 359, 360 (D.C. 1988).

Thus, in awarding fees under the Rental Housing Act, a court or agency must, as it would with other fee-shifting statutes, ascertain a "reasonable" hourly rate for the legal services at issue, "as measured by prevailing market rates in the relevant community for attorneys of similar experience and skill." District of Columbia v. Jerry M., 580 A.2d 1270, 1281 (D.C. 1990). Because EAJA is not, and does not purport to be, a "reasonable" measure of "prevailing market rates," it offers no basis for calculating attorney fees in rental housing cases. For this reason alone, the Commission's fee ruling cannot be sustained.

II. THE COMMISSION ABUSED ITS DISCRETION IN DISMISSING OUT OF HAND THE HOURLY RATES SET OUT IN THE LAFFEY MATRIX.

Even apart from its error in seizing on the EAJA attorney-fee cap, the Commission's dismissal out-of-hand of the Laffey Matrix rates proffered by the tenants in their motion for fees, and unopposed by the housing provider, cannot be defended. For starters, although the Commission's counsel now invokes in its brief several new rationales for the RHC's dismissal of the Laffey Matrix, see, e.g., RHC Br. 8-10 (tenants' motion devoid of evidence establishing that the Laffey rates were "the prevailing rates" in the community for similar work); id. at 11-12 (Laffey Matrix limited to complex federal litigation); id. at 13-14 (Laffey Matrix inapplicable to administrative proceedings in the District), none of these purported reasons for rejecting the Laffey rate was actually articulated by the Commission itself in its decision. Instead, the Commission acknowledged in its fee order that "the Laffey Matrix may offer an alternative

method of establishing an hourly attorney's fee for [Legal Aid] in this case," but then rejected the Laffey rates without further discussion because "the Commission has traditionally used the fee provision in the federal Equal Access to Justice Act." Tenants' App. A41. "[A]n administrative order can only be sustained on the grounds relied on by the agency." Dorchester House Assocs. v. District of Columbia Rental Hous. Comm'n, 913 A.2d 1260, 1264 (D.C. 2006) (citations omitted). Because, as argued above, the Commission's sole reason for rejecting the Laffey rates was erroneous, its rejection of the Laffey Matrix cannot stand.

In any event, none of its counsel's new arguments for why, despite the absence of opposition to the rate by the housing provider, the Commission was entitled to summarily reject the Laffey rates proffered by the tenants, withstands scrutiny. The Laffey Matrix is a presumptively reasonable measure of market rates in the District of Columbia community: It has been approved by this Court and the U.S. Court of Appeals for the District of Columbia Circuit and is ubiquitous in cases involving an array of federal, local, and administrative law issues—in both complex matters and in matters that are less so. This Court should hold that the Laffey Matrix governs Legal Aid's hourly rate in this case.

A. The Commission Mischaracterizes Both the Laffey Matrix and What Is Required to Make a Prima Facie Showing of a Reasonable Hourly Rate.

In its brief, the Commission repeatedly characterizes the Laffey Matrix as establishing reasonable hourly rates only for attorneys handling "complex federal litigation in the District of Columbia." See, e.g., RHC Br. 9, 11, 13. The Laffey Matrix itself, issued and updated annually by the U.S. Attorney's Office in the District of Columbia, is "intended to be used in cases in which a 'fee-shifting' statute permits the prevailing party to recover 'reasonable' attorney's fees." Laffey Matrix 2003-2010, U.S. Attorney's Office for the District of Columbia, available at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html (last updated

on July 1, 2009).[6] The purpose of the Laffey Matrix, and the reason it is used so widely, is to simplify the process of calculating fee awards by avoiding the need for extensive factfinding in every case to determine prevailing rates in the community. See Hampton II, 599 A.2d at 1115 (admonishing that "[a] request for attorney's fees should not result in a second major litigation") (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)); see also Lively, 930 A.2d at 988.

Contrary to the Commission's argument in this Court, reliance on the Laffey Matrix by courts and agencies in the District of Columbia has not been limited to cases involving particular federal fee-shifting statutes, distinctive legal skills, or those litigated in particular fora. Quite the contrary, the Laffey Matrix is solidly entrenched in the District as "one legitimate means of calculating attorneys' fees in those cases, such as this, where a prevailing party is statutorily entitled to attorney's fees." Lively, 930 A.2d at 990. In the more than twenty-five years since its hourly rate scheme was adopted in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), the Laffey Matrix "has served as a guide in nearly every conceivable type of case" in the District of Columbia. Miller v. Holzmann, 575 F. Supp. 2d 2, 14 (D.D.C. 2008) (citing a wide range of cases); accord Univ. Legal Servs. Protection & Advocacy, Inc. v. Knisley, No. 1:04cv01021 (RBW), 2006 U.S. Dist. LEXIS 89140, at *21 (D.D.C. Dec. 11, 2006) (Laffey Matrix "the preferred method for calculating the awardable fee used in this Circuit").

Although the Commission characterizes the Laffey Matrix as appropriate only for awards in "complex" or "complicated" federal litigation, RHC Br. 9, 11, 13, courts awarding fees under federal fee-shifting statutes in the District of Columbia have routinely found Laffey rates to be presumptively reasonable in myriad cases, many of which ordinarily would not be deemed

[6] Tenants appended the Laffey Matrix 2003-2009 (last updated on June 19, 2008) to their attorney-fee motion. Tenants' App. A14. The 2009-10 rates are the same as the 2008-09 rates.

"complex." See, e.g., Jackson v. District of Columbia, 603 F. Supp. 2d 92, 96 (D.D.C. 2009) (recognizing that "[c]ourts in this district have routinely held that attorneys' fees in IDEA[7] actions are reasonable if they conform to the Laffey Matrix") (citing cases); Pleitez v. Carney, 594 F. Supp. 2d 47, 53 (D.D.C. 2009) (accepting Laffey rates for attorneys without a customary billing rate in case arising under Fair Labor Standards Act); Judicial Watch, Inc. v. Bureau of Land Mgt., 562 F. Supp. 2d 159, 175 (D.D.C. 2008) (using Laffey Matrix to determine reasonable hourly rate in Freedom of Information Act action); Woodland v. Viacom, Inc., 255 F.R.D. 278, 279-81 (D.D.C. 2008) (embracing standard Laffey Matrix and approving even higher rates in fee discovery dispute); see also Hansson v. Norton, 411 F.3d 231, 236 (D.C. Cir. 2005) (noting that plaintiff "acknowledges that the 'reasonable hourly rate' is guided by the Laffey matrix prepared by the U.S. Attorney's Office" for purposes of administrative discrimination complaints against agency); Adcock-Ladd v. Secretary of Treasury, 227 F.3d 343, 347 & nn.3, 5 (6th Cir. 2000) (accepting Laffey Matrix as establishing a "reasonable foundational rate" for D.C. lawyer taking deposition of witness in D.C. for Tennessee case).

The Commission cites a few federal cases in an effort to cast doubt on whether the Laffey Matrix is used in "non-complex" litigation, but these decisions are readily distinguished. It cites Agapito v. District of Columbia, 525 F. Supp. 2d 150, 155 (D.D.C. 2007), as an example of a federal district judge rejecting the Laffey Matrix in "arguably non-complex litigation," RHC Br. 15, even though the opposing party there, unlike here, presented evidence of a different prevailing standard, the cases were unusually simple, the lawyers entitled to fees presented no counter-arguments, and the court "recogniz[ed] that other IDEIA cases might . . . qualify" for the

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[7] The statute at issue, the Individuals with Disabilities Education and Improvement Act, is interchangeably abbreviated IDEA and IDEIA.

Laffey Matrix. Agapito, 525 F. Supp. 2d at 154-55.[8] The court's decision in Griffin v. Washington Convention Center, 172 F. Supp. 2d 193 (D.D.C. 2001), see RHC Br. 15, is equally unhelpful to the Commission. There, the court rejected Laffey rates because the prevailing party's counsel had accepted a contingent fee arrangement that would have led to a substantially lower recovery than Laffey rates and failed to establish that counsel charged discounted rates for public-spirited, non-economic purposes, as required under Covington v. District of Columbia, 57 F.3d 1101, 1107-08 (D.C. Cir. 1995); see Griffin, 172 F. Supp. 2d at 196-200.

Finally, the Commission relies on Muldrow v. Re-Direct, Inc., 397 F. Supp. 2d 1 (D.D.C. 2005), see RHC Br. 15, but the Commission misunderstands what that court actually ruled. Muldrow reduced by 25 percent the fee that would have been awarded using the "updated" Laffey Matrix—not the standard Laffey Matrix issued by the U.S. Attorney's Office, which is at issue here. 397 F. Supp. 2d at 3 & n.3. The rates in the Updated Laffey Matrix are higher than those set out in the U.S. Attorney's Office Laffey Matrix.[9] By reducing the fee award by 25 percent, Muldrow simply declined to award the higher Updated Laffey Matrix rates because the

[8] The fact-specific nature of Agapito's rejection of the Laffey Matrix is underscored by the fact that federal courts in the District regularly accept the Laffey Matrix as establishing reasonable hourly rates for administrative proceedings and cases under the IDEA. See, e.g., Jackson, 603 F. Supp. 2d at 96; Bush ex rel. A.H. v. District of Columbia, 579 F. Supp. 2d 22, 26-27 (D.D.C. 2008); Coleman v. District of Columbia, No. 03-00126 (HHK), 2007 U.S. Dist. LEXIS 32743, at *14-*18 (D.D.C. May 3, 2007); Laster v. District of Columbia, No. 05-1875 (RMU), 2006 U.S. Dist. LEXIS 50599 (D.D.C. July 25, 2006); Alfonso v. District of Columbia, 464 F. Supp. 2d 1, 7 (D.D.C. 2006); Lopez v. District of Columbia, 383 F. Supp. 2d 18, 24 (D.D.C. 2005).

[9] Two different versions of the Laffey Matrix are used in the District. The U.S. Attorney's Office version, see supra pages 10-11, calculates rates by adding the change in the overall cost of living, as reflected in the Consumer Price Index ("CPI") for the Washington, D.C. area, for the prior year and then rounding to the nearest multiple of $5. Smith v. District of Columbia, 466 F. Supp. 2d 151, 156 (D.D.C. 2006). A second version, sometimes called the "Updated Laffey Matrix," calculates rates by using the legal services component of the CPI, rather than the general CPI used by the U.S. Attorney's Office. Id. at 156; Salazar v. District of Columbia, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000); see http://www.laffeymatrix.com. Here, the tenants have sought fees only under the standard Laffey Matrix issued by the U.S. Attorney's Office.

case involved only "a relatively straightforward negligence suit." Id. at 4-5; see also DL v. District of Columbia, 256 F.R.D. 239, 243 (D.D.C. 2009) (noting that some courts, including Muldrow, have declined to apply the legal services index Laffey Matrix, instead of the standard Matrix, without greater case complexity); American Lands Alliance v. Norton, 525 F. Supp. 2d 135, 149-50 (D.D.C. 2007) (same); McDowell v. District of Columbia, No. 02-1119 (RWR/JMF), 2006 U.S. Dist. LEXIS 46371, at *4-*6 (D.D.C. July 11, 2006) (refusing to award higher fees using the Updated Laffey Matrix without greater complexity and a more significant evidentiary record). None of the decisions cited by the Commission detracts from the widespread use of the Laffey Matrix in federal court or suggests that submission of Laffey rates with a motion for attorney fees would not satisfy the prevailing party's prima facie burden.

Similarly, although the Commission insists that, at best, the Laffey Matrix sets reasonable hourly rates for lawyers handling complex "federal" litigation, the Matrix is well established as a benchmark for determining reasonable fees in cases brought under District of Columbia statutes. In Lively, this Court accepted the Matrix as "one legitimate means" of calculating reasonable rates in a case brought under the D.C. Human Rights Act. 930 A.2d at 990. The D.C. Superior Court also uses the Laffey Matrix. See, e.g., Feeney v. Joseph J. Magnolia, Inc., No. 2006 CA 001931 B, 2009 WL 391965 (D.C. Super. Ct. Jan. 13, 2009) (finding requested rates reasonable in action under the D.C. Minimum Wage Act because they "fall within the guidelines outlined by the Laffey Matrix"); Mack v. Bunn, No. 2006 CA 002198 B, 2008 WL 622165 (D.C. Super. Ct. Mar. 4, 2008) (applying Laffey Matrix in case brought under D.C. Consumer Protection Procedures Act); Scales v. District of Columbia, No. 02-0006989, 2005 WL 4976581 (D.C. Super. Ct. Oct. 28, 2005) (finding requested rates reasonable under Laffey Matrix for counsel representing MPD police officer); Jackson v. Byrd, No. 01-CA-825, 2004 WL 3249692 (D.C.

Super. Ct. Sept. 2, 2004) (applying Laffey Matrix to D.C. Consumer Protection Procedures Act, as adjusted at plaintiff's request).

The Commission weakly suggests that tenants have not demonstrated the Laffey Matrix's applicability to administrative proceedings in the District, see RHC Br. 14-15 & n.8, but reliance on the Laffey Matrix is routine for determining reasonable hourly rates for Legal Aid and other legal services providers in administrative proceedings under the Rental Housing Act—the statute at issue here. See, e.g., Zein v. Dudley Pro Realty, No. RH-TP-08-29264, at 6-7 (D.C. Office of Administrative Hearings ("OAH") June 23, 2009) (awarding Laffey rate to Legal Counsel for the Elderly ("LCE") lawyer Jennifer Berger, the former Legal Aid lawyer whose fees are at issue here) (Tenants' Supp. App. A185-A186). Barnes v. 2724 Alabama Avenue, LLC, No. RH-TP-06-28678, RH-TP-06-28800 (Consolidated), 2008 D.C. Off. Adj. Hear. LEXIS 15, at *6-*7 (D.C. OAH Apr. 21, 2008) (awarding Laffey rates to Legal Aid lawyers Julie Becker and Beth Harrison and noting that these rates "are also consistent with rates that the Rental Housing Commission has approved for other attorneys practicing in the field"); Coleman v. Bailey, No. RH-TP-07-28987, 2008 D.C. Off. Adj. Hear. LEXIS 91, at *5-*6 (D.C. OAH Dec. 18, 2008) (awarding Laffey rate to LCE lawyer Jennifer Berger); Gourdine v. Tenants of 425 Evarts Street, N.E., RH-SR-07-20111, at 4-5 (D.C. OAH Sept. 16, 2008) (Tenants' Supp. App. A196-A197) (same).[10] In short, administrative case law confirms that the Laffey Matrix is a presumptively reasonable measure of prevailing market rates, not merely in "complex federal cases," but in

[10] The Commission's attempt to explain away Coleman and Barnes falls flat. See RHC Br. 15 n.8. The Commission wrongly characterizes those cases as having "reflexively" applied the Laffey rates despite "the apparent absence of any evidence that they established the prevailing rate." Id. Instead, in these and other decisions cited in text, OAH faithfully applied this Court's decision in Lively, which established that the Laffey Matrix was an appropriate measure for determining reasonable attorney fees under fee-shifting statutes in the District. That the resulting Laffey rates were also in line with rates the Commission had previously awarded only reinforces the reasonableness of the Laffey Matrix as a measure of hourly rates.

administrative proceedings in the District. Nothing in the Rental Housing Act justifies applying rates based on the Laffey Matrix in OAH proceedings and EAJA rates in RHC proceedings. And it would make equally little sense to award attorneys their Laffey rates for their work in this Court on this appeal, but the lower EAJA rate for work before the Commission.

The underlying premise of the Commission's argument—that Rental Housing Act (or perhaps all) administrative proceedings in the District are uncomplicated and somehow unworthy of full compensation, see RHC Br. 14-15—is unsupported by the statute, case law, or D.C. agency practice. As OAH observed in Gourdine, "[t]he substantial rehabilitation petition . . . was a complex matter, requiring two attorneys and an expert witness." Order at 5 (Tenants' Supp. App. A197); cf. Coleman, 2007 U.S. Dist. LEXIS 32743, at *14-*15 & n.5 (rejecting District's argument that IDEA litigation does not merit Laffey rates because it is less complex than other federal litigation, commenting "[s]aying it does not make it so"). The proceedings before the RACD and the Commission in this case were even more complex, with sixteen witnesses, including two expert witnesses, presenting testimony over the course of a six-day hearing. The majority of the tenants spoke only Spanish, and both Legal Aid lawyers representing them spoke Spanish. The appeal to the RHC presented six issues and led to a 61-page decision.

Indeed, the law on substantial rehabilitation, addressed only once by this Court in Tenants of 738 Longfellow Street, N.W. v. District of Columbia Rental Housing Commission, 575 A.2d 1205 (D.C. 1990), and pronounced "Delphic" by one administrative law judge, Sister Rule Prop. LLC v. Tenants of 1940 Biltmore St., N.W., No. RH-SR-07-20110, 2008 D.C. Off. Adj. Hear. LEXIS 27, at *29 (D.C. OAH Jan. 11, 2008), is anything but simple. Certainly neither the housing provider, who did not oppose the tenants' proffered Laffey rates, nor the Commission in its attorney fee order, demonstrated the existence of a separate submarket for

administrative housing proceedings with rates lower than the prevailing rates in the broader legal market, as represented by the Laffey Matrix. See Covington, 57 F.3d at 1111 (rejecting similar argument that the court should define the relevant legal market narrowly as including only plaintiff attorneys in civil rights, employment, or discrimination actions); cf. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) (awarding legal fees incurred in prosecuting a discrimination claim in state administrative as well as judicial proceedings).

B. The Tenants Made an Unconstested Showing That the Laffey Rate Was Presumptively Reasonable, and They Were Required to Do No More.

The housing provider (who is responsible for the fees here) did not contest the hourly rates below and reiterates in his Reply Brief (at 14) that he "expresses no opinion on what the properly hourly rate should be." The Commission concedes that this Court has held that the Laffey Matrix is a "legitimate means" of calculating attorney fees. RHC Br. 12 (citing Lively, 930 A.2d at 990). Yet the Commission contends that the tenants were not entitled to rely on the Laffey Matrix in making a prima facie showing of their counsel's reasonable rate, but instead were required to present other evidence, including attorney affidavits, establishing the prevailing rates in the community for similar services by similarly qualified lawyers. Id. at 8-9.[11] The Commission cites no authority for the proposition—inconsistent with Lively—that the Laffey Matrix does not supply prima facie evidence of prevailing market rates. Equally important, its proposed new approach, which would require extensive factfinding in every case involving a fee-shifting statute, runs afoul of this Court's admonition that "[a] request for attorney's fees should

[11] Oddly, the Commission suggests that by recognizing the Laffey Matrix as "one legitimate means" of calculating fees and "not the only valid method," Lively, 930 A.2d at 990, 988 n.4, see RHC Br. 12, the Court meant that the Commission would be perfectly entitled to discard the Matrix out of hand. Laffey is only "one" means of calculating fees because prevailing parties can establish market rates in several ways, such as by "point[ing] to such evidence as an updated version of the Laffey matrix or the U.S. Attorney's Office matrix, or their own survey of prevailing market rates in the community." Covington, 57 F.3d at 1109 (emphasis added).

not result in a second major litigation." Hampton II, 599 A.2d at 1115. When no contrary evidence about reasonable rates is presented, it is an abuse of discretion for the Commission to disregard the Laffey rates, let alone discard them in favor of a "tradition[]" of applying the EAJA rate cap, see Tenants' App. A41, that has nothing to do with prevailing market rates.

If anything, this Court implicitly recognized that the Laffey Matrix was a conservative measure of reasonable rates in this community when it observed that the Matrix "is merely a starting point" and that "automatic application" of its formula "could result in an injustice to attorneys who had willingly taken on important public issues." Lively, 930 A.2d at 990; see, e.g., Smith, 466 F. Supp. 2d at 156 (Updated Laffey Matrix "somewhat more generous" and "more accurate" than standard Laffey Matrix). To be sure, that the Laffey Matrix presumptively demonstrates reasonableness does not mean that its rates are conclusively appropriate in every case. Courts and agencies retain discretion to adjust those rates upward or downward as necessary. As one court explained: "Using this matrix as a guide, the Court must then exercise its discretion to adjust this sum upward or downward to arrive at a final fee award that reflects 'the characteristics of the particular case (and counsel) for which the award is sought.'" Falica v. Advance Tenant Servs., Inc., 384 F. Supp. 2d 75, 78 (D.D.C. 2005) (citation omitted).

Here, however, the housing provider made no showing that the Laffey rate should be adjusted, and the Commission offered no justification for either adjusting or rejecting it—other than its preference for the inapposite EAJA rate cap. Nothing more was required of the tenants. See Hampton II, 599 A.2d at 1118 n.17 ("[I]n the normal case the [landlord] must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate.") (citing National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1326 (D.C. Cir. 1982)); accord Covington, 57 F.3d at 1111 (finding that

the District "did not come close to rebutting the presumption of reasonableness plaintiffs established"). Nor did the Commission hold that the tenants failed to provide sufficient documentation that the Laffey Matrix established the prevailing rate. Thus, although the District makes much of the supposed lack of evidence to support the Laffey rate in this case, RHC Br. 8-10, this Court cannot affirm on that alternative basis. See Dorchester House, 913 A.2d at 1264.

Because the tenants substantiated their requested hourly rate, and their proposed rate went unrebutted, this Court should order the Commission to award fees at the Laffey rates.

III. THE COMMISSION ERRED IN RULING THAT IT LACKED AUTHORITY TO ADDRESS THE FEE REQUEST FOR RACD-LEVEL LEGAL SERVICES.

This Court should remand the issue of attorney fees for the RACD hearing-level services to the Commission so that the agency either can determine the fee award, or can remand the matter further to OAH for adjudication. Indeed, although the District attempts to defend the Commission's refusal to consider fees for work performed at the trial level, it and the housing provider concede that, if the Commission's decision is sustained on the merits, a remand on the fee matter would be appropriate. See RHC Br. 7; Petitioner's Reply Br. 15.

Moreover, a remand is warranted because the Commission's ruling rests on a fundamental error of law. Addressing the request for fees for work performed before the RACD, the Commission ruled that it could not grant the request because it was "authorized to award fees only for legal services and time expended in regard to representation on matters before the Commission." Tenants' App. A31 (emphasis added). The Commission determined, in other words, that it had no discretion to award fees for services provided at the hearing level. As argued in our opening brief, this determination was not correct. Consistent with D.C. Code § 42-3509.02, the Commission's own regulations authorize fee awards for work performed at both levels of the administrative process. See 14 D.C.M.R. § 3825.1; see also Tenants' Br. 34-37.

Contrary to the Commission's argument in this Court, the tenants have never contended that the Commission was required to award the requested fees. See RHC Br. 5. Rather, the tenants argued—both in their initial attorney fee motion and in their brief before this Court—that the Commission had the authority to award fees for work performed at the trial and appellate levels, and that, given the peculiar circumstances of this case, it should have exercised that discretion to make a comprehensive fee award. See Tenants' Br. at 34-37; Tenants' App. A5 n.2. As explained below, during the time this case was pending before the Commission, jurisdiction over rental housing disputes was transferred from the RACD to the Office of Administrative Hearings. See id. Because the agency that had initially decided the case no longer had any authority to hear rental housing matters, the tenants could not file a fee petition with the original hearing examiner; nor was it practicable to file a fee request with OAH, given that OAH had never adjudicated any portion of the case. See id. Under these circumstances, the Commission either should have exercised its discretion to decide the fee issue or remanded to OAH to address the matter.

The Commission did neither, on the ground that it purportedly lacked the authority to address the fee question in any way. That is plainly incorrect. Because the Commission misapprehended its own discretion to award fees, its decision was in error and must be reversed. See, e.g., Teachey v. Carver, 736 A.2d 998, 1004 (D.C. 1999) ("Where a judge (or agency) is invested with discretion to choose between permissible alternatives, but does not recognize the existence of such discretionary authority and therefore fails to exercise it, then that failure constitutes an abuse of discretion.").

CONCLUSION

The Commission's order on the tenants' motion for attorney fees should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Intervenors/Cross-Petitioners to be delivered by first-class mail, postage prepaid, this 24th day of July, 2009, to:

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