In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-0855V

Filed: 28 July 2009

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BRIAN FRANKLIN and ANDREA FRANKLIN, as legal representatives of SCOTT P. FRANKLIN,	
Petitioners,	
v.	**PUBLISHED**
SECRETARY OF HEALTH AND HUMAN SERVICES,	
Respondent.	
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Gregory David Kincaid, Esq., Norton, Hubbard, Ruzicka, Kreamer & Kincaid, Olathe Kansas, for Petitioner;
Heather Lynn Pearlman, Esq., U.S. Department of Justice, Washington, District of Columbia, for Respondent.

PUBLISHED DECISION ON INTERIM ATTORNEYS' FEES AND COSTS[1]

The above-captioned matter was transferred on 23 April 2008 to the Undersigned for the purpose of determining timeliness of filing, on a motion to dismiss standard. The Court ruled that, for the moment, the timing issue was resolved by Petitioners' amendment of the Petition, to plead in the alternative both that the vaccine at issue initially caused, or, in the alternative, that it significantly aggravated, Scott's injury of an autism spectrum disorder. Subsequent to the Court's expressly provisional ruling, which did not address the dispositive merits, nor even the reasonable basis or good faith of the Petition, Petitioner filed an application for interim attorneys' fees and costs on 30 June 2008. Respondent filed Opposition to the application on 18 July 2008 and Petitioner filed a Reply brief on 11 August 2008. The Undersigned agreed to retain jurisdiction over this matter to rule on the issue of the instant motion, before the action is transferred back to the Omnibus Autism Proceeding.

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[1] Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b)(2), they may, within 14 days of its filing, seek the redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy."

Petitioner requested interim attorneys' fees and costs for those expenses that have been incurred since this Petition was filed almost ten years ago, on 1 October 1999. Unlike many other cases in the Omnibus Autism Proceeding, Petitioners herein filed early in the proceedings several volumes of medical records, fact witness affidavits, results from testing by Vijendra Singh, PhD, and the expert reports of Dr. John Menkes, a pediatric neurologist, and Dr. Jeffrey Bradstreet. The issue before the Court is whether and how much Petitioners are now entitled to recover interim attorneys' fees and costs incurred in prosecuting the Petition thus far.

§ 15(e)(1) of the Vaccine Act,[2] provides for compensation of reasonable attorney's fees and costs incurred in the proceedings appurtenant to petition brought in the Vaccine Program. That section states, in relevant part, that "In awarding compensation ... [the] court shall also award as part of such compensation an amount to cover reasonable attorneys' fees, and other costs incurred in any proceeding on [the] petition." Unlike many other attorney fee compensation regimes provided for by federal statute, petitions before the Vaccine Program that do not prevail may still recover such reasonable attorneys' fees and costs upon a judicial determination "that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." *Id*.

Although the general rule for awarding "compensation" hinges on both the success of a petition and the petitioner's acceptance or rejection of the judgment entered by the Court of Federal Claims (*see* §§ 15(a), 15(f)(1), and 21(a)), the plain wording of the Act provides that compensation shall be awarded for reasonable attorneys' fees and costs "incurred in *any* proceeding on [a petition filed under section § 11]." § 15(e)(1) (emphasis added); *see also Saunders v. Secretary of HHS*, 25 F.3d 1031 (Fed. Cir. 1994) ("section 15(e)(1) recognizes a distinction between a judgment on the merits and a judgment granting attorneys' fees").

In interpreting § 15(e)(1)'s use of the phrase "reasonable attorneys' fees" (which is not defined or explained in the statutory text), the Federal Circuit has long used a "lodestar" method that multiplies a reasonable rate by a reasonable number of hours, both to be substantiated by a petitioner through the proffer of persuasive evidence. *Saxton ex rel. Saxton v. Secretary of HHS*, 3 F.3d 1517, 1521 (Fed. Cir.1993); *cf. Blum v. Stenson*, 465 U.S. 886, 888 (1984). More recently, the Federal Circuit has reinterpreted the reasonable rate component by reference to the construction other federal circuit courts of appeal have distilled in applying other federal fee-shifting statutes. *Avera v. Secretary of HHS*, 515 F. 3d 1343, 1348 (Fed. Cir. 2008) ("Since all of these statutes use similar language–referring to 'reasonable attorneys' fees'–that would suggest that the forum rates should generally apply."). This resulted in a "forum rule" which in practice is often swallowed by a so-called *Davis* exception. *See Avera* at 1347-49 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). The rule now applied is to calculate the reasonable rate by reference to the typical rate for similar work within the venue in which the court sits, unless "the bulk of an attorney's work is done outside the jurisdiction of the court and where there is a *very significant* difference in compensation favoring D.C." *Id*., quoting *Davis*

[2] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq*. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

County Solid Waste Mgmt. and Energy Recovery Special Serv. Dist. v. United States Envtl. Prot. Agency, 169 F.3d 755, 758 (D.C. Cir.1999) (emphasis in original).

A. WHETHER PETITIONERS ARE ENTITLED TO INTERIM ATTORNEYS' FEES AND COSTS AT ALL

Petitioner's request for interim attorneys' fees and costs reminds the Court of this Petition's special situation, atypical of most of the petitions in the Program, and asserts that in this case, these proceedings are protracted; costly experts have been and must be retained; counsel suffers undue hardship without an award of interim attorneys' fees and costs; the fees represent a substantial sum; and that payment will not be forthcoming for quite a while, albeit an indeterminate time.

Respondent's Opposition stipulates that these factors are the ones propounded in the *Avera* opinion of the Federal Circuit in interpreting Section 15(e),[3] but disputes whether Petitioners have satisfied any of those factors in a way that balances in their favor. Respondent distills the factors threefold: protraction of proceedings, retention of costly experts, and undue hardship to petitioner(s). However, Respondent's arguments then proceed into policy judgments. Regarding the protracted proceedings factor, Respondent places responsibility for protraction on Petitioners' shoulders, arguing that they "should" not be awarded compensation for fees because of their choice to include this Petition within the OAP. Respondent likewise affixes responsibility for expert expenses to Petitioner's charge, because these experts' work support encephalopathy as a vaccine-related injury, not autism, which Petitioners had *chosen* to pursue as an afterthought and a shift in litigation strategy.

The reasoning behind, and closest legal analogy to, these arguments is the doctrine of equitable estoppel. *See, e.g., Stone v. Bank of Commerce*, 174 U.S. 412, 427 (1899) (restating the principle of equitable estoppel as "the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights"). However, this equitable balancing does not belong to either one of these factors, as they were fabricated in the *Avera* opinion, and presumably should have no part of the Court's analysis of them. Petitioner's Reply brief was quick to point out this reality. The only equitable consideration among the *Avera* factors is the word "undue" in the last factor. Respondent implicitly recognized this as well, because the last argument in Respondent's Opposition to the award of interim fees simply recapitulates that Petitioners "should not" be awarded interim fees and costs, because "any hardship...stems from [P]etitioners' decision to pursue this claim via the OAP, rather than relying on the causation theories developed and supported by [P]etitioners' retained experts from 1999 to March 2003." Opposition at 4.

Unfortunately, as with so much of the *Avera* decision, the Court is at a loss as to the legal standard to be applied: these factors are suggested as more fitting, but perhaps non-exclusive; no

[3] To be specific, there is little interpretation, but a great deal of construction of section 15(e) to be found there.

terms are defined; and, as there is no reliance on statutory language or specific explanation given in other cases, there is nowhere else to look for a gloss on such terms. *Avera* at 1352 (stating "The statute permits such awards" without citation other than reference to vague "underlying purposes of the Vaccine Act," and explaining "Interim fees are *particularly appropriate* in cases where proceedings are protracted and costly experts must be retained," but denying interim fees in that case because "Appellants ha[d] not demonstrated that they ha[d] suffered undue hardship"). It is wholly unclear what qualities and quantities of hardship are due or undue. Is such hardship determined by the equities in the case as Respondent argues? Or is hardship determined by the relative financial pressure denial would impose upon Petitioners or Petitioners' counsel? If either Petitioners or Petitioners' counsel were as rich as Croesus, would that make a difference? *Cf.* Lev. 19:15; *see generally* II Chron. 19:6-7. What degree of either equitable considerations and/or financial concerns would tip the balance in either party's favor? The oracle remains silent in the face of these questions and concerns. Most frustrating is that such a weighing of asymmetrical "factors" requires the Court to strip off the blindfold of justice and inject its own qualitative calculus into whether a petitioner *deserves* an interim fee award, based almost entirely upon a guess of what the apocryphal–if not mythical–statutory purpose might be. It may prove ultimately to be an empathetic enterprise (for one party or the other), but it is not law.

Nevertheless, this is the determination the Court is called upon to make. Petitioners appear to have provided sufficient evidence and argument upon the three factors listed in *Avera*. There is no doubt that the Omnibus Autism Proceedings have been protracted, through no fault of either the Court or any one party to those proceedings, and that they will yet continue for some time in the "test case" phase before individual cases are sorted through and tried. It is also manifest that Petitioners have enlisted several experts, requiring the payment of significant fees and costs. Although, as Respondent pointed out, these experts espoused a theory other than the one currently pursued by Petitioners, the appurtenant *dictum* of *Avera* does not attach significance to such a circumstance, so neither will the Court here.

Likewise, Petitioners have also proffered evidence of hardship based upon this protraction and expense, and have argued that it is undue. Without any scale to weigh what amount of hardship is due or undue, the Court must venture a guess as to what the Federal Circuit must have meant on this factor. In the *Avera* opinion, the Federal Circuit stated that the petitioners there had not demonstrated undue hardship following statements that they had not demonstrated protraction or expert expense. As a means of rationalizing this factorial test of *Avera* into a discernable legal test, the Court interprets that the presence or lack of undue hardship is the presence or lack of the other two factors (or others, as the case may be). If the *Avera* petitioners did not demonstrate undue hardship because they did not demonstrate protraction or expert fees, then the fact that Petitioners here have demonstrated these must mean that they have demonstrated an undue hardship. Admittedly, this analysis bears resemblance to Plato's cave-dwellers predicting shadow patterns, but without understanding the logic of the form, all that is left is to induce patterns from the particulars. Plato, *The Republic*, Book VII.

One outstanding question that the Court must always consider, before awarding fees and costs, is the good faith and reasonable basis of the Petition. This question is one that is better

addressed once the merits of the underlying facts have been weighed, and the Court has reached findings of fact and conclusions of law regarding those facts. *But see Avera* at 1352 ("A special master can often determine at an early stage of the proceedings whether a claim was brought in good faith and with a reasonable basis."); *Id*. at 1353 (Rader, J., concurring) ("The routine award of fees to non-prevailing petitioners is in harmony with the less adversarial, streamlined process for Vaccine Act claims. ...a vaccine petitioner's attorney will almost always receive fees").

Several members of this bench have explored the meaning of these dual requirements, neither of which is defined by the statute itself. *See Hamrick v. Secretary of HHS*, No. 99-0683V, 2007 WL 4793152 (Fed. Cl. Spec. Mstr. Jan. 9, 2008); *see also Lamar v. Secretary of HHS*, No. 99-0583V, 2008 WL 3845165 (Fed. Cl. Spec. Mstr. Jul. 30, 2008); *Brown v. Secretary of HHS*, No. 99-0539V, 2005 WL 1026713 (Fed. Cl. Spec. Mstr. Mar. 11, 2005); *cf. Jessen v. Secretary of HHS*, (Fed. Cl. Spec. Mstr. Apr. 13, 2007).

Petitioners have made a putatively sufficient showing of the petition's good faith and reasonable basis in filing the Petition. The Court knows Petitioner's Counsel to be a professional, amiable, upstanding officer of the Court, and has been given no reason to doubt Petitioners' good faith from the evidence presented. *Hamrick*, *supra*, at 3 (finding good faith present "[b]ecause there is no evidence to the contrary," where the petitioner's counsel averred good faith, without objection or evidentiary challenge from Respondent).

As compared with the subjective aspect of good faith, reasonable basis is an objective criterion. *Hamrick* at *4. Due to the posture of the case at this point, there is quite a bit about this case with which the Court is unfamiliar, which makes the reasonable basis of the Petition's filing more difficult to objectively review. The Court knows from its review of the timeliness issue that young Scott suffered from various health conditions, that may or may not have been autistic in nature, before receiving the MMR vaccine on 7 October 1996, and that Petitioners aver that Scott's condition qualitatively changed after that vaccination, which led them to implicate the vaccination with his progressional downturn in development. *Accord Lamar*, *supra*, at *4 (holding that, "[w]ith competing views of causation reflected in the medical records, it is not reasonable to expect an attorney, even one as experienced in vaccine litigation as this petitioner's counsel, to dismiss the petition without seeking an expert opinion," where histories given in medical records reflected parents' view of vaccine causation). The fact that Petitioners were able to secure a plurality of doctors to support at least one theory of vaccine causation persuades the Court that, at this juncture, there is some prima facie reasonable basis for the Petition.[4] As to the additional claim that

[4] *Hamrick* and *Lamar* raise the question whether petitions that possess the critical "reasonable basis" at the time of their filing may lose such basis during the progress (or lack thereof) of later proceedings. It is not entirely clear under the law governing the Program whether reasonable basis of a petition may be lost once present, or whether a petition that proceeds beyond the realm of reasonableness presents merely a question of reasonableness of the attorney time expended after that line is crossed. § 15(e)(1) of the Vaccine Act requires an objectively reasonable standard of the attorneys' fees requested in every application for fees and costs, and separately requires additional proof of "reasonable basis for the claim for which the petition was brought" in those applications pertaining to non-prevailing petitions. However, since the delineation of that issue is not now before the Court, the Court does not expressly rule threupon, but warns Petitioners of the possibility that fees and costs later accrued may or may not be deemed reasonably compensable at the ultimate

vaccination caused an autistic disorder in young Scott, the ongoing litigation on that very question by hundreds of litigants leads the Court to conclude that the threshold standard of "reasonable basis" has been satisfied, regardless of whether the autism claims prevail on the merits of scientific and legal causation standards. However, since most of the fees and costs sought herein pertain to the work done prior to adding this case to the OAP, whether there was a reasonable basis to add this Petition thereto is of less concern than is Petitioners' original theory of the case. In "the totality of circumstances" of which the Court has been made aware, in the rather limited proceedings convened before the Undersigned, there appears to have been a reasonable basis for the Petition. *Hamrick* at *4.

Therefore, in light of these facts, the Court **finds** that, under the Federal Circuit's direction in *Avera*, **Petitioners are entitled to an award of interim attorneys' fees and costs**. In truth, the Court views the grant of interim fees as an *ultra vires* extension of the Court's authority beyond the limited boundaries of the Vaccine Act, the only "fee-shifting statute" that applies to Program cases. The Federal Circuit's *Avera* opinion expressly overturned the decision of Judge Wheeler of the Court of Federal Claims, which had based its denial of interim fees on the "lack[of] authority to award Petitioners an interim payment of fees... The boundaries of this Court's review are set by the Vaccine Act. The Vaccine Act does not provide for the interim payment of fees, and therefore the Court cannot grant interim payment." *Avera v. Secretary of HHS*, 75 Fed. Cl. 400 (2007) (reversed, citations omitted). The Federal Circuit's opinion, written by Circuit Judge Dyk, corrected this view, and urged a more creative view of statutory construction based on certain Supreme Court cases: "The Supreme Court has construed other fee-shifting statutes, which are silent with respect to interim fees, to allow interim fees in appropriate circumstances." *Avera* at 1351. Given the Federal Circuit's reliance on such cases to confect a heretofore unknown legal novelty, they bear closer examination.

In *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 706-08 (1974), after "noting the absence at that time of any explicit statutory authorization for an award of fees in school desegregation actions" [i.e. before the passage of a fee-shifting statute], the district court premised its award of interim fees "on two alternative grounds rooted in its *general equity power*," namely, "obdurate noncompliance" of the opposing party and the view "that the circumstances that persuaded Congress to authorize by statute the payment of counsel fees under certain sections of the Civil Rights Act of 1964 were present in even greater degree in school desegregation litigation" [brought under a

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conclusion of these proceedings.

This specific issue raises a larger problem endemic to the reasoning espoused in *Avera*. What should happen if later, when all the facts of the underlying facts of the Petition are known, the Court decides that the Petition lacked a reasonable basis *ab initio*, or suffered from some jurisdictional defect? Would Petitioners be required to repay the disbursement of funds for interim attorneys' fees? Would an action lie for the Respondent to recover such amounts? Under what statutory authority would that action accrue? There is surely no legal authority given to this Court by statute to grant any such relief. The Federal Circuit in *Avera* did not consider these quandaries, or if they did, did not provide guidance to the parties or this Court.

different statute, 42 U.S.C. § 1983]. 416 U.S. at 706-08 (emphasis added).[5] The Fourth Circuit Court of Appeals had then reversed, explaining that "the failure of Congress to provide specifically for counsel fees in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully, and that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts.'" *Id*. at 709 (internal marks omitted).

The Supreme Court overturned the court of appeals, in an opinion written by Justice Blackmun, admitting that, "It is true that when the District Court entered its order, it was at least arguable that the petitioners had not yet become 'the prevailing party,' within the meaning of" the governing statute, which had "ma[de] the existence of a final order a prerequisite to the award." *Id*. at 722. Tellingly, the Supreme Court disagreed with the Court of Appeals, not based on any statutory language or legal principle, but because the statute's requirement at the time of the district court's ruling was *unmanageable*. *Id*. As further support, the *Bradley* opinion voiced a sentiment that echoes in *Avera*: "To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary evidenced by the passage of [the statute]." *Id*. at 723. The Court did not explain why this hardship, among the many "slings and arrows of outrageous fortune"[6] befalling any litigant, was legally dispositive in that case, or explain its special characteristics. And it is left to *post hoc* surmise why the Federal Circuit chose to base the award of interim attorneys' fees and costs in Program cases on such contentious jurisprudence, which has been the subject of no small amount of dispute and distinguishment since 1974.[7] It is uncommon, to say the least, for the Federal Circuit to alter a statutory scheme based upon either a federal court's "general equitable power" or upon the difficulty a particular statutory requirement might impose upon litigants.[8]

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[5] *Cf. Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970) (recognizing a right to attorneys's fees in "situations in which *overriding considerations indicate the need* for such a recovery"–a departure from the "American Rule," that attorneys' fees are not ordinarily recoverable from another party), cited in *Bradley* at 706 n. 8 (emphasis added).

[6] William Shakespeare, HAMLET, Act 3 Scene 1.

[7] In over one hundred decisions in federal courts alone, courts have attempted to rationalize, distinguish, or side-step the precedential import of the rules stated in *Bradley*. *See, e.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990); *see generally Id*. at 841-858 (Scalia, J., concurring) ("the rule we expressed in *Thorpe* and *Bradley* was wrong ... the clear rule of construction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law [is that] absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."); *Taylor v. National Group of Companies, Inc.*, 790 F. Supp. 142 (N.D. Ohio 1992); *see also Summers v. Department of Justice*, 569 F. 3d 500 (D.C. Cir. 2009); *Gersman v. Group Health Ass'n, Inc.*, 975 F. 2d 886 (D.C. Cir. 1992) (complaining of frustration created by *Bradley* and its progeny that "we are left with each side arguing that Congress has expressed an intent to apply the statute in a manner consistent with that side's view because it has not given us language clearly expressing a contrary intent").

[8] Also, given the unsettled question regarding what, if any, are the equitable powers inhering to an Article I court, such as is the Court of Federal Claims, it seems questionable to tether the grant of interim attorneys' fees to an exercise of equitable jurisdiction.

In the *per curiam* opinion of *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the Supreme Court was called upon to rule on an attorneys' fees request[9] brought under 42 U.S.C. § 1988, which, "by its terms thus permits the award of attorney's fees only to a 'prevailing party.'" 446 U.S. at 756. The Court there approved in theory the award of prevailing party attorneys' fees to parties that "were not ... 'prevailing' parties in the sense intended by 42 U.S.C. § 1988." *Id*. This apparent contradiction was rationalized by the Court inasmuch as "[t]he legislative history ... indicates that a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Id*. at 756-57. The Court there recognized a new right, for one litigant to be compensated in attorneys' fees by the other party, not based upon any statutory language, but because "Congress contemplated the award of fees *pendente lite* in some cases." Even under these loose standards, the Supreme Court did not award interim attorneys' fees, because "it seem[ed] clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." This was required due to the rather obvious problem of forejudging who is to be a "prevailing party" in litigation, similar to the problem in the Program of forejudging whether a petition will prevail or "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." § 15(e)(1).

In the similar case of *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989), the Supreme Court stated that interim fees were available under § 1988 "where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues" because Congress contemplated it, even though such contemplation did not galvanize or solidify into statutory text. 489 U.S. at 790. There the party seeking fees had prevailed in some "significant issue in litigation which achieved some of the benefit the parties sought in bringing suit," which justified the award of fees. *Id*. at 791-2.

Lastly, the *Avera* Court cites *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) to posit that (perceived) similarities in diction and phrasing between § 15(e)(1) and other fees-shifting statutes dictates that it should be construed with the gloss applied to those statutes. This unrigs the remaining moorings of meaning for that section of the Vaccine Act. If courts scry the meaning of statute *x* from wispy penumbras in the mystical reaches of the joint congressional mind, and then haruspicate the meaning of statute *y* based on the divined meaning given to statute *x*, the result can amount to nothing more than sortilege for those trying to apply statute *y* to the specific facts of a particular case. True, if statutory language were actually interpreted based upon statutory text, and not upon what 536 disparate individuals[10] might have intended or purposed, using the interpretation of one text to help interpret another, similarly-worded statute would make perfect sense. That is the rule stated in footnote two in *Zipes* (restating the rule that

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[9] In *Hanrahan*, the plaintiffs were members of the "Black Panthers" group who were suing the police for an allegedly unreasonable weapons search *via* a civil action filed under 42 U.S.C. § 1983.

[10] Adding 435 Congressmen in the House of Representatives, 100 in the Senate, plus the President equals 536 constitutional lawmakers. Not included in such a computation are the legion administrative ministers and rule-makers who may later expand upon the statutory creation.

where the language of one statute is "substantially the same" as another statute, such "similar language is 'a strong indication' that they are to be interpreted alike"). That is not what is afoot here.[11] *See Avera* at 1353 (Rader, J., concurring) (presciently reasoning, albeit on a slightly different sub-issue, that, "[r]ather than referring to other circuits' approaches to fee-shifting statutes (all of which differ significantly from the Vaccine Act fee provisions), [he] would honor the Court of Federal Claims' established doctrines for fees in vaccine cases"). Why should petitioners in the Vaccine Program be entitled to attorneys' fees because desegregation litigation is too difficult or unmanageable? How does a trial court apply a legally cognizable and discernable standard, given this Procrustean rationale set forth in *Avera*?

Lastly, it is worth delineating the Federal Circuit's legitimate exercise of statutory interpretation in *Saunders*, *supra*, from the discussion in *Avera*. In *Saunders*, the plain wording of the statute indicated an apparent ambiguity, if not outright contradiction, between two of its provisions. Certain parts of the Act conditioned an award of "compensation" upon an election to accept the Court's judgment and not to pursue civil suit outside of the Program, and the wording of § 15(e) includes attorneys' fees and costs under the rubric of compensation. 25 F. 3d at 1033.

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[11] Compare the text of § 15(e)(1) of the Vaccine Act:

> In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court shall also award as part of such compensation an amount to cover—
> (A) reasonable attorneys' fees, and
> (B) other costs,
> incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

to the text of the statute at issue in *Bradley* (20 U.S.C. § 1617 (1970 ed., Supp. V), Pub. L. 92-318, Title VII, § 718, 86 Stat. 235, 369 (repealed)):

> Upon the entry of a final order by a court of the United States against a local educational agency, a State ... or the United States ..., for failure to comply with ... this chapter ... or for discrimination on the basis of race, color, or national origin in violation of [federal law] ..., the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

to the text of 42 U.S.C. § 1988 as it existed at the time *Hanrahan* and *Texas State Teachers Ass'n* were decided (the Civil Rights Attorney's Fees Awards Act of 1976, PL 94-559, October 19, 1976, 90 Stat 2641) and still remains unchanged in relevant part today:

> In any action or proceeding to enforce a provision of [certain anti-discrimination statutory] sections ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Besides the use of the words "court," "reasonable," "attorney," "fee," and "cost," § 15(e)(1) of the Vaccine Act does not appear to bear the critical resemblance to those anti-discrimination fee-shifting statutes that they bear to one another in phrasing or usage of words.

However, the wording of § 15(e) itself did not seem to jibe with this stricture. *See* § 15(e)(1) (compensation shall be awarded for reasonable attorneys' fees and costs "incurred in *any* proceeding on [a petition filed under section § 11]" (emphasis added)). The Court reasoned that the term "compensation" was used in two different ways in the Vaccine Act: one overarching usage, that included attorneys fees, meaning any Program funds disbursed to a petitioner, and one specific meaning more narrowly applying to funds compensating for a proven vaccine-related injury, following an election of acceptance of the Court's judgment. The Court in *Saunders* rationalized an apparent contradiction *in the statutory text*, *based upon the statutory text*. As demonstrated above, *Avera* represents a departure from the statutory text, under the banner of statutory purpose and intent.

The problem is not merely one of statutory interpretation, but one of the court's exercise of jurisdiction and constitutional legitimacy. The *Avera* opinion explained its fabrication of the heretofore unknown creature of interim attorneys' fees by stating, "There is nothing in the Vaccine Act that prohibits the award of interim fees." 515 F. 3d at 1351. However, federal courts are not courts of general, common law jurisdiction, constrained only by specific statutory prohibitions. Rather, they are courts of limited jurisdiction that must point to the grant of specific jurisdiction for all but the most basic of judicial actions.

With the exception of the Supreme Court of the United States, federal courts are, one and all, creatures of statute;[12] therefore they each exercise limited subject matter jurisdiction which is itself granted by statute.[13] As such, they have been granted the authority and power to hear cases only where specific subject matter is at issue.[14]

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[12] United States Constitution, Article III, Section 1; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). The Supreme Court, in a landmark case on federal jurisdiction, held:

> Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish."

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701-702 (1982).

[13] This restriction is based upon the appropriate deference due to state governments and laws contemplated by our federal system:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which a federal statute has defined.

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (internal marks omitted).

[14] *See*, *e.g.*, United States Constitution, Article III, Section 2: "The judicial Power shall extend to all Cases...arising under...the Laws of the United States..."; Vaccine Act, Section 12(a) ("The United States Court of Federal Claims and

In the context of federal courts, within the federal experiment of These United States, jurisdiction is conferred by statutory grant. The previously independent, *sovereign* Colonies were each granted independence from King George III,[15] and at first only confederated for mutual benefit under the Articles of Confederation. After some time, the people of these several States decided it was best to divest certain aspects of sovereignty (but only those aspects) from each of the States, and to reinvest that sovereignty in the national government (now termed the "federal" government). As has been repeatedly shown, only those aspects of authority and sovereignty which were vested explicitly in the national government, through the ratification of the United States Constitution, can be exercised by any part of the federal government. United States Constitution, Amendment X. Therefore, in a narrowing cone of authority: the Constitution only grants to the national (federal) government the authority originally given it by the people of the several States; the national government as a whole may only exercise the authority contained in the body of the Constitution; Congress may only legislate national laws according to the grants and limitations of authority contained in Article I, including their legislation granting judicial authority to the federal courts; and federal courts may only exercise jurisdiction over the subject matter of the legislation properly passed by Congress. As a result, this immarcescible truth stands: federal courts do indeed wield great power, but they wield that power within a circumscribed area of authority, beyond which they shall not trespass. This is the basis for the distinction between federal courts, which are of "limited" jurisdiction, and courts of the several State governments, which retain general jurisdiction over all subject matter not explicitly and exclusively assigned to the national (i.e. federal) courts.

This brings us back to the Vaccine Program. Congress ostensibly possessed the constitutional prerogative to create the Program under the authority of the Taxing and Spending Clause of the Constitution, found at Article I, Section 8, Clause 1. In creating the Program, Congress vested the United States Court of Federal Claims (originally the Claims Court), acting through the Office of Special Masters, with "jurisdiction over proceedings to determine if a petitioner under [§ 11 of the Act] is entitled to compensation under the Program and the amount of such compensation." § 12(a). Therein Congress also vested the Court with the power to "issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded." *Id*. Attorneys' fees are contemplated within the subject matter of "compensation" over which Congress delegated authority to the Court to adjudicate claims in the Vaccine Program. § 15 (e)(1).

The subject matter jurisdiction of the Court then, by which authority the Court decides Program cases, is the authority to decide if petitioners are entitled to compensation, premised on their underlying claims of vaccine-related injury. Attorneys' fees and costs are a form of compensation under the Vaccine Act, albeit a special subcategory of compensation, under the broader meaning of the word compensation as used in the Act. *Saunders*, *supra*. As such, the Court may only award

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the United States Court of Federal Claims special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under [section 11] is entitled to compensation under the Program and the amount of such compensation. The United States Court of Federal Claims may issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded.")

[15] Treaty of Paris, Article I (1783).

attorneys' fees and costs as mandated by the Act.[16] The Court otherwise lacks the power to take away one party's property to give it to another party, any more than would some other disinterested individual citizen. The opinion voiced in *Avera* requires this Court to order payment of funds beyond that contained in the words of the statute. However, given that *Avera* appears to be binding, mandatory precedent[17] upon this case, this Court faces no alternative but to so order.

Incidentally, the Court hereby renders its own *obiter dictum* to state that, if it must arrogate itself extra-constitutionally for the benefit of a party or an attorney, the Court is pleased that such attorney happens to be Petitioners' Counsel in the instant case. Petitioners' Counsel continually comports himself professionally, both in his amiability, and in his compliance with the Order of the Court.

B. THE REASONABLE RATE AT WHICH TO AWARD INTERIM ATTORNEYS' FEES

The Federal Circuit's *Avera* opinion also represented a departure from preexisting application of law on the issue of determining a reasonable rate for attorneys' fees. As with the conclusion that interim fees were allowed under the Vaccine Act based upon non-Act court rulings, so also the *Avera*

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[16] The Court of Federal Claims, like every federal court in existence (other than the Supreme Court) owes its existence and jurisdiction to statutory grant, and, as a court of limited jurisdiction, is granted jurisdiction only by statute. *See generally* United States Constitution, Article III; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (ruling that "federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed"); *FAAUO v. C.I.R.*, 165 F.3d 572, 578 (7th Cir. 1999) (Posner, J.) ("The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous. All federal courts are courts of limited jurisdiction. We are given no reason to suppose that statutes of limitations are intended to be administered differently in the Tax Court than in the federal district courts, which share jurisdiction in federal tax cases with the Tax Court."); *Terran v. Secretary of HHS*, 195 F. 3d 1302 (Fed. Cir. 1999) ("It is well understood that the Court of Federal Claims, like all federal courts, is a court of limited jurisdiction."). As stated above, this limitation of federal power originates from the sovereignty left in the hands of the individual States, comprised of the remainder that was not transferred by the people to the federal government at the time of ratification of the Constitution. *Cf.* United States Constitution, Amendment X.

[17] Some ambiguity yet remains on this point, inasmuch as the *Avera* holding did not rely on the justification for interim attorneys' fees. Indeed, the Federal Circuit expressly affirmed the denial of interim attorneys' fees and costs to the petitioners in that case, and Respondent was left unable to appeal its discussion on interim fees. As such, there is ample reason to view the entire discussion in *Avera* regarding whether interim fees may be awarded as mere *obiter dicta*.

Whether text in a judicial opinion is *obiter dicta* is even more important in the context of federal, Article III courts (as is the Federal Circuit Court of Appeals), because they are only permitted to rule upon an actual "case or controversy," and lack jurisdiction to render merely advisory opinions beyond the rulings necessary to resolve a dispute. *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Allen v. Wright*, 468 U.S. 737, 766 (1984); *Laird v. Tatum*, 408 U.S. 1 (1972); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968). Furthermore, from the very earliest days of national (federal) courts, it has been recognized that such courts may not decide issues not properly within their jurisdiction due to a failure to meet the terms of Article III. *Hodgson v. Bowerbank*, 5 Cranch (9 U.S.) 303 (1809).

court drew its analytical framework from case decisions outside of the Program on fee rates. Respondent had argued for continuation of the rule applied since the Program's inception, or, as alternatively stated in the *Avera* opinion, "the government urge[d] that we *adopt* a 'hometown rule,' which dictates that the proper rate to apply is the market rate of the geographic location where the attorney maintains an office and practices law." *Id*. (emphasis added).

Instead, the Federal Circuit stated that, because the Vaccine Act bore such close resemblance in wording with fee-shifting statutes applied by the several other federal circuit courts of appeals, the same "forum rate" rule should apply, along with the typically limited exception to that rule recognized in *Davis County*, *supra*. *Avera* at 1348-49.[18] Without citation support, the Federal Circuit announced that, "Here, the forum for cases brought pursuant to the Vaccine Act is the District of Columbia, where the Court of Federal Claims, which has exclusive jurisdiction over cases arising under the Vaccine Act, is located."[19] *Avera* at 1348.

But the matter was not so easily resolved, because, unlike all the federal district courts applying the other fee-shifting statutes mentioned in *Avera*, almost none of the petitioners or petitioners' counsel appearing in the Vaccine Program come from within the (putative) forum. Thus, what is the exception in all of those other contexts–the "*Davis* exception"–became the governing rule in the Program...maybe. "In [*Davis*], the District of Columbia Circuit recognized a limited exception to the forum rule "where the bulk of [an attorney's] work is done outside the jurisdiction of the court and where there is a *very significant* difference in compensation favoring D.C." *Avera* at 1349, quoting *Davis* at 758 (emphasis in original).

By "outside the jurisdiction of the court," the District of Columbia Circuit certainly meant "*territorial* jurisdiction," as federal courts often exercise their jurisdiction across state and national boundaries. This is where the rough definition of the Vaccine Program's forum–its venue, its

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[18] B*ut see supra* at note 7; *Avera* at 1348 n. 3 (distinguishing another decision on fees and costs in which Judge Dyk wrote the majority opinion, *Richlin Security Service Co. v. Chertoff*, 472 F.3d 1370 (Fed. Cir. 2006), *reversed* 128 S.Ct. 2007 (2008), which "*applied the same principle* but found that differences in the 'goals and objectives' of the similar fee-shifting statutes required different interpretations") (emphasis added); *Avera* at 1353 (Rader, J., concurring) ("[the *Avera* majority] chose to rely on inapposite provisions ... that are very different from the Vaccine Act and operate in contexts far removed from the federal claims jurisprudence of the United States Court of Federal Claims ... This difference from other fee-shifting statutes ... cuts against application of a forum rule and in favor of a hometown rule.")

Writing a separate, concurring opinion, specifically addressing this issue, Judge Rader insightfully challenged the "wisdom in jettisoning the Court of Federal Claims' longstanding application of the 'hometown rule' approach to attorneys' fees awards under the Vaccine Act." 515 F. 3d at 1352-53.

[19] The citation for that sentence is to the provision in the Vaccine Act granting subject matter jurisdiction to the Court of Federal Claims, which does not mention geographical locations, let alone define a geographic "forum" for the Program.

territorial jurisdiction–as the District of Columbia falls apart.[20] Whereas federal district courts, created by Congress pursuant to Article III of the Constitution, applying other fee-shifting statutes, have been assigned a geographic territorial jurisdiction called a district, giving rise to the law affecting venue, the Vaccine Program, in which an Article I court applies a differently-worded fee compensation statute, is in no such way territorially defined or confined.[21] Court hearings in Program cases are often tried in the hometown of the petitioners at issue, which is often not the same hometown of the petitioner's counsel, where such counsel may have prepared the case for trial. In other cases, hearings are convened in Washington, D.C., or telephonically, with witnesses and counsel appearing from several far-flung climes all across "the fruited plain." Awarding attorneys' fees to one attorney, depending on where he performed the "bulk" of the work on the case, depending wholly on the hazard or accident of his travel pattern is illogical, when he (or she) remains the same attorney, with the same expertise, regardless of his happenstance geographical location. If counsel before a district court are ever "outside the jurisdiction of the court," counsel before the Program cannot properly said to be so. When, then, if ever, should the "*Davis* exception" apply? If it does not apply, should all practitioners appearing before the Program be compensated at the level of attorneys in Washington, D.C., where *Avera* would set this Court's forum? This would be what the petitioner in *Avera* argued for, and goes directly against what the Federal Circuit stated should happen.[22] *Cf. Avera* at 1353 (Rader, J., concurring) (*Avera* "requires the Court of Federal Claims to undertake a complex *Davis* exception analysis rather than simply determining the local applicable rates for a reasonable fee award.").

This entire discussion in *Avera* presents an onerous, and potentially troublesome burden of analysis, and one that, in most cases (such as this one), will follow, albeit in a catawampus fashion, the previous rule, the one derided by *Avera*: the "hometown rule." Here, no hearing has taken place, and Petitioners' Counsel has presumably done the preponderance of the work performed in the case

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[20] The Court here melds together these disparate terms to reconcile the multiplicity of terms used to describe forum in *Avera* and elsewhere. It is very clear that these terms mean radically different things. For example, venue defects may be waived; jurisdictional defects may not. "Nothing in this chapter shall impair the *jurisdiction* of a district court of any matter involving a party who does not interpose timely and sufficient objection to the *venue*." 28 U.S.C. § 1406(b) (emphasis added). "As used in this section, ... the term 'district' includes the *territorial jurisdiction* of each such court." 28 U.S.C. § 1406(c) (emphasis added); "'Jurisdiction' ... is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006).

[21] *But see Avera* at 1353 (Rader, J., concurring) ("The forum will always be Washington, DC in Vaccine Act cases, even where the Special Master assigned to the case holds hearings at some remote location, because the Special Master operates as an extension of the United States Court of Federal Claims."). Although Circuit Judge Rader's opinion is very well-stated and generally well-taken in many other aspects, due to its brevity, it does not explain or cite to authority regarding why the operative forum in Vaccine Act cases is currently, and "will always be" the District of Columbia.

[22] Similarly, the *Avera* opinion purports to seek an outcome where petitioners' counsel are paid on a timely, fair basis–an admirable goal to be sure. However, by assigning Washington, D.C. as the Court's forum, and applying *Davis*, *Avera* denies New York City rates to New York City attorneys, of which there are a plurality appearing regularly before the Program. This is because the *Davis* exception only applies where the out-of-jurisdiction attorneys' rates are lower than the forum rate. If counsel come from "outside the jurisdiction" into the forum, from somewhere where attorney billing rates are higher, under *Avera* and *Davis*, they would appear to be stuck with the forum's rate.

from his office in Olathe, Kansas (a suburb of Kansas City). Therefore, instead of just following the hometown rule, and applying what Petitioners' Counsel can (and does regularly) charge for his services in Kansas City's environs, the Court must first seek to apply a Washington, D.C. rate, unless he performed most of the case's work in and around Kansas City (he did), and yes, compared to Kansas City, "there is a *very significant* difference in compensation favoring D.C." *Avera* at 1349, quoting *Davis* at 758. So therefore the Court must then investigate what Petitioners' Counsel can charge for his services in and around Kansas City.

In this case, Petitioners' Counsel can (and did, and does) charge $250 per hour for his level of expertise in the Kansas City market. In fact, Petitioners filed the original fee agreement between themselves and Petitioners' Counsel from 1999, similar to others executed at that same time. The stated rate is $250.00 per hour. Exhibit A to Petitioners' Reply; *see also* Exhibit B to same, Affidavit of Attorney Gregory D. Kincaid. What the typical market price is for an item is a presumptively accurate measure of what the "reasonable" price is for that item. Respondent's Objections did not overcome this presumption.

WHEREFORE, the Court **awards** Petitioners the attorney rates requested by their interim fee petition, with experienced and associate attorney rates **between $150 and $250 per hour**, and secretarial/paralegal rates **between $65 and $85 per hour**.

C. THE REASONABLE HOURS TO COMPENSATE *VIA* AN AWARD OF INTERIM ATTORNEYS' FEES

Respondent's opposition to individual entries is scatter-shot, but often accurate where aimed. However, Respondent also made generalized objections without particularized focus, which the Court deems to be waived. Vaccine Rule 8(f)(1) ("Any fact or argument not raised specifically in the record before the special master will be considered waived and cannot be raised by either party in proceedings on review of a special master's decision.")

Respondent correctly points out that general informational conferences that are not specific to prosecuting the instant petition are not generally compensated. "The court can only reimburse petitioners for costs incurred in proceedings on the petition in question. Because such an expense is not attributable to the proceedings on this petition only, [compensation] is not allowed." *Guy v. Secretary of HHS*, 38 Fed. Cl. 403 (1997) (citation omitted). Therefore the Court **disallows compensation for 11.0 hours requested for 9-10 September 2000** for attending a lecture on autism.

Respondent likewise objects to one quarter hour requested by Petitioners for "Telephone call from" without further explanation. The Court reminds Petitioners that they bear the burden of demonstrating to a preponderance the existence or occurrence of facts through evidence. *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). Therefore, given that this entry appears incomplete, the Court **disallows compensation for 0.25 hour requested for 16 March 2001** for "Telephone call from."

Respondent objects to Petitioners' Counsel's use of five hours for writing letters to the Court and Petitioners' expert witnesses, and to "consult with" fellow practitioner Silvia Chin-Caplan. Though some of the correspondence in that entry may have been related to the prosecution of the case at bar, consultation with Mrs. Chin-Caplan, without further explanation, is not directly related. Consequently, that entire, undivided time entry is not compensable. Therefore, the Court **disallows compensation for 5.0 hours requested for 3 May 2002**.

Respondent objects to compensation at the experienced attorney rate for non-attorney paralegal or secretarial work, as in 4.15 hours spent on 29 January 2001 by Attorney Kincaid "organiz[ing] file and photocopy[ing] all records for Dr. Menkes," and one hour spent on 28 June 2002 to organize correspondence.

With few exceptions, what sets the reasonable (i.e., market) rate for a billable task is the nature and quality of the task performed and the price the market assigns to it, not the unrelated, overqualifying expertise possessed by the person performing the task. Although "someone may charge more (or less) to perform work of a particular nature, based on what consumers are willing to pay that person to perform that task," it remains also true that "services should be compensable by reference to the services rendered, and not by reference to [that person's] qualifications as such, standing alone." *Kantor v. Secretary of HHS*, No. 01-679V, 2007 WL 1032378 *5 (Fed. Cl. Spec. Mstr. Mar. 21, 2007). The Court "cannot reimburse" what amount to "routine tasks more properly delegated to a paralegal...at an attorney's hourly rate." *LeBlanc v. Secretary of HHS*, No. 90-1607V, 1995 WL 695202 *2 (Fed. Cl. Spec. Mstr. Nov. 8, 1995). The Court will not compensate as reasonable attorneys' fees what should properly be considered "overhead." *Id*. at *3.

Therefore, the Court **reduces the rate of compensation,** from $250.00 per hour **to $85.00 per hour, for 5.15 hours requested for 29 January 2001 and 28 June 2002** for performing paralegal or secretarial work.

Petitioners requested $52,415.15 in interim attorneys' fees and costs, from which 16.25 hours at $250 per hour were disallowed, leaving $48,352. From that amount, 5.15 hours at the attorney rate of $250 per hour were reduced to the paralegal/secretarial rate of $85 per hour, leaving a total of **$47,502.90**.

CONCLUSION

Based on a review of Petitioners' application for interim attorneys' fees and costs, and the documentation attached thereto, the Court finds that Petitioners are entitled under *Avera v. Secretary of HHS* to an award in the amount of $47,502.90. Therefore, in the absence of a motion for review

filed in compliance with Vaccine Rules 23 and 24, the clerk of the court is directed to enter judgment in favor of Petitioner in the amount of $47,502.90 for reasonable attorneys' fees and costs.[23]

Hence, **a check for $3,462.20 shall be paid to Petitioners,[24] and a check for $44,040.70 shall be paid to Petitioners and Petitioners' Counsel jointly.** In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, **the clerk shall forthwith enter judgment** in accordance herewith.

IT IS SO ORDERED.

Richard B. Abell
Special Master

[23] This amount is intended to cover *all* legal expenses incurred up to and including 1 July 2008. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered up to and including 1 July 2008. Furthermore, 42 U.S.C. § 300 aa- 15(e)(3) prevents an attorney for charging or collecting fees (including costs) that would be in addition to the amount awarded by this Court. See generally, *Beck v. Secretary of HHS,* 924 F. 2d 1029 (Fed. Cir. 1991).

[24] Petitioners themselves paid $3,462.00 toward the prosecution of this Petition. *See* Supplementary Statement in Support of Petition for Interim Award of Fees and Litigation Expenses. The remainder was paid or credited on Petitioners' behalf by Petitioners' Counsel.