In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-0270V

Filed: 6 November 2009

SUSAN WALMSLEY,	*	
Petitioner,	*	
v.	*	**PUBLISHED**
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Forum Rate, *Avera*, *Laffey* Matrix
Respondent.	*	

John F. McHugh, Esq., Law Office of John McHugh, New York City, New York, for Petitioner; *Lisa A. Watts, Esq.,* U.S. Department of Justice, Washington, District of Columbia, for Respondent.

PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS[1]

The case in chief for the above-captioned matter was resolved on 23 June 2008 by a decision premised on the joint stipulation of the parties. Petitioner filed an application for attorneys' fees and costs on 7 August 2008, and the parties filed briefs in support and opposition thereto throughout August and September. On the issue of attorneys' fees and costs to which Petitioner is entitled, this case is ripe for the Court's ruling.

§ 15(e)(1) of the Vaccine Act,[2] provides for compensation of reasonable attorneys' fees and costs incurred in the proceedings appurtenant to a 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*.

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

[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.

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), cases in the Vaccine Program had long followed 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, 888-896 (1984).

> A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)

Whereas a reasonable rate used to be based on the local community in which counsel's office was located, 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 (differently-phrased) 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*. at 1349, quoting *Davis 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).

Once the appropriate market is decided, the best, and presumptive determinant of whether a rate is reasonable is the market price: A reasonable fee is what a willing buyer would pay a willing seller for the good or service in question, and the Court, in awarding fees and costs, should do its best to follow the price signals of the free market. *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 522 F.3d 182, 184 (2d Cir. 2008).

Since Petitioner prevailed upon the underlying Petition, there is no question that Petitioner is entitled to reasonable attorneys' fees and costs. Furthermore, Respondent does not object to the use of time expended in prosecuting this matter by Petitioner's Counsel. The questions before the Court regard first, the reasonable rate for Petitioner's Counsel, Mr. McHugh, and second, the rate and sufficiency of proof for the efforts of Dr. Kinsbourne, Petitioner's retained expert witness.

A. THE REASONABLE RATE AT WHICH TO AWARD PETITIONER ATTORNEYS' FEES

For about one year, the issue appeared resolved regarding what rate to compensate for Petitioner's Counsel, Mr. McHugh. Not only had this Court ruled on the subject, but such ruling was the subject of a published decision of the Undersigned. *Kantor v. Secretary of HHS*, No. 01-679V, 2007 WL 1032378 (Fed. Cl. Spec. Mstr. Mar. 21, 2007). In that case, Petitioner had militated for the "*Laffey* Matrix" and District of Columbia forum rates, as did several other parties represented by attorneys regularly appearing before the Program, but the Court followed the "hometown rule" employed within the Vaccine Program since its inception. Approximately one year later, the Federal Circuit took up the issue of a forum rate in the case of *Avera v. Secretary of HHS*, 515 F. 3d 1343 (Fed. Cir. 2008). The question presented here is whether *Avera* dictates a different outcome on the issue of what rate to award for Petitioner's Counsel's work in this case.

1. The Federal Circuit's mandatory precedent in *Avera v. Sec'y of HHS*

The Federal Circuit's majority opinion in *Avera*, penned by Judge Dyk, represents a substantial departure from preexisting application of the Vaccine Act on the issue of determining a reasonable rate for attorneys' fees. *Rodriguez v. Sec'y of HHS*, No. 06-0559V, 2009 WL 2568468 (Fed. Cl. Spec. Mstr. Jul. 27, 2009) ("Because [*Avera*] changed the focus from the geographic rule previously used in the lodestar calculation to the forum rate, decisions issued prior to [*Avera*] awarding specific hourly rates must be viewed with some caution, as they may be based on evidence of the geographic rate for the attorneys involved."). As with its conclusion that interim fees were allowed under the Vaccine Act based upon court rulings from outside the Program, so also the *Avera* court drew its analytical framework from case decisions outside of the Program on fee rates. In that case, 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." 515 F. 3d at 1348 (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.[3] 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."[4] *Avera* at 1348; *but see Rodriguez v. Sec'y of HHS*, No. 06-0559V, 2009 WL 2568468 *12 (Fed. Cl. Spec. Mstr. Jul. 27, 2009) ("The *Laffey* Matrix was judicially created for application in a completely different forum, that of the U.S. District Court for the District of Columbia.").

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"–often becomes the governing rule in the Program. "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). While the Davis court arguably did not expressly require the one-way ratchet of the "favoring D.C." phrase, this language from the Federal Circuit in *Avera* does seem to create a one-way ratchet, and that is the language that is binding on this Court.[5]

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[3] B*ut see Franklin v. Sec'y of DHHS*, No. 99-0855V, 2009 WL 2524492 (Fed. Cl. Spec. Mstr. Jul. 28, 2009) at note 11 (listing the statutory text of the several statutes the Federal Circuit surmised bore such close resemblance to § 15(e)(1) of the Vaccine Act); *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.

[4] 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 any geographical locations, let alone define the Program's geographic "forum."

[5] Even though the *Avera* opinion purports to seek an outcome where petitioners' counsel are paid on a timely, fair basis, by assigning Washington, D.C. as the Court's forum, and applying *Davis*, *Avera* appears to deny higher rates to attorneys from legal markets with higher rates. This is because their application of 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 putatively higher, under *Avera*, they would appear to be stuck with the forum's rate, if the forum rate is lower.

By "outside the jurisdiction of the court," the District of Columbia Circuit certainly meant "*territorial* jurisdiction,"[6] as federal courts often exercise their jurisdiction across state and national boundaries, and the limits of federal court jurisdiction is seldom geographical. This is where the rough demarcation of the Vaccine Program's forum–its venue, its territorial jurisdiction–as the District of Columbia completely falls apart.[7] 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.[8] 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." 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 petitioners in *Avera* and *Kantor* argued for,

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[6] The governing law on reasonable attorney rates for fee-shifting contexts in the Sixth Circuit makes this modifier explicit:

> ... when a counselor has voluntarily agreed to represent a plaintiff in an out-of-town lawsuit, thereby necessitating litigation by that lawyer primarily in the alien locale of the court in which the case is pending, the court should deem the "relevant community" for fee purposes to constitute the legal community within that court's *territorial jurisdiction*; thus the "prevailing market rate" is that rate which lawyers of comparable skill and experience can reasonably expect to command within the *venue* of the court of record, rather than foreign counsel's typical charge for work performed within a geographical area wherein he maintains his [or her] office and/or normally practices, at least where the lawyer's reasonable "home" rate exceeds the reasonable "local" charge.

Gratz v. Bollinger, 353 F. Supp. 929, 946-948 (E.D. Mich. 2005), quoting *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000) (emphasis added).

[7] 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).

[8] *Rodriguez v. Sec'y of HHS*, No. 06-0559V, 2009 WL 2568468 *16 note 49 (Fed. Cl. Spec. Mstr. Jul. 27, 2009) ("In view of the nationwide jurisdiction conferred on the Court of Federal Claims and the special masters who hear Vaccine Act cases, the term "local counsel" is something of a misnomer."); *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.

and goes directly against what the Federal Circuit stated should happen. *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 unnecessarily onerous, and potentially unworkable analysis, a point taken up by another colleague on this bench in the recent decision of *Rodriguez v. Sec'y of HHS*, No. 06-0559V, 2009 WL 2568468 (Fed. Cl. Spec. Mstr. Jul. 27, 2009), the only other published decision besides *Kantor* addressing Mr. McHugh's billing rate, and the only one filed since the Federal Circuit's *Avera* opinion. Due to the closeness of its analog, the Court must address its constituent components.

2. Persuasive Precedent from *Rodriguez v. Sec'y of HHS*

As the Court does here, the special master in *Rodriguez* found the *Davis* exception did not apply, and that therefore, under *Avera*, ruled that the D.C. forum rate–whatever it is–should apply. *Id*. at *3. At first,[9] the special master in *Rodriguez* considered extending the forum rate market to include the greater Washington metro area, and ordered the parties to file, for reasons that were never explicitly detailed, "information concerning fees in the broader geographic area in order to provide more information that might assist [her] in determining the forum rate." *Rodriguez* at *1 note 10. In contrast, both parties recognized throughout that the *Avera* Court was very specific in delineating the District of Columbia as the forum for Vaccine Act attorney fee calculations. *Avera* at 1348. That special master's stated rationale for this choice appears to have been frustration at the absence of comparable practicing attorneys within the District itself, and the guidance provided by her "experience in Vaccine Act cases." *Rodriguez* at *1 note 10 ("In making a request for information on fees from a geographic area broader than the District of Columbia, I was guided by my experience in Vaccine Act cases").

However, while it is true that special masters are generally afforded deference on factual questions when ruling on attorney fee applications, where the Federal Circuit has spoken so definitively to create a generally-applicable rule, that deference is tenuous or absent. *Compare Wasson v. Sec'y of HHS*, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F. 2d 131 (Fed. Cir. 1993) ("[T]he special master is given reasonably broad discretion when *calculating* such awards" and "may rely upon [] her own general experience and her understanding of the issues raised.") (emphasis added) *with Slimfold Mfg. Co., Inc. v. Kinkead Industries, Inc.*, 932 F. 2d 1453, 1459 (Fed. Cir. 1991) (instructing trial court to "rely on [] experience and knowledge" of deciding "what are reasonable hours and reasonable fees" in a case where "documentation is considered inadequate"). This error is akin to conflating questions of law with questions of fact. The Undersigned, now in the same

[9] Seventeen slip opinion pages later, the *Rodriguez* decision briefly mentions, "assuming, *arguendo*, that petitioner has demonstrated that the Laffey Matrix rates are "those prevailing in the community" (the District of Columbia)..." (*Id*. at *12), and in a footnote cites a footnote from a Court of Federal Claims opinion to say "the forum for Vaccine Act cases is the District of Columbia" (*Id*. at *13 note 42). These are the closest that decision comes to affirmatively ruling on the applicable geographical limits of the forum, which presumably overrode the previously ordered foray into explicitly considering a broader "D.C. area" as the relevant geographical forum.

unenviable position of determining a forum rate, sympathizes with that resort to a discoverable basis to render a decision, but cannot do likewise for this reason. The Court is left with the task of finding a District of Columbia forum rate for Vaccine Program practitioners without tangible examples for analogy or comparison.

The *Rodriguez* decision also considered, without deciding, whether Mr. McHugh's other practice area of expertise, transportation law, provides a useful point of comparison with his work in the Vaccine Program, to wit: "It is Mr. McHugh's burden[10] to establish that the two fields of practice are sufficiently similar [in absolute skill required and in his individual relative experience in each] to permit him to command the same fees in both." *Id*. at *4. That special master styled the core issue as "what constitutes Mr. McHugh's rate for *similar* litigation." *Id*. The Undersigned, in *Kantor*, has already considered this question and answered it, but such resolution was based upon a market price for which the Court could ascertain actual real-world data: Mr. McHugh's billing rates in Manhattan. The problem now is that *Avera* requires the Court to award Petitioner attorneys' fees for Mr. McHugh's services at the rate he would garner in the forum territory of the District of Columbia, for which no data are available.

This latter question is the one which the petitioner in *Rodriguez* (and Petitioner in this case) seeks to answer by reference to the *Laffey* Matrix, as "highly probative evidence of the forum rate in the District of Columbia." *Rodriguez*. at *5. The special master in *Rodriguez* seemed to rely on a declaration, filed by Respondent, of a private attorney that worked on the *Laffey* case's fee litigation, which that special master references to establish the specificity, if not uniquity of the area in which *Laffey* arose, i.e., employment discrimination. *Rodriguez* at *6. This attorney's affidavit also stated that the matrix "was never designed to set attorney rates in normal federal litigation by competent attorneys." *Id*. This led the special master in *Rodriguez* to conclude, "There are significant differences between the litigation in which the *Laffey* Matrix is applied and Vaccine Act litigation," and therefore ruled against Petitioner's urging to employ the matrix because the proof "failed to show that the services provided in civil cases tried in the U.S. District Court for the District of Columbia are similar to Vaccine Act litigation, or that [Mr. McHugh's] skill and reputation are similar to those counsel who command the *Laffey* Matrix rates [petitioner] requests." *Id*. at *11-12.

In contradistinction, not only is employment discrimination arguably less complex than litigation in the Vaccine Program,[11] it is certainly in no way unique from other types of litigation

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[10] Actually, the burden is the petitioner's. Conflating counsel with the party at interest is a common error committed in Program attorney fee proceedings, because of the practice of counsel foregoing payment until attorneys' fees are paid by the Court, making the reimbursement of attorneys' fees seem as if they are payments directly to counsel. Even where that is the case, however, the party at interest remains the petitioner.

[11] The *Rodriguez* decision makes repeated reference (*Id*. at *6-7) to other areas of law (*e.g.*, employment discrimination, medical malpractice, and drug liability) that were perspected as more complex than vaccine injury litigation within this Program, to which the Undersigned merely notes his dissent. Aside from relaxed procedures in the absence of jury trials and substantially reduced discovery, the matters litigated in the Program are decidedly more complex than employment discrimination claims, and the statutes and substantive rules affecting both are of comparable complexity. The additional difference, when comparing the Program to medical malpractice, is medical duty of care and

based upon federal statutes. The *Laffey* court itself contradicts this latter proposition. *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 374 (D.D.C. 1983) (finding that "the relevant legal market in this action is complex employment discrimination litigation *and that this market is subject to the same hourly rates that prevail in other complex federal litigation*") (emphasis added). In fact, the *Laffey* court expressly rejected arguments that would have determined fee rates according to one specific specialty area of law. *Id*. As to whether the Court should follow the guidance provided by the district court's written ruling, or that of an attorney representing a litigant in that matter is a matter of only momentary contemplation.

The special master in *Rodriguez* did note that the Federal Circuit's *Avera* opinion "left open the question of the applicability of the *Laffey* Matrix in Vaccine Act cases," and that, "Applying the *Laffey* Matrix to Vaccine Act cases has a certain allure because a bright line rule would go a long way toward reducing unnecessary litigation over attorneys' hourly rates in Vaccine Act cases ... eliminat[ing] the necessity for a petitioner to establish [a reasonable rate]. *Rodriguez* at *11. Going even further, "Were the court to adopt such an approach, the question of what hourly rate is 'reasonable' could be established very easily, simply by reference to the *Laffey* Matrix or a similar scheme based on Vaccine Act compensation rates." *Id*. The special master in *Rodriguez* later went on to "echo the sentiment expressed by the Chief Special Master ... regarding the utility of establishing a " *Laffey*-like" matrix for the forum rate of attorney fees within the Vaccine Program, based on reasonable rates for varying levels of experience." *Id*. at *12.

What seemed to be the deciding factor in *Rodriguez* was that "[t]he *Laffey* Matrix was judicially created for application in a completely different forum, that of the U.S. District Court for the District of Columbia," and that the Court of Federal Claims "has never found that matrix applicable in fee-shifting cases in or outside of the context of the Vaccine Act" in the past. *Id*. at *12. Interestingly, the *Rodriguez* opinion stops there, and does not consider whether the new demands and challenges facing the Court under the *Avera* precedent might have altered that historical course, adding merely that, "Unfortunately, unless the Federal Circuit squarely addresses whether the *Laffey* Matrix presents the prima facie forum rate in Vaccine Act litigation, the issue of its applicability will continue to bedevil our attorney fees cases." *Id*. at *12 note 41.

In response to Petitioner's request for a finding of a rate of $450 per hour, the special master in *Rodriguez* found, in a footnote, that such a rate was too high, "[b]ased on [her] experience and recent research," research which she did not discuss further or provide *any* citation. *Id*. at *10 note 33. Nor did she disclose her experientially-gained inductive reasoning process, as would befit her determination of one of that case's core issues. *Id*. She found that "the market rate in Washington, DC, for similar work performed by an attorney of Mr. McHugh's experience and reputation" ranged from $310 to $335 for the period of 2006 through 2009, recognizing that such finding differed from the one found in *Kantor*. *Id*. at *23. It seems odd that the opinion would discuss at length the absence of a practical standard to determine a forum rate for the District of Columbia under the Federal Circuit's *Avera* precedent, and then resolve such a thorny issue in a passing footnote, with

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its breach; otherwise the two are substantially comparable. And, aside from a few differences in procedure, there is little to differentiate Program cases from drug liability cases outside of the Program.

only shadowy reference to how this Gordian Knot was untangled.[12] Withal, this specific finding provides no analogous reasoning to guide the Court in the instant case, even though the Court does take into consideration the more explicitly stated reasoning recounted above. As the special master in *Rodriguez* pointed out, "[w]hat another special master determined to be a reasonable hourly rate ... is relevant to, but not binding upon" the Court resolution of the instant case. *Id*. at *23.

3. The Parties' Arguments

In the instant case, Petitioner has requested a rate of $350 per hour for attorney work performed before 1 November 2006, $400 per hour for work performed 1 November 2006 through 31 December 2006, and $450 per hour for work performed from 1 January 2007 through the end of this matter. As mentioned *supra*, the Undersigned has already deemed a rate of $350 per hour reasonable for the period of 2006 and before. *See Kantor*, *supra*. Accordingly, Respondent raised no objection to the hourly rate of $350 per hour for the work performed up until 31 October 2006. Respondent's objection challenges Petitioner's counsel's rates under framework mandated by the Federal Circuit in *Avera*.

Petitioner argued, based on *Avera*, that "market rates for legal services in the forum should be used to calculate" the reasonable attorney fee rate, and that the geographical forum is the District of Columbia. Application for Fees and Costs at 5. Petitioner cited persuasive precedent from the Court of Federal Claims that litigation in the Vaccine Program is complex litigation,[13] and referenced

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[12] The special master in *Rodriguez* based her conclusion on a forum rate for Washington D.C. upon (a) the rate awarded in 2004 to a Washington attorney who litigated in one Program case, within the procedural context of an Order to Show Cause why that amount should not be awarded, and without specific discussion of that attorney's work; (b) the negotiated rate of a practitioner representing petitioners from within a law school clinic, negotiated not with paying clients on the issue of practitioner's own reimbursement, but with government counsel on the amount that would be paid to the practitioner's employer institution; and (c) Boston counsel whose firm appears regularly in Vaccine Program cases.

Therefore, it is not controversial to state that there is no clearly applicable evidence to establish a District of Columbia "forum" rate by the lights of Vaccine Program history. A practitioner in a non-profit legal clinic, other out-of-town counsel, and the rate awarded one attorney five years ago in an Order to Show Cause are less than dispositive proofs of the current forum rate.

[13] In an early attorneys' fees and costs decision on review to a judge of the Claims Court, the Court stated:

> This court notes that the level of complexity involved in Vaccine Act cases is not a reason to reduce the lodestar rate in this instance. Although Congress chose to provide petitioners with an alternative to the traditional civil forum, relax standards of causation, and ease rigid procedural rules, issues under the Act are nonetheless complex. Vaccine litigation requires counsel's extensive knowledge of biology, microbiology, immunology, neurology, pediatrics and infant and child development, and a variety of complex damage issues. It does not follow that simply because the legal issues have changed, and perhaps been simplified, that significant skill is not required to competently represent a petitioner. The substantive issues of vaccine litigation remain complex, both factually and legally-it is merely the procedural framework which has simplified.

Monteverdi v. Sec'y of HHS, 19 Cl. Ct. 409, 433-34 (1990) (footnote omitted). By 1999, the Chief Special Master could say, concerning the relative complexity of Vaccine Program litigation, that:

the *Laffey* Matrix[14] as the presumptive standard for "prevailing rates for complex litigation in the District of Columbia." *Id*. at 6. However, Petitioner noted that, "The Matrix applies based upon an attorney's years of experience and is not modified based upon the size of the firm." Petitioner added that other federal district courts outside the District of Columbia have used the *Laffey* Matrix to determine attorney rates in their locality, after adjusting the locality pay differential accordingly (the Washington-Baltimore area has a locality pay differential of +20.89%, while the differential is +26.36% for New York City-Newark). *Id*. at 7. Based on these figures, and citing one federal district court's ruling on the subject,[15] Petitioner averred that there was lacking the "very significant difference" mentioned in the *Avera* opinion's discussion on this topic, and concluded that the Court should award the forum (Washington, D.C.) rate listed on the *Laffey* Matrix. *Id*. at 8.

Petitioner also summarized the legal career of Petitioner's counsel, which reads quite impressive: six years with the Department of Justice, of which two were spent as a trial attorney in the District of Columbia and the other four were spent as an Assistant United States Attorney in the Southern District of New York. The Court notes that these are two of the most well-respected and rigorous federal districts, and two of the most competitive legal markets in the nation. Following

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> The court has historically viewed vaccine cases as fairly straightforward and involving less difficult issues of causation than are seen in traditional tort litigation. However, the viewpoint has changed over the past several years and the undersigned can no longer agree with the supposition that the Act is not a complex piece of federal legislation. ... While the rules of procedure are relaxed, complex legal and medical issues are encountered with relative frequency and many claims require as much preparation as traditional tort actions. Clearly, the straightforward nature of the Act, as originally contemplated by Congress, has proven a falsity in many instances. Not only do most claims take years to resolve, but the amount of damages awarded may reach in the millions over a vaccinee's lifetime. These scenarios are quite comparable with the traditional tort system. In addition, because of the 1995 administrative changes to the Vaccine Injury Table, most petitioners are forced to pursue actual causation theories. Consequently, when the medical records fail to sufficiently support petitioners' contentions, as they often do, petitioners are obligated to present testimony from qualified medical experts who may have spent hours reviewing the records and preparing one or several expert reports. Furthermore, it is this court's experience that one expert is often inadequate to support petitioners' claims; it is not unusual for one to four experts from various disciplines within the medical community to testify on petitioners' behalf. In addition, multiple hearings in any given case are not infrequent. And, of course, the court relies heavily on the experts' testimony to comprehend what are often truly difficult medical matters in causation-in-fact cases. The effective presentation of these cases requires knowledgeable, able, and experienced counsel. Such counsel command high hourly rates in the open market; the same market the lodestar is premised upon. Therefore, the argument that Program litigation is uncomplicated and requires less expertise or preparation than traditional tort litigation is no longer valid and will not be considered a factor in determining hourly rates.

Erickson v. Sec'y of HHS, No. 96-0361V, 1999 WL 1268149 (Fed. Cl. Spec. Mstr. Dec. 10, 1999) (citations and footnotes omitted). Respondent cited no contrary authority to rebut this point.

[14] Available at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html (last visited 28 October 2009)

[15] *In re HPL Techs., Inc., Secs. Litig.*, 366 F. Supp. 2d 912 (N.D. Cal. 2005) (applying *Laffey* Matrix to calculate attorneys' fees at local rate in California by adjusting according to locality pay differential).

his government service, Petitioner's counsel spent over two years as general counsel to a transportation-industry interest, and has spent the rest of his long legal career in a litigation role, representing commercial and individual clients alike from his office in downtown (financial district) Manhattan, just steps away from historic Fraunces Tavern. Petitioner reiterated the point made in *Kantor*, that many of Mr. McHugh's peers from his time at the Department of Justice are now highly-placed in powerful New York firms.

For her part, Respondent quickly honed in on the one-way (downward) ratchet announced in the *Avera* opinion, as well as the lack of practical direction offered by the Circuit there in enunciating the forum rates for the stated forum of the District of Columbia.[16] Respondent's Opposition Brief at 4-5. Though not entirely clear at first, it appears that Respondent agrees that a D.C. forum rate should apply to Mr. McHugh, leaving Respondent's contention addressed primarily to what rate is appropriate for the District. Respondent was also quick to point out that the Federal Circuit in *Avera* contemplated the *Laffey* matrix as a standardized forum rate index, but did not rule on the issue, but rather had "no occasion to determine whether the so-called *Laffey* Matrix should play any role in the determination of fees under the Vaccine Act in those cases where forum rates are utilized." Respondent's Objections at 5, citing *Avera* at 1350.

Respondent claimed that "*Laffey* Matrix rates only apply under specific circumstances, none of which are present here," but did not articulate what those specific circumstances are, nor explain their relative presence or absence in the instant matter. Respondent's Objections at 6. In arguing that the *Laffey* Matrix does not apply to the Vaccine Program by the terms of the Act, Respondent proved that the matrix cannot be said to be binding on the Court, but did not prove that it is a false or inadvisable guide. Such argument is a valiant attempt to close the barn doors of statutory interpretation after the *Avera* horses have bolted. As the special master in *Rodriguez* repined, the *Avera* opinion mandates a D.C. forum rate in the absence of a useful exemplar. Might the *Laffey* Matrix suffice to provide such an exemplar, to fill the void created by the *Avera* mandate? This proposition was never squarely addressed, let alone rebutted, by Respondent.

Respondent provided a declaration from the Deputy Chief of the Civil Division of the United States Attorney's office for the District of Columbia, as an attached exhibit to Respondent's Objections. Respondent summarized the declaration, and argued thereupon:

> Mr. Van Horn explain[ed] that the *Laffey* Matrix is used within the District of Columbia by the United States Attorney's Office for cases "that involve fee-shifting statutes permitting a prevailing party to recover 'reasonable' attorneys' fees from the government. The Matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases." The fee-shifting statutes employing the *Laffey* Matrix are readily distinguishable from the unique fee-shifting provisions of

[16] Respondent's brief likewise cites Judge Rader's concurring opinion in *Avera* with approval, as does the Undersigned, regarding the difficulty and lack of precedent or guidance for the Court to follow in discovering a forum rate.

> the Vaccine Act ... [inasmuch as] ... "[f]ee-shifting statutes that apply in our practice areas specify that only prevailing parties are eligible to recover attorneys' fees from the government."

Respondent's Objections at 7. Respondent argued in a similar vein that the risk of nonpayment imposed in a "prevailing party" context inflates the *Laffey* Matrix rate higher than it would be in the Vaccine Program, where petitioners are more likely (but not guaranteed) to be reimbursed their attorneys' fees and costs. However, the two cases that Respondent cited with that argument militate *against* that argument, and the Court does not place weight on this argument. *City of Burlington v. Dague*, 505 U.S. 557, 562-67 (1992); *Rupert v. Sec'y of HHS*, 55 Fed. Cl. 293, 301 (2003) ("The risk of nonpayment, or contingency, is not an appropriate consideration in setting the lodestar rate under fee-shifting statutes," and it is "contrary to statute and precedent [to] consider[] the existence of such risk").

The Court would agree with Respondent, and did agree with Respondent, on the qualitative differences between the Vaccine Act's fee provisions and the verbiage of other fee-shifting statutes, until the Federal Circuit's *Avera* opinion obliterated these distinctions. Instead of addressing the Vaccine Act's grant of attorneys' fees in its own context, given its significant textual difference from other fee-shifting statutes, the Federal Circuit used those other, differently-worded statutes as interpretive analogs for Section 15(e) of the Act. Though the Undersigned would certainly agree to the meaningful difference between Section 15(e) and those "prevailing party" fee-shifting statutes, it appears that the distinction is meaningless to the majority of the *Avera* panel. Moreover, the Vaccine Program is certainly a context where parties recover reasonable attorneys' fees from the government, especially where (as here) Petitioner has received an award on the underlying Petition.

Respondent also challenged the rate appropriate for Mr. McHugh inasmuch as he worked as a solo practitioner for the period in question. Respondent's Opposition at 11-12. This issue is well-discussed in both *Kantor* and *Rodriguez*, *supra*. The short answer is that solo practitioners charge a flat rate for their time, even though their time expenditure ranges, from the marginal maximum competency that their experience allows, all the way to activities that might be delegated to junior associates in a large firm environment. These latter activities dilute the asking price their expertise might otherwise demand in a large firm context, and the limitation of singularity means their knowledge and efficacy are limited to one person. These considerations, among others, affect the market rate of a solo practitioner vis-à-vis intermediate- or large-sized firms.

Respondent's reminder on this point is well-taken, and the Court does bear that consideration in mind. However, it does not appear that Petitioner is asking for the rate appropriate for a partner in a large New York City or even District of Columbia firm. As the Court understands it, Petitioner's argument seemed to be that the rate appropriate for Mr. McHugh is that of a well-experienced senior attorney, practicing in lower Manhattan as a solo practitioner, and that his rate should be that of an equivalent lawyer in the District of Columbia which is equal to, or marginally lower than, the rate for his locality.

In her Reply brief, Petitioner pointed out that Respondent had not proffered a contrary market rate for Petitioner's Counsel, nor argued affirmatively for a guide for the Court to establish such a rate, instead only arguing against Petitioner's claims. Petitioner's Reply at 2. Petitioner also used her reply as an opportunity to again press the Court to use the *Laffey* Matrix as its benchmark for determining D.C. forum rates, and pointed out that Respondent had not offered any countervailing standard or basis for the Court to employ in establishing market rates.

Petitioner also assailed Respondent's argument regarding the cost differential for risk of loss that might differentiate the fees recoverable under the *Laffey* Matrix in "prevailing party" contexts from the Vaccine Program, the only support for which was an affidavit from a Department of Justice official, who restated an argument that has been squarely rejected when considered by the Supreme Court and the Court of Federal Claims' Vaccine Program respectively. *City of Burlington* and *Rupert*, *supra*; *see also Pa. v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 720 (1987), quoting *Laffey v. Northwest Airlines, Inc.*, 746 F. 2d 4, 27-28 (D.C. Cir. 1984).

Next Petitioner addressed whether the Vaccine Act qualifies as "complex federal litigation," citing the persuasive words of the Court of Federal Claims in 1990, when most of the cases in the Vaccine Program were Table cases that did not require extensive expert witness testimony and scientific factual argument:

> One might ask whether a patent or tax attorney should be penalized because he or she presented their case in a mini-trial or ADR. The savings in terms of fees which *simplified procedures* offer is not in lowering the hourly rate, but in reducing the total number of hours an attorney must spend in bringing a particular claim."

Monteverdi v. Secretary of HHS, 19 Cl. Ct. 409, 434 n. 118 (1990) (emphasis added). Petitioner also cited to a decision by the United States District Court for the District of Columbia, addressing the D.C. Circuit's use of the *Laffey* Matrix to determine fees for a variety of legal areas, not just theaters as "complex" as the one addressed in *Laffey* (employment discrimination):

> [T]he *Laffey* Matrix[] has achieved broad acceptance in this Circuit and has served as a guide in nearly every conceivable type of case. ... The generic matrix's use in such a diverse range of cases cuts against defendants' argument that reasonable rates can be derived only from data peculiar to a case's legal specialty area.

Miller v. Holzmann, 575 F. Supp. 2d 2, 14 (D.D.C. 2008); see also *Id*. at 14-15 (faulting the defendants opposing the use of the *Laffey* Matrix for "fail[ing] to demonstrate that for purposes of calculating a reasonable hourly rate, *qui tam* litigation differs in any meaningful way from other complex, civil litigation that occurs in federal court").

Lastly, Petitioner states the reasoning most persuasive to the Undersigned, before and after the Circuit's opinion in *Avera*: that "Mr. McHugh's $450 hourly rate – his actual rate charged to private, paying clients – is the presumptively reasonable rate in this case. Petitioner's Reply at 8. *See Arbor Hill*, *supra*; *Franklin*, *supra*, at 11 ("What the typical market price is for an item is a presumptively accurate measure of what the "reasonable" price is for that item."); *Kantor*, *supra*, at 9 ("[T]he best indicator of what "the market" will pay for Mr. McHugh's services is what other

clients are willing to pay for the same or similar services from the same attorney. Also, Mr. McHugh assuredly provides his other clients with services that are similar, if not equivalent to the services rendered here. ... If this rate were unreasonable, rational market forces and rational consumers (clients) would not pay that price for those services, and then Mr. McHugh would either change that price or would not have sufficient clients to stay in business. His continued solvency thus militates on his behalf.").

As a side point, in her Reply, Petitioner was perhaps confused by the tack taken by Respondent's opposition, and believed Respondent was arguing for New York City rates instead of forum (D.C.) rates, an understandable confusion based upon the nuance of Respondent's arguments. Petitioner took another opportunity to state that there is negligible difference between the cost of his services in New York City as compared with the District of Columbia, but that, following *Avera*, the appropriate legal market to derive a billing rate is the District of Columbia. On both points, the Court is inclined to agree. From the Court's understanding of the subject, the differential in rates may lie in the marginal extremes, but that the difference would not be substantial at the intermediate range in which Mr. McHugh finds himself. Likewise, as best as the Court can determine, Respondent's position remained throughout that the District of Columbia was the appropriate market, so there does not seem to be dispute on that point. Respondent's Opposition at 4; Respondents Surreply at 1.

4. Discussion

To restate, Petitioner has argued for a rate of $450 per hour on the grounds of (a) that is how much Mr. McHugh charges his non-Program clients for his time in his office in downtown Manhattan, and (b) that is the rate that would be due under the *Laffey* Matrix for someone of his experience engaged in complex federal litigation in Washington D.C., which, citing *Avera*, she believes is the relevant market to determine his rate in the Program. Respondent does not offer a contrary rate as more appropriate, but only contests that suggested rate and attacks Petitioner's arguments in support. It seems fairly clear that, under the mandatory precedent of *Avera*, Petitioner is entitled to the rate for Mr. McHugh's work in this matter that he would garner in the District of Columbia, which the Circuit announced as the forum for the Program. The central question before the Court is what basis to use to determine the forum rate for Mr. McHugh, in the absence of comparable exemplars, or relevant history of Mr. McHugh having worked recently in the District. One option (the only one explicitly proffered herein) is to adopt the *Laffey* Matrix in this specific circumstance of evidentiary void, a matrix specifically designed for calculating attorney fee rates in the District of Columbia in complex federal litigation. Respondent (as well as one other special master, in *Rodriguez*) contend that the *Laffey* Matrix is disanalogous because the litigation to which *Laffey* applied was somehow qualitatively more complex or unique, rendering the matrix inapplicable to the Program. It is certainly true that the matrix has been rejected within the Program in the context of calculating local rates, and it is also true that the Federal Circuit in *Avera* did not choose to adopt the matrix, for which ample argument was given by the petitioner in that case.

The Federal Circuit's choice not to adopt the *Laffey* Matrix is not precedential, since the Davis exception applied to the petitioner's counsel in *Avera*, and, in contrast, the matrix is "utilized

by the District of Columbia Circuit for counsel practicing in the District of Columbia in the area of complex litigation." *Avera* at 1346, 1350 ("We thus have no occasion to determine whether the so-called *Laffey* Matrix should play any role in the determination of fees under the Vaccine Act in those cases where forum rates are utilized."). Similarly, the pre-*Avera* decisions on attorneys' fees in the Program, which rejected the matrix, do not bind its application here, since those cases also dismissed arguments for a forum rate, which *Avera* expressly adopted.

In light of the reasoned legal precedent presented in this case, it would be fatuous to differentiate Program cases from cases where *Laffey* is applied based purely on a lack of complexity on the part of the Program cases or a higher threshold of specificity and complexity on the part of the areas where *Laffey* is applied. Despite what affidavits from attorneys might argue, the law on these topics appears rather straightforward: the *Laffey* Matrix, as designed and as implemented, pertains generally to complex federal litigation within the District of Columbia, and petitions brought pursuant to the Vaccine Act qualify as complex federal litigation, evidentiary and procedural streamlining notwithstanding.

Given the dearth of other evidence to employ, the *Laffey* Matrix seems an appropriate, easily calculable standard to follow in determining forum rates for the District of Columbia, which the Federal Circuit has declared to be the forum for the Vaccine Program. Certainly, resort to the matrix would not be appropriate where a more reliable data set is obtainable (i.e., what the attorney in question charges his or her non-Program clients in the relevant market). It certainly is of no use wherever the *Davis* exception applies, as it will in most Program cases. Even if mere *obiter dicta*, it is the Undersigned's opinion that the *Laffey* Matrix will often prove to be a rigid, bureaucratic contrivance, but one that may be necessary in cases like this one, where no other standard presents itself, which was, arguably, the context of the matrix's creation in the first place. 572 F. Supp. at 361, 373. Where there are other sources of evidence to better approximate the market rate in a community, the matrix should be avoided. It is only because of the strictures of the Federal Circuit's *Avera* precedent that such resort is taken: another unforeseen, but foreseeable legal consequence of that opinion.

The Court therefore **RULES**, based on the *Laffey* Matrix, that Petitioner is entitled to **$450 per hour for Mr. McHugh's attorney billing rate**, which, although performed entirely in Manhattan, is billed at the rate of the forum, the District of Columbia.

Although the Court is reluctant to resort to the *Laffey* Matrix, the consolation is that the same result would likely emerge under the logic followed in its *Kantor* decision, inasmuch as Mr. McHugh charges his other, non-Program clients that same rate as is here awarded. That appears to be the consensus worth to the market of Mr. McHugh's professional time. Were the Court to analyze Mr. McHugh's rate under a geographic locality ("hometown") rule, what Mr. McHugh charges for non-Program cases would be the Court's yardstick. Likewise the Court here finds, in accordance with the case law cited *supra*, his other practice areas are sufficiently similar to be used as useful guides of his billing rate. Admiralty is another area of niche practice based on federal statute, and common carrier injury torts bear sufficient resemblance to cases alleging injury from vaccines. His market rate is, *prima facie*, the presumptive, reasonable norm, until proven otherwise. Ruefully for all

involved, the Court must perforce perform the above forum rate analysis under the dictate of *Avera*. Were that to change, the Court would revert back to the sensible former system.

Wherefore, the Court **orders** that Petitioner be compensated $8,837.50 for 25.35 hours of work performed from 16 June 2002 through 22 September 2006 at a rate of $350 per hour; $1,200.00 for 3 hours of work performed from 16 November 2006 through 5 December 2006 at a rate of $400 per hour; and $19,012.50 for 42.25 hours of work performed from 12 January 2007 through 30 July 2008 at a rate of $450 per hour; **for a total of $29,050.00** in compensation for attorneys' fees incurred by Petitioner.

B. THE REASONABLE HOURS AND RATE TO AWARD DR. KINSBOURNE

Lastly, Respondent contests the rate appropriate for Dr. Kinsbourne, first assailing Petitioner's failure of proof due to the absence of billing records for Dr. Kinsbourne, and then, following Petitioner's filing of more detailed billing records, disputed the amounts due for the hours expended. Respondent's Opposition at 12; Respondent's surreply at 3. Petitioner's Application for Attorneys' Fees and Costs demanded a flat rate of $500 per hour for Dr. Kinsbourne, despite the Court's rulings on Dr. Kinsbourne's rate. Their later emendations break down the time spent by date and activity, and charge variably either $300 or $500 depending thereupon.

The Court largely agrees with Respondent's points on this topic, with the exception of her demand that certain work performed by Dr. Kinsbourne, that was arguably "secretarial" in nature, should be struck entirely and not compensated. This ignores the practice of the Undersigned enunciated clearly in *Kantor*, *supra*, and prompts the error rectified most recently by the Court of Federal Claims in *Valdes v. Sec'y of HHS*, __ Fed. Cl. __, 2009 WL 3347106 (2009) (finding a special master "abused his discretion in not approving the fee request at a paralegal rate" where the special master denied payment entirely for an attorney performing secretarial work).

Aside from this one legal error, Respondent's legal arguments are all well taken. Dr. Kinsbourne's time may be worth $500 per hour now, but it has not been at that rate at all times during the pendency of this Petition. The Undersigned has already adopted the Chief Special Master's findings in *Simon v. Sec'y of HHS*, No. 05-0941V, 2008 WL 623833 (Fed. Cl. Spec. Mstr. Feb. 21, 208). *See Adams v. Sec'y of HHS,* No. 01-0267V, 2008 WL 2221852 at *2 (Fed. Cl. Spec. Mstr. Apr. 30, 2008). However, Respondent's specific objections do not seem to mesh with the holding in *Simon* or her own (winsome) legal arguments. In *Simon*, Dr. Kinsbourne was awarded a rate of $300 per hour for work performed before December of 2006, $300 per hour for his time spent since that date for work that is properly classified as a consultant (e.g., consulting with Counsel), and $500 per hour for his time spent since that date for work that actually required his medical expertise. See *Simon* at *8.

In January 2007, which is after December 2006, Dr. Kinsbourne charged Petitioner time for reviewing medical records, reviewing medical literature, and conferencing (presumably with

Petitioner's Counsel). He charged $500 per hour for the former two activities and $300 per hour for the latter one. Respondent challenges the $500 rate for reviewing medical literature (without further argument). However, reviewing medical literature for half an hour, along with the time spent reviewing Petitioner's medical records, was part and parcel of his expert review and opinion formation in support of this Petition. The Court does not make the subtraction recommended by Respondent on this point. The same goes for the similar expenditure of time in July 2007, where Respondent employed the same argument on the same type of activity. The Court declines making subtraction there as well. The Court does cut the rate claimed for collating and faxing articles down to $90 per hour, and therefore subtracts $205 from the $250 claimed to perform that service.

In total, the Court **orders** that Petitioner be compensated in the amount of **$6,920.00** for Dr. Kinsbourne's expert services in this case, instead of the $7,125.00 claimed.

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 to an award in the amount of $38,403.54. 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 $38,403.54 for reasonable attorneys' fees and costs.[17]

Hence, **a check for $1,688.00 shall be paid to Petitioner,[18] and a check for $36,715.54 shall be paid to Petitioner and Petitioner's 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

[17] This amount is intended to cover *all* legal expenses incurred in this matter. 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).

[18] Petitioner herself paid $1,688.00 toward the prosecution of this Petition, including a $1,500 retainer to Dr. Kinsbourne. *See* Declaration of Susan Walmsley, filed as part of Petitioner's Application for Attorneys' Fees and Costs. The remainder was paid or credited on Petitioners' behalf by Petitioners' Counsel.