In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 99-533V
Filed: July 25, 2011
To be Published

CASEY HOCRAFFER,	*	
	*	Attorney fees and costs; Reasonable
Petitioner,	*	hourly rate; Reasonable hours
	*	expended; Reimbursement for
v.	*	attorney travel time; Use of a
	*	paralegal; Reimbursement for an
SECRETARY OF THE DEPARTMENT	*	attorney performing medical
OF HEALTH AND HUMAN SERVICES,	*	research; Interest against the
	*	United States; Forum rate;
Respondent.	*	Davis exception; Laffey Matrix

Paul S. Dannenberg, Esq., Huntington, VT, for Petitioner.
Glenn A. MacLeod, U.S. Department of Justice, Washington, D.C., for Respondent.

ATTORNEYS FEES AND COSTS DECISION[1]

GOLKIEWICZ, Special Master.[2]

I. Introduction

This case was filed under the National Vaccine Injury Compensation Program[3] on July 29, 1999. The Mandate from the Court of Appeals for the Federal Circuit affirming

[1] The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing. Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.**

[2] The case was originally assigned to the undersigned, but subsequently reassigned to Special Master LaVon French on July 23, 2002. Special Master French issued the initial entitlement decision on March 11, 2004. Upon her retirement, the case was reassigned to the undersigned on December 22, 2004.

the Court of Federal Claims judgment entered on April 9, 2010. During the intervening nearly eleven years devoted to processing this case, three decisions were issued by the Court's special masters, three decisions were issued by Judge Nancy B. Firestone and, ultimately, the Federal Circuit issued the final decision resolving the merits of the case.[4] Now the issue of reasonable attorney's fees and costs is presented.[5] Given the amount of time and process involved, a significant request for fees and costs was anticipated. However, even with that expectation, the undersigned was taken aback by petitioner's request.

Petitioner filed an Amended Petition for Fees and Costs ("P Am. Fee Pet.") on July 8, 2010, requesting $510,058.50 for attorney's fees.[6] This figure is derived from a bill for 1,096.9 hours of attorney time billed at $465.00 per hour worked.[7] Petitioner also requested costs in the amount of $24,834.53. Respondent filed her Response to

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[3] The National Vaccine Injury Compensation Program (hereinafter "Program" or "Act") comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (2006)(hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

[4] Hocraffer v. Sec'y of the Dept. of Health & Human Servs., 366 F. App'x 161, (Fed. Cir. 2010)(affirming decisions of Judge Firestone and Special Master Golkiewicz); Doe/34 v. Sec'y of the Dept. of Health & Human Servs., 87 Fed. Cl. 758 (Fed. Cl. 2009)(originally filed under seal on June 5, 2009)(denying Motion for Review); Doe/34, No. 99-533V, 2009 WL 1955140 (Fed. Cl. Spec. Mstr. Jan. 30, 2009)(finding damages in the amount of $5,841.50); Hocraffer, 2007 WL 5180525 (Fed. Cl. 2007)(granting Motion for Review in part to allow for additional testimony on damages); Hocraffer, 2007 WL 914914 (Fed. Cl. Spec. Mstr. Feb. 28, 2007)(finding damages in the amount of $5,841.50 on a limited duration of the injury); Hocraffer, 63 Fed. Cl. 765 (Fed. Cl. 2005)(reversing decision of special master and finding for petitioner on entitlement with a limited period of damages); Hocraffer, 2004 WL 627777 (Fed. Cl. Spec. Mstr. Mar. 12, 2004)(denying compensation). Petitioner requested two of the decisions, those in 2009, be redacted.

[5] Since this petitioner was found entitled to compensation, the statute mandates an award for reasonable fees and costs. "In awarding compensation on a petition . . . the special master or court shall also award as part of compensation an amount to cover reasonable attorneys' fees and other costs incurred in any proceeding on such petition." § 15(e).

[6] Throughout this opinion, the undersigned references petitioner's Exhibit 3 ("P Ex. 3"), which are the typed billing entries attached to petitioner's Amended Fee Application, filed July 8, 2010.

[7] Petitioner had previously filed an interim fee application ("Int. Fee App.") on May 1, 2009, requesting fees and costs totaling $316,917.00. This number was the product of 758.9 hours billed at $400.00 per hour. Int. Fee App. at 2. The undersigned denied this request on May 27, 2009, while waiting for the impending ruling on the merits of the case. Order, filed May 27, 2009. With Judge Firestone's June 5, 2009 Decision denying petitioner's Motion for Review, petitioner renewed the request for interim fees on June 12, 2009. Following several filings by the parties - the last being petitioner's Amended Petition for Interim Fees and Costs on December 23, 2009 - and the Federal Circuit's Decision on February 16, 2010, affirming Judge Firestone's decision, the undersigned ordered petitioner on February 23, 2010, to file a final motion for fees and costs. Petitioner filed her final Motion for Attorney's Fees and Costs on April 23, 2010 ("P Fee App."). This request for fees included hand-written entries for petitioner's attorney's billable time, many of which are illegible. P Ex. 3, attached to P Am. Fee App., filed April 23, 2010. The undersigned granted a Motion filed by respondent and ordered petitioner to re-file the time sheets in a typed format. Scheduling Order, filed June 10, 2010. Thereafter, petitioner filed the Amended Petition with type-written time sheets on July 8, 2010.

Petitioner's Final Application for Award of Attorney's Fees and Costs ("R Resp.") on July 30, 2010, vigorously contesting the request. In a nutshell, respondent contests as unsupported the hourly rate of $465 and characterizes as "patently 'unreasonable'" the number of hours billed. R Resp. at 8, 14. Petitioner replied on September 24, 2010 ("P Reply"), raising a number of arguments that will be discussed later. In addition, petitioner submitted a bill for drafting the Reply. P Reply, Ex.13. With the additional request, petitioner's request for fees and costs stands at $556,794.53. This is made up of $531,960.00 (1144 hours billed at a rate of $465 per hour) for fees and $24,834.53 for costs. P Reply at 27. Respondent replied on October 15, 2010 ("R Reply"). Finally, petitioner filed a Sur-Reply on November 4, 2010 ("P Sur-Reply"). The undersigned has reviewed the complete file of this case and considered the parties' arguments and support thereto. As will be discussed fully below, based upon the relevant case law and the undersigned's experience, it is found that an award for reasonable attorney's fees is $124,343.30 (661.7 hours compensated at rates of $163 to $200 per hour), and an award for reasonable costs is $24,421.98.

To understand the decision, some context is necessary. The context is provided in response to the parties' arguments over who is responsible for the extended proceedings, and thus the extraordinarily large request for fees. Petitioner stated that respondent presented unreasonable opposition and was overzealous in litigating this case. P Reply at 4. Respondent rejoins that it was petitioner "repeatedly raising legal arguments" that were unreasonable and overzealous, which forced respondent to defend accordingly. R Resp. at 18; see also R Reply at 1-2. Respondent also contends that petitioner made straightforward damages issues, which should have settled, unnecessarily complex. Id. Petitioner responds in turn arguing that the request is justified by the "unusual medical complexity and extreme 11 year protraction" of the case. P Reply at 11. Petitioner contends that the "unrelenting opposition" by respondent led to the necessary substantial expenditures of time. Id. at 12.

The undersigned has a different perspective; that is, petitioner's inefficient prosecution of this case unnecessarily prolonged the ultimate resolution. While petitioner correctly points out that she was "successful on two appeals to the Court of Federal Claims,"[8] P Sur-Reply at 1, it was petitioner's failure to grasp the critical import of Dr. Heubi's testimony, petitioner's own expert, which generated much unproductive process.[9] In summary, Judge Firestone recognized Dr. Heubi as a national expert in

[8] In petitioner's Surreply, petitioner states that both remands were due to a finding of legal error. Petitioner's characterization of the second remand as finding "legal error" is questionable. In fact, Judge Firestone stated, "[a]lthough the court generally agrees with Respondent that Petitioner's attempt to add a new expert and submit other medical evidence at this late date is very problematic, the court is not prepared to find, in the unique circumstances of this case, that this new evidence should be excluded from consideration." Hocraffer No. 99-533V, 2007 WL 5180525, at *4 (Fed. Cl. July 13, 2007). The "unique circumstances" appear to be the liability and damages phases of the case were bifurcated and the separate phases were heard and decided by different special masters. Id.

[9] Respondent walks a fine line in arguing that the claimed fees are "patently 'unreasonable'. . . in light of the value of the case." R Resp. at 8. Respondent argues for "economic rationality," contending that petitioner's counsel "knew, or should have known, the small value of his client's case." R Reply at 3 n 3. Respondent recognizes that such analysis has been rejected by one judge of the Court of Federal Claims,

Reye's Syndrome. Hocraffer v. Sec'y of the Dept. of Health & Human Servs., 63 Fed. Cl. 765, 769, 770, 777, 779 (Fed. Cl. 2005). Dr. Heubi testified at trial that milder cases of Reye's Syndrome result in "little" long-term sequelae. Transcript of Entitlement Hearing, held June 17, 2004, at 65 ("Ent. Tr."); Hocraffer, 63 Fed. Cl. at 772. He stated further that the "more severe your case in terms of coma grade, the more likely you're going to have neurologic sequelae." Ent. Tr. at 65. Based largely upon Dr. Heubi's testimony, the Court found that the record did not support petitioner suffering "any long-term effects" from her Reye's Syndrome. Hocraffer, 63 Fed. Cl. at 779. Dr. Heubi did not waver from this position first stated at the June 17, 2003 hearing, and reaffirmed in two affidavits and subsequent testimony before the undersigned in 2008. P Ex. A attached to Memorandum regarding Damages, filed December 14, 2005; Heubi Supplemental Affidavit, filed March 27, 2006; Transcript of Damages Hearing, held August 7, 2008, at 78-84 ("D. Tr."). It was based upon Dr. Heubi's evidence that the undersigned stated in 2006 that "respondent's suggestion of at most $5,000 is extremely reasonable for pain and suffering based upon compensation awarded in past cases under the Program." Order at 4, filed July 14. Petitioner never challenged Dr. Heubi's statements. Instead, petitioner argued that she developed neurological sequelae, manifested by migraines. See Decision on Remand filed January 30, 2009 at 5, 10. Petitioner presented the testimony of Dr. Jacobson to support her position.

Ultimately, petitioner's effort failed primarily because Dr. Jacobson agreed with Dr. Heubi. He agreed with Dr. Heubi that the primary allegation of neurologic impairment, petitioner's migraines, is not recognized as connected to Reye's Syndrome. Doe/34 v. Sec'y of the Dept. of Health & Human Servs., 2009 WL 1955140, at *5 (Fed. Cl. Spec. Mstr. Mar. 4, 2009).[10] Dr. Jacobson agreed with Dr. Heubi that mild cases of Reye's Syndrome recover uneventfully and the petitioner had a mild case. Id. Dr. Jacobson agreed with respondent's neurologist that petitioner exhibited no clinical signs

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citing Morse v. Sec'y of the Dept. of Health & Human Servs., 93 Fed. Cl. 780, 791 (Fed. Cl. 2010). Id. While the undersigned is sympathetic to respondent's view, it is misplaced here. While the ultimate award was $5,841.50, the award would have been much larger if petitioner's arguments were accepted. Petitioner's failure was not in pursuing her arguments, but was in failing to address head-on the consistent testimony of Dr. Heubi. For example, if petitioner understood, as she should have, at the close of Judge Firestone's initial remand on January 26, 2005, that Dr. Heubi's testimony of a 30-day period of injury would result in a relatively small award, petitioner would have either settled the case at that point or immediately pursued a contrary expert opinion. However, petitioner embarked on a 14 month damages odyssey, which included three damages memoranda with an attached affidavit from Dr. Heubi stating that Petitioner suffered the ill-effects from Reye's Syndrome for as long as 30 days. In fact, petitioner's memorandum stated that petitioner "is hereby claiming damages for Petitioner's suffering for a period of one month." Petitioner's December 14, 2005 Memorandum at 1. In addition, petitioner's efforts ignored Dr. Heubi's testimony and Judge Firestone's findings. The undersigned continuously explained to counsel the futility of those actions. It was not until May 15, 2006, that petitioner filed her Status Report and Amended Damages, which stated petitioner's intent to expand her claim for damages and consult another expert. Eventually, petitioner was permitted to produce testimony from Dr. Jacobson; however, even that testimony never took issue with the key components of Dr. Heubi's testimony - that petitioner suffered the ill-effects of a minor Reye's Syndrome.

[10] Petitioner requested redaction of the undersigned's 1/30/2009 Decision and Judge Firestone's 7/15/2009 Decision.

of an encephalopathy. Id. at *5-6. Dr. Jacobson recognized that petitioner's own affidavit contained no references to migraines. Id. at *7. And finally, petitioner's treating doctor, Dr. Ratnasamy, who saw petitioner at a critical time following immunization testified at the June 17, 2003 Entitlement Hearing that, "[i]n my personal evaluation of her, there was no encephalopathic symptoms at the times I saw her in April and June." Id. at *6. In the face of this evidence, Dr. Jacobson maintained his opinion that Petitioner suffered neurologic injuries caused by the vaccine, all the while conceding that he "humbly struggled with trying to sort out this case." Id. at *10. Dr. Jacobson's testimony was rejected. Petitioner was found to have suffered a limited period of harm from her Reye's Syndrome and was awarded $5,841.50 in damages and ultimately those findings were affirmed on appeal. Id. at *11, aff'd 87 Fed. Cl. 758 (Fed. Cl. 2009). This period of harm is what Dr. Heubi testified to in 2003 and was found by Judge Firestone in 2005. Dr. Heubi stated the same in affidavits submitted with petitioner's damages submissions on December 14, 2005, and March 27, 2006. Dr. Heubi then testified to the same at the Hearing in August 2008. Seven years of litigation took place after Dr. Heubi first gave his opinion on the severity of Petitioner's Reye's Syndrome. Counsel's failure to appreciate the significance of Dr. Heubi's opinion led to the continuing litigation seen in this case and ultimately added to the extraordinary bill for fees and costs.[11]

It was recognized in Perreira that petitioner is not granted a blank check and counsel is obliged to monitor expert evidence. Perreira v. Sec'y of the Dept. of Health & Human Servs., 27 Fed. Cl. 29, 33-34 (Fed. Cl. 1992)(affirming decision in which "[t]he special master found that the Program obligates counsel to investigate the facts and make sure that there is reputable medical support for an expert's opinion."). Counsel is not expected to completely understand the import of medical information, but counsel is expected to understand the import of medical principles as explained by the expert and applied to the facts of the case. Here, counsel should have recognized as far back as Judge Firestone's initial remand decision in January of 2005 that petitioner's own expert, a nationally recognized expert in Reye's Syndrome and the expert that the judge relied upon in finding for petitioner, that the period of injury was short and thus the damages were limited. While counsel had every right, and arguably an obligation, to investigate a

[11] Counsel's continuing failure to appreciate the significance of Dr. Heubi's opinion can be seen in his arguments supporting the fees submission. Counsel argues that the undersigned gave too much credit to Dr. Heubi as a pediatric gastroenterologist "who admittedly did not have the training or experience to render neurological opinions." P Reply at 17. Dr. Heubi was recognized as one of the nation's experts on Reye's Syndrome. Hocraffer, 63 Fed. Cl. 765, 777. He testified regarding his credentials that "I consider myself to be pretty unimpeachable, to be honest with you, about the topic of Reye's Syndrome." Ent. Tr. at 51. Based upon Dr. Heubi's testimony, the Court found that the record did not support petitioner suffering long-term effects of her illness. Id. at 779. While the Court permitted petitioner to submit evidence from a neurologist, the judge commented that the court "generally agrees with Respondent that Petitioner's attempt to add a new expert and submit other medical evidence at this late date is very problematic." Order on Petitioner's Motion for Review, slip op. at 4. Even regarding the evidence of encephalopathy, a neurological condition outside of Dr. Heubi's area of expertise, the issue was the relationship of the symptom of the encephalopathy – migraine headaches – to Reye's Syndrome. See Doe/43, 2009 WL 1955140, at *5-6. Given Dr. Heubi's expertise regarding Reye's Syndrome, he was uniquely qualified to opine on this issue. Dr. Heubi, along with Dr. Jacobsen and respondent's expert, Dr. MacDonald, acknowledged that "there is no recognized connection between Reye's Syndrome and migraine headaches." Id. at *5.

connection between petitioner's continuing medical issues and her Reye's Syndrome through a neurologist, such efforts should not have begun after the filing of three damages' memoranda and fourteen months after Judge Firestone's decision. See P Status Report, filed May15, 2006. These efforts also should have ended when discussing the case with Dr. Jacobson and determining that Dr. Jacobson did not take issue with Dr. Heubi and could not substantiate his beliefs of further harm. Instead, counsel pushed forward with what he should have recognized was unreliable, insufficient proof. In this respect, counsel did not do his job.

This summary of the case is not presented as a precursor to finding petitioner's efforts on appeal unreasonable. It is very difficult to question petitioner's efforts before the Court; as pointed out, petitioner secured two remands. Respondent has questioned petitioner's appeal to the Federal Circuit. In the undersigned's view, that appeal, as well as much of this litigation, was problematic. However, in the absence of some guidance from the reviewing courts, the undersigned is reluctant to determine an appeal herein was frivolous.[12] The preceding summary is presented to counter petitioner's contention that the extensive litigation in this case is due to respondent's litigiousness. That

[12] This is a serious issue that needs to be addressed by the reviewing courts. "Special masters are mindful that reducing fees for work performed on appellate litigation may be perceived as penalizing an attorney for appealing the same special master's decision. As a consequence, they approach such fees determinations cautiously." Broekelschen, No. 07-137V, 2011 WL 2531199, at *4 (Fed. Cl. Spec. Mstr. Jun. 3, 2011). The appellate process in the Program is exploding, along with the costs that go with such process. See Broekelschen, 2011 WL 2531199, at *2 (suggesting doubt in the reasonable basis of successive appeals)(citing Phillips v. Sec'y of the Dept. of Health & Human Servs., 988 F.2d 111, 113 (Fed. Cir. 1993)(Plager, J., concurring)). This is not what Congress contemplated. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, H. R. Conf. Rep. No. 386, 516-17 (1989)("[the Act] provides for an appeal of the master's decision to the U.S. Claims Court under very limited circumstances."). There are significant costs involved with this burgeoning resort to the appellate courts. See, e.g., Broekelschen, 2011 WL 2531199, at *7-10 (awarding $85,290.00 for appellate work on three successive appeals). These costs can be seen in this case by comparing various states of the proceedings:

- If the case concluded with the first Decision on Remand on 2/28/2007,
  - Total request for fees: 545.7 hours at $465 = $253,750.50
  - Total award for fees: 321.1 hours at $163-$191 = $ 56,889.30
- If the case concluded with the second Decision on Remand on 1/30/2009,
  - Total request for fees: 746.7 hours at $465 = $347,215.50
  - Total award for fees: 433.3 hours at $163-$195.50 = $ 78,663.30
- If the case concluded with the affirmance by the Court of Federal Claims on 6/5/2009,
  - Total request for fees: 826 hours at $465 = $384,090.00
  - Total award for fees: 473.3 hours at $163-$200 = $86,663.30
- Conclusion with the Federal Circuit's affirmance on 2/16/2010,
  - Total request for fees: 982.1 hours at $465 = $456.676.50
  - Total award for fees: 584.7 hours at $163 to $200 = $108,943.30

Doing the math, 44% of the requested hours and 45% of the awarded hours related to the proceedings following the first Decision on Remand. However, as noted throughout this Decision, Dr. Heubi's position never wavered regarding the limited period of injury and thus there was never a basis for changing the damages calculation from the first Decision on Remand through the Circuit's final Decision. That said, without some comment from the reviewing court as to the reasonableness of an appeal, the undersigned is disinclined to deny compensation for the time and cost of what are arguably, but not clearly, questionable appeals.

characterization defies reality. Respondent's actions followed the evidence, primarily that of petitioner's expert, Dr. Heubi. It was petitioner who ignored the facts and evidence, and thus extended the life of this case unnecessarily. The impact of petitioner's actions translates directly into the number of hours claimed. This can be seen from the following summary.

Petitioner filed this claim on July 29, 1999. Petitioner billed for 326.6 hours[13] up to the first special master Decision filed on March 16, 2004. P Ex. 3, pp. 1-30. Two and one-half years of that time, during which petitioner filed twenty-one status reports, were devoted to petitioner filing the medical records, which are required by the Act to accompany the filed Petition. § 11(c)(2). Petitioner billed 169.1 of the 326.6 hours during this two and one-half year period. P Ex. 3, pp. 1-17. Contrary to petitioner's arguments regarding respondent's delay, respondent was ordered on January 15, 2002, to file her Rule 4 Report and did so on April 30, 2002. Thereafter, expert reports were submitted and the special master conducted a Hearing on June 17, 2003. The special master entered her Decision on March 11, 2004, denying petitioner's entitlement to compensation.

Petitioner appealed that Ruling. For the period of the Motion for Review - from the date of the Special Master's opinion denying compensation through Judge Firestone's reversal in petitioner's favor, March 11, 2004 to January 26, 2005 - petitioner billed a reasonable 44.9 hours. It was also at this point in the proceedings the Federal Claims Court found a very small window for damages based upon Dr. Heubi's testimony. Hocraffer, 63 Fed. Cl. at 779.

The next period of time is very problematic. From the time of the Court's Decision until petitioner's Amended Damage's Notice, filed May 15, 2006, a period of roughly fourteen months, petitioner billed 95.5 hours. During this time, petitioner filed three memoranda on damages and two statements from Dr. Heubi, both of which confirmed his earlier testimony regarding Petitioner's short period of sequelae from her Reye's Syndrome. P Ex. A, attached to Memorandum regarding Damages, filed December 14, 2005; Heubi Supplemental Affidavit, filed March 27, 2006. With the filing of the Amended Damages Notice, wherein petitioner "withdr[ew] her limited request for 13 months or 30 days of damages," petitioner effectively began the damages process anew. The undersigned's July 14, 2006 Order chronicles the proceedings during this period. The expenditure of these 95.5 hours was largely for naught.

Petitioner billed 78.7 hours beginning on February 28, 2006, through the filing of undersigned's first Decision on Remand issued on February 28, 2007, which found $5,841.50 in damages based upon Dr. Heubi's testimony. Petitioner filed a Motion for Review and the Court remanded the case a second time on July 13, 2007. Petitioner billed a reasonable 36 hours for this effort. As stated earlier, petitioner's characterization of the remand as finding "legal error" is questionable. Supra p. 3, n.8.

[13] As petitioner's billing entries dates do not match up perfectly with the dates of entries in this case's docket sheet, apportionment of some minimal hours awarded between the periods may be shifted; e.g., one hour in one period may be awarded in the subsequent period.

This remand led to petitioner retaining Dr. Jacobson in an effort to expand the time and nature of petitioner's injuries. The undersigned rejected petitioner's evidence in a Decision issued on January 30, 2009, and found the $5,841.50 determined in the February 28, 2007 Decision on Remand to be reasonable compensation. Petitioner billed 165 hours for this period, approximately an 18 month period.

Petitioner filed a third Motion for Review on February 26, 2009. Judge Firestone denied the Motion in a Decision issued on June 5, 2009. Petitioner billed 79.3 hours during this four month period. Petitioner thereafter appealed to the Federal Circuit. The Circuit affirmed Judge Firestone's ruling on February 16, 2010. Petitioner billed 156.1 hours for this appellate effort.

The above is a summary of the proceedings; it is not intended to be a complete rendition of events. But it should give the reader a sense how and why so much time passed in the litigation of this case. It should also convey from the undersigned's perspective that while counsel is obligated to proceed zealously on behalf of his client, those efforts are expected to proceed within the bounds of the evidence. If counsel proceeds outside the existing evidence, he does so at risk of finding such actions unreasonable and thus not compensable. In this case, counsel failed to understand or accept the evidence produced from his own expert, Dr. Heubi, and the importance of that evidence in damages. While it was reasonable to explore additional evidence in the form of the neurologist, it bordered on unreasonable to continue litigating when the two experts essentially agreed that petitioner had a mild version Reye's Syndrome with minimal sequelae.

However, petitioner's efforts on appeal were not so egregious for the undersigned to find them unreasonable in the absence of some indication from the reviewing courts to that end. Thus, the undersigned's focus will be on the reasonableness of the time spent during the course of the proceedings. As will be shown, much of that time was unreasonable.

II. Legal Standard

Pursuant to 42 U.S.C. § 300aa-15(e) of the Act, special masters may award "reasonable" attorney's fees as part of compensation. This may be true even if a petitioner was unsuccessful on the merits of the case. §15(e)(1). To determine reasonable attorneys' fees, this court has traditionally employed the lodestar method, which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 343, 1347-48 (quoting Hensley) (Fed. Cir. 2008); Saxon v. Sec'y of the Dept. of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993).

The burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the fees and costs petitioner is requesting are reasonable. Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1(1991). The Federal Circuit, in examining the documentation requirements in other legal contexts, made clear that the documentation must be sufficiently detailed to enable the reviewing judge to determine its reasonableness.

> The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case. **In the absence of such an itemized statement, the court is unable to determine whether the hours, fees and expenses, are reasonable for any individual item.**

Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (emphasis added)(citing St. Paul Fire and Marine Insurance v. United States, 4 Cl. Ct. 762, 771 (Cl. Ct. 1984).

While the burden rests with petitioner to prove reasonableness, petitioner is not given a "blank check to incur expenses." Perreira, 27 Fed. Cl. at 34. The Federal Circuit has stated "[i]t was well within the special master's discretion to reduce the hours [expended in a matter] to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521; Sabella v. Sec'y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201, 211 (Fed. Cl. 2009)("The special master . . . is not required to award fees and costs for every hour claimed, he need only award fees and costs that are reasonable. See 42 U.S.C. § 300aa-15(e).").

In assessing the number of hours reasonably expended, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensley, 461 U.S. at 434 (1983). Special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486, aff'd, 988 F.2d 131 (Fed. Cir. 1993).

My colleague discussed the reasonableness standard in the context of "reasonable costs" "'Reasonableness' may be evaluated from a paying client's perspective. The United States Supreme Court stated that '[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority.'" Sabella v. Sec'y of the Dept. of Health & Human Servs., No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Sept. 23, 2008) aff'd in part & rev'd in part (on other grounds), Sabella v. Sec'y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201 (2009)(hereinafter Sabella II)(quoting Hensley, 461 U.S. 424, 433-34 (emphasis in original)); Riggins v. Sec'y of the Dept. of Health & Human Servs., 406 F. App'x 479, 481 (Fed. Cir. 2011)("The Supreme Court has created a guiding principle in determining whether hours are reasonable: '[h]ours that are not properly billed to one's client are not

properly billed to one's adversary pursuant to statutory authority.' Hensley, 461 U.S. at 434, 103 S.Ct. 1933 (emphasis omitted)").

The requirement that attorneys' fees be reasonable applies likewise to costs, *e.g.*, consultant and expert fee costs. "The conjunction 'and' conjoins both 'attorneys' fees' and 'other costs' and the word 'reasonable' necessarily modifies both. Not only must any request for attorneys' fees be reasonable, so must any request for reimbursement of costs." Perreira v. Sec'y of the Dept. of Health & Human Servs., 27 Fed. Cl. 29, 34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

Additionally, a special master may reduce a fees and costs request that is not reasonable *sua sponte*, regardless of whether respondent filed an objection to a particular request. In making such a reduction, a special master is not required to provide petitioner with an opportunity to explain the unreasonable request as the burden lies with petitioner to provide an adequate description and documentation of all requested costs and fees in the first instance. Sabella II at 208-209; Saunders v. Sec'y of the Dept. of Health & Human Servs., 26 Cl. Ct. 1221, 1226 (1992); Duncan v. Sec'y of the Dept. of Health & Human Servs., No. 99-455, 2008 WL 4743493, at *1 (Fed. Cl., Aug. 4, 2008) ("the Special Master had no additional obligation to warn petitioners that he might go beyond the particularized list of respondent's challenges."); Savin v. Sec'y of the Dept. of Health & Human Servs., 85 Fed. Cl. 313, 317-19 (2008) (Order denying Motion for Review).

As recently stated by the U.S. Supreme Court, "the determination of fees 'should not result in a second major litigation.'" Fox v. Vice, -- U.S. --, 131 S.Ct. 2205, 2011 WL 2175211, *8 (2011)(citing Hensley, 461 U.S. at 437). Further:

> The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet "the burden of establishing entitlement to an award." But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And, [while the trial court must apply the correct standard,] appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it.

Id. (internal citations omitted). The above standard will be applied to the issues in this case.

III. Discussion

A. Hourly Rate

Succinctly stated, the basic process of determining the hourly rate is as follows:

> [T]he analysis must begin with a determination of the forum rate. Once the forum rate is determined, then, if the bulk of the work was performed outside the forum, the analysis may shift to the market rate. Only if the "bulk of the work" exception to the forum rate applies is it then necessary to determine the rate of compensation in the legal marketplace where that work was performed, in order to determine if the Davis exception to the forum rule applies.

Rodriguez v. Sec'y of the Dept. of Health & Human Servs., No. 06-559V, 2009 WL 2568468, at *10 (Fed. Cl. Spec. Mstr. Jul. 27, 2009), aff'd 632 F.3d 1381 (Fed. Cir. 2011).

First, the special master must determine the forum rate for attorneys of similar "skill, experience and reputation." Avera, 515 F.3d at 1348 (citing Blum, 465 U.S. 886, 888 (1984)). In Vaccine Act cases, Washington, D.C., has been found to be the applicable forum. Avera, 515 F.3d at 1348; Hall v. Sec'y of the Dept. of Health & Human Servs., No. 02-1052V, 2010 WL 1840837, at *6, 8 (Fed. Cl. 2010), aff'd 93 Fed. Cl. 239 (Fed. Cl. 2010), aff'd 640 F.3d 1351 (Fed. Cir. 2011). Next, if the bulk of the work was done outside the forum, the special master must determine the market or local rate for the attorney. E.g., Avera, 515 F.3d at 1347-49. Last, the special master must determine if the Davis exception applies; if so, the local rate is awarded, if not, petitioner is entitled to the forum rate. Id. The Davis exception[14] applies if the "bulk of the work" was performed outside the forum and the forum rate is very significantly higher than the local rate. Id. In this case, petitioner requests the forum rate of $465.00 as the hourly rate for her attorney, Mr. Dannenberg. P Fee App; P Am. Fee App.; P Reply at 7.

Since the issuance of Avera, the Federal Circuit has recently had opportunity to speak further on the issue of attorney rates. In Rodriguez, 632 F.3d 1381 (Fed. Cir. 2011), the Circuit discussed whether the Laffey Matrix[15] should determine the reasonable

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[14] The Davis exception is derived from Davis County Solid Waste Mgmt. & Energy Recovery Special Servs. Dist. v. EPA, 169 F.3d 755 (D.C. Cir. 1999).

[15]

> The Laffey Matrix is based on the hourly rates allowed by the U.S. District Court for the District of Columbia in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 371 (D.D.C.1983), rev'd on other grounds, 746 F.2d 4 (D.C. Cir.1984)(rejecting use of the matrix rates in that particular case). The Court of Appeals for the District of Columbia Circuit later approved of applying Laffey Matrix rates (see, e.g., Covington v. District of Columbia, 57 F.3d 1101, 1109 (D.C.Cir.1995)), and now the matrix is maintained by the U.S. Attorney's Office for the District of Columbia. It includes a chart of hourly rates for attorneys, based on the number of years in practice. Yearly updates to the original hourly rates allowed by the district court are based on annual increases in the Consumer Price Index.

Schueman v. Sec'y of the Dept. of Health & Human Servs., No. 04-693V, 2010 WL 3421956, *4 n. 12 (Fed. Cl. Spec. Mstr. Aug. 11, 2010).

hourly rate for attorneys practicing under the Vaccine Act. The Circuit found the special master had properly considered the evidence before her and did not err in rejecting petitioner's proffer of the Laffey Matrices for determination of the attorney rate. In Masias v. Sec'y of the Dept. of Health & Human Servs., 634 F.3d 1283 (Fed. Cir. 2011), the Circuit reaffirmed use of the Davis exception and again agreed with the special master's rejection of Laffey Matrix rates. Finally, in Hall v. Sec'y of the Dept. of Health & Human Servs., 640 F.3d 1351 (Fed. Cir. 2011), the Davis exception was again upheld and the Circuit discussed what constitutes a "significant difference" when applying the Davis exception was had; the Federal Circuit therein approved of applying the Davis exception as there was a 59% difference between the forum and local rates, favoring the forum.

1. The Parties' Evidence and Arguments regarding the Attorney Hourly Rate

In support of the claimed $465 rate, petitioner provided Mr. Dannenberg's affidavit, affidavits from three attorneys practicing law in Vermont near petitioner's counsel, the Laffey Matrices, and an affidavit from an attorney practicing law in and around Washington, D.C. P Fee App. at 1-2; P Exs. 1 (Affidavit of Paul S. Dannenberg), 2 (Affidavits of James W. Spink and Roger E. Kohn), 7 (Laffey Matrix), 8 (Adjusted Laffey Matrix), 9 (Affidavit of Eric A. Eisen), 11 (Affidavit of Gordon E. R. Troy).

Petitioner claims the Laffey Matrices, evidencing a rate between $465 and $686, are an admission by the Department of Justice on an attorney's hourly rate. P Fee App. at 3-4. Also according to petitioner, the affidavit of Attorney Eisen evidences $400 as a reasonable hourly rate for complex litigation. Id.[16] Presumably, petitioner supplied the Laffey Matrices and Mr. Eisen's affidavit as evidence of the forum rate. The 2009 affidavit from Eric A. Eisen, Esq., an attorney practicing since 1977, sets forth his litigation experience in commercial law, employment law, civil rights and other civil litigation areas. P Ex. 9. Mr. Eisen states his current rate is $400 per hour for litigation in the District of Columbia, but this rate is sometimes discounted or increased. Id. The undersigned notes that the areas of law practiced by Mr. Eisen do not appear to compare to practice under the Vaccine Act. Petitioner makes no effort to justify a comparison to Mr. Eisen's practice areas and rate and, indeed, presents no evidence that Mr. Eisen's practice areas, skill and reputation are comparable to Mr. Dannenberg's practice. Petitioner then argues that the Davis exception does not apply because "important" work in the case occurred in Washington, D.C.; petitioner's argument equates "bulk of the work" with "important" work. P Fee App. at 4-5. In later briefs arguing the Davis exception does not apply, petitioner also argues that the difference between the forum rate and local rate is not significant. P Am. Fee Pet. at 3-4. From petitioner's arguments, the affidavits of the local Vermont attorneys are irrelevant because the Davis exception does not apply.

[16] Petitioner's arguments often blend the local Vermont rates with those evidencing the forum rate, without understanding the need to distinguish between local and forum rates. See, e.g., P Sur-reply at p. 4, ¶ 7.

Petitioner's exhibit 7 is the Laffey Matrix, evidencing a rate for attorneys with over twenty years of experience of $465 for 2009 and 2010. P Ex. 7. An adjusted Laffey Matrix, P Ex.8, shows a rate for attorneys with over twenty years experience of $686. Again, the Laffey Matrices were presumably supplied as evidence of the forum rate. In the Fee Petition, petitioner relied upon a decision by another special master wherein forum rates, specifically Laffey Matrix rates, were awarded to another attorney who represents petitioners under the Vaccine Act and practices in New York City. P Fee Pet. at 2 (relying upon Walmsley v. Sec'y of the Dept. of Health & Human Servs., No. 06-270V, 2009 WL 4064105 (Fed. Cl. Spec. Mstr. Nov. 6, 2009)(awarding forum rates to a solo-practitioner located in Manhattan proper, New York, N.Y., as the Davis exception did not apply)). Since issuance of the Walmsley decision and as was previously discussed, supra p. 11-12, recent Federal Circuit opinions declined applying the Laffey Matrices to Vaccine Act cases. Moreover, the undersigned notes that, to his knowledge, this was the only Vaccine Act case to award Laffey Matrix rates. See Schueman v. Sec'y of the Dept. of Health & Human Servs., No. 04-693V, 2010 WL 3421956, at *4, n. 14 (Fed. Cl. Spec. Mstr. Aug. 11, 2010)(listing cases declining to apply rates found in the Laffey Matrix).

Petitioner's attorney affidavit states Mr. Dannenberg has practiced law since 1986, his practice is limited to "vaccine injury litigation," and his local hourly rate for vaccine injury litigation is presently $300.00 per hour. P Ex. 1.[17] Mr. Dannenberg's business address is Huntington, VT. Huntington is approximately twenty miles from Burlington, VT. According to data from the U.S. Census Bureau, Huntington, VT, had a population estimate of 1,950 in July 2009. U.S. Census Bureau, Table 5, Annual Estimates of the Resident Population for Minor Civil Divisions in Vermont, Listed Alphabetically within County: April 1, 2000 to July 1, 2009, http://www.census.gov/popest/cities/ (Sept. 2010)(follow "Minor Civil Divisions: 2000 to 2009" hyperlink).

Although petitioner contends that the forum rate applies in this case, petitioner also supplied three affidavits of attorneys working in Vermont in support of the local or market rate. Again if petitioner's argument that the bulk of work was performed in the forum is correct, the evidence of a local rate would be unnecessary. The first is a 2007 affidavit of James W. Spink, Esq., wherein Mr. Spink states he has practiced law since 1980 in the "fields of plaintiff and defense general tort litigation and mediation/ADR" in Burlington, VT. P Ex. 2, 1. In 2007, Mr. Spink charged an hourly rate ranging from $185 to $250. Id. The second affidavit, which was signed in 2010, is from Roger E. Kohn, Esq. Mr. Kohn has practiced law since 1972 with "substantial litigation experience, particularly on behalf of plaintiffs" and charges between $195 and $225 per hour, with most of his cases billing at the $225 rate. P Ex. 2, 2. Mr. Kohn practices in northwest Vermont, including Burlington and Middlebury, VT. Id. Third, petitioner filed the affidavit of Gordon E.R. Troy, Esq. P Ex. 11. Mr. Troy began practicing law in 1986, works in private practice in Charlotte, VT, and concentrates his "practice on

[17] A search on the court's CM/ECF system shows Mr. Dannenberg has attorney of record in 21 Vaccine Act cases since 1990. See also Schueman, 2010 WL 3421956, at *3, n. 6 (Fed. Cl. Spec. Mstr. Aug. 11, 2010)(finding Mr. Dannenberg to be counsel in 10 open or recently closed Vaccine Act cases).

trademark, copyright, unfair competition, internet, computer law, general intellectual property counseling and litigation matters." Id. Mr. Troy's standard hourly rate is $325.00 per hour. See also P Reply at 4 ("[Mr. Troy's areas of practice] similarly involve complex federal litigation.").

Notably, Mr. Dannenberg's stated rate of $300.00 per hour, which is supported by nothing more than the bare assertion that this is Mr. Dannenberg's rate, contrasts with the evidenced rates of the two Vermont attorneys who have six and fourteen more years of experience and charge a lower hourly rate. In the Amended Petition, petitioner appears to distance her attorney from these two attorneys collecting rates of $185-$250, stating they "do not practice complex federal litigation." P Amended Pet at 2; see also P Reply at 4 ("Both of these attorneys are general practitioners, and do not practice complex federal litigation in the vaccine program.").

Regarding whether the forum or local rate applies, petitioner argues that the Davis exception does not apply because "significant legal work" was done in the forum, Washington, D.C., and because the difference between the local and forum rates in this case is not significant. P Fee App. at 3-6; P Am. Fee App. at 3-4.

Relying on a strained interpretation of the phrase "bulk of the work," petitioner claims her attorney is entitled to the forum rate because "significant" legal work was performed in Washington, D.C. Petitioner included an interlocutory Order of another special master discussing the application of forum rates and local rates in awards of attorney fees in Vaccine Act cases. P Ex. 10, Stewart v. Sec'y of the Dept. of Health & Human Servs., No. 06-287V, 2008 WL 5024924 (Fed. Cl. Spec. Mstr. Oct. 23, 2008)(discussing the special master's interpretation of "bulk of the work" as it relates to the Davis exception and offering respondent the opportunity to brief her interpretation if it is contrary to the special master's interpretation). As of the filing of this Decision, no final fees decision had been issued in Stewart; however, the special master has issued an interim fee award. Stewart, No. 06-287V, slip op. on Interim Attorneys' Fees and Costs, 2010 WL 2342467 (Fed. Cl. Spec. Mstr. May 17, 2010). While not stated explicitly, this Decision appears to have awarded hourly rates based upon counsel's local rates. This presumption is based upon the award of $200 per hour to Mr. Gage. This hourly rate is known to be the local rate for this counsel. Id. at *6 (awarding rate awarded in Heflin v. Sec'y of the Dept. of Health & Human Servs., 2008 WL 5024923 (Fed. Cl. Spec. Mstr. Oct. 28, 2008); also discussing rate awarded in Kuttner v. Sec'y of the Dept. of Health & Human Servs., 2009 WL 256447 (Fed. Cl. Spec. Mstr. Jan. 16, 2009)); see also Hall, 640 F.3d at 1354 (awarding a local rate of $240 for an attorney practicing outside of the forum). Thus, it appears that while the special master considered awarding the forum rate based upon an interpretation of "bulk of work" meaning "significant," after considering the parties' briefs, the special master awarded interim fees based upon local rates. To date, no other special master has equated "bulk" with "significant" work.

Even though petitioner contends that the bulk of work took place in Washington, D.C., and thus the Davis exception does not apply, petitioner further rationalizes the proffered $465 forum rate because the difference between the forum rate and the alleged

local rate of $325, seen in Mr. Troy's affidavit, is only a 43% difference. P Am. Fee App. at 3. Petitioner cites the Federal Claims Decision in Hall v. Sec'y of the Dept. of Health & Human Servs., stating the judge held a 50% difference between the forum and local rates is "required" to employ the Davis exception. P Amended Pet. at 3 (citing Hall); Hall v. Sec'y of the Dept. of Health & Human Servs., 93 Fed. Cl. 239, 247-250. The undersigned finds that petitioner overstates Judge Bush's finding in Hall.

The Court's decision in Hall found that a difference of more than 59% was very significant when determining whether to apply the Davis exception. Hall, 93 Fed. Cl. at 249. However, this decision did **not** hold "a 50% difference is required" to apply the Davis exception as alleged by petitioner. Since that time, the Federal Circuit declined "setting a rule as to what constitutes a very significant difference between local and forum hourly rates" as it would be "stifling and impractical." Hall, 640 F.3d at 1357. "[M]aking this determination is multifaceted and the experience of the special master is invaluable to it." Id. In Hall, the Federal Circuit also included a chart showing a significant difference was found in cases where the percentage differences range from 46% to 60%. Id. at 1357. The Federal Circuit's Decision in Hall was not issued when the parties briefed the issues in this case.

Respondent disagrees with petitioner's arguments regarding her attorney's hourly rate of $465 per hour, objecting on several grounds. Respondent characterizes petitioner's requested rate as a rate "equivalent to an attorney of similar experience litigating complex litigation cases in Washington, D.C." R Resp. at 12. Respondent argues petitioner's attorney is due the market rate of attorneys in Huntington, VT, with skill, experience and reputation similar to Mr. Dannenberg. Respondent argues petitioner has not substantiated such a high hourly rate; in fact, respondent finds petitioner's affidavits from Vermont attorneys actually undercut the request for $465 per hour. Id. at 14.

Further, respondent disagrees with petitioner's strained interpretation of "bulk of the work" when discussing whether the Davis exception applies. Respondent notes that the Order relied upon by petitioner, even if it was a final decision, is not binding on the undersigned. R Resp. at 14, n. 7 (discussing the interpretation of "bulk of the work" in the Stewart-Sotelo Order and arguing the special master "misinterpreted the word 'bulk' to mean 'important' or 'significant,'" and relying on the plain meaning of the term, "the greater part" to characterize the phrase quantitatively, not qualitatively). Respondent argues the "bulk of the work" is a quantitative characteristic of the work, not qualitative. Id. at 14-15, n. 7. In this case, respondent notes that the majority of the work was performed in Vermont, with the exception of a one day hearing and oral arguments in Washington, D.C., and a damages hearing in New York City. Id. at 12-13.

Respondent objects to petitioner's reliance upon the Laffey Matrix and adjusted Laffey Matrix because petitioner has failed to show Vaccine Act litigation bears any similarity to the complex litigation contemplated with Laffey rates and on the grounds that petitioner is not entitled to a forum rate since the bulk of the work was performed in Vermont. R Resp. at 14-16 (citing Rodriguez v. Sec'y of the Dept. of Health & Human

Servs., No. 06-559V, 2008 WL 2973914 (Fed. Cl. Spec. Mstr. Jul. 27, 2008)(discussing differences between vaccine practice and civil tort litigation), aff'd 91 Fed. Cl. 453 (2010), aff'd 632 F.3d 1381 (2011)).

Petitioner disagrees with the notion that Vaccine Act litigation is not complex, federal legislation. "[I]t has been determined in a number of cases that vaccine program work is complex federal litigation, and is comparable to other complex federal litigation." P Reply at 4. However, recently, the Federal Circuit answered the question of "whether the reasonable hourly rate for attorneys handling Vaccine Act cases in the District of Columbia should be determined by applying the Laffey Matrix, or whether the rate should be determined by considering a variety of factors, which may or may not include the Laffey Matrix." Rodriguez v. Sec'y of the Dept. of Health & Human Servs., 632 F.3d 1381, 1384 (Fed. Cir. 2011). "Vaccine Act litigation, while potentially involving complicated medical issues and requiring highly skilled counsel, is not analogous to 'complex federal litigation' as described in Laffey so as to justify use of the Matrix instead of considering the rates charged by skilled Vaccine Act practitioners." Id. at 1385. Continuing, the Federal Circuit stated:

> The Vaccine Act provides petitioners with an alternative to the traditional civil forum, applies relaxed legal standards of causation, and has eased procedural rules compared to other federal civil litigation. Vaccine Act proceedings, which involve no discovery disputes, do not apply the rules of evidence, and are tried in informal, streamlined proceedings before special masters well-versed in the issues commonly repeated in Vaccine Act cases, are different from the complex type of litigation the Laffey Matrix is designed to compensate. While some cases under the Vaccine Act may present special challenges, those difficulties are reflected and compensated in the other half of the lodestar calculation—the reasonable number of hours expended. In addition, unlike the fee-shifting statutes to which the Laffey Matrix has been applied, a party need not "prevail" under the Vaccine Act in order to receive an award of attorneys' fees. . . . Under Dague, in determining a reasonable rate to be used in the lodestar calculation, it is appropriate to take account of the fact that Vaccine Act attorneys are practically assured of compensation in *every* case, regardless of whether they win or lose and of the skill with which they have presented their clients' cases. If this were not true, Vaccine Act attorneys would be more favorably compensated than attorneys who take cases under fee-shifting statutes and are only paid by the opposing side if their clients' claims are meritorious and they skillfully prosecute those claims.

Id. at 1385-86; see also Masias v. Sec'y of the Dept. of Health & Human Servs., 634 F.3d 1283, 1288 n. 6 (Fed. Cir. 2011)("Avera, we note, did not reach the question whether the Laffey Matrix should play any role in the determination of fees under the Vaccine Act in those cases where forum rates are utilized. We did, however, have occasion to reach that question in Rodriguez . . . .").

During the time the parties were briefing the attorney fees in this case, a petitioner was awarded the attorney rate of $300 per hour for Mr. Dannenberg in another Vaccine Act case. Schueman v. Sec'y of the Dept. of Health & Human Servs., No. 04-693V, 2010 WL 3421956 (Fed. Cl. Spec. Mstr. Aug. 11, 2010). Petitioner agrees with the special master in that case that her attorney is due forum rates but disagrees with the special master's determination of her attorney's forum rate. In support, petitioner explained that "[t]here was not a 'very significant' difference per Avera between Attorney Dannenberg's local rate of $300 per hour, local rates in Chittenden County, Vermont, of $325 per hour pursuant to Mr. Troy's affidavit and a forum rate of between $400 and $465 per hour." P Reply at 7. Petitioner's comparison looks at local and forum rates indiscriminately, without breaking the evidence into local and forum. It appears that petitioner's counsel may not grasp the application of the Davis exception in Vaccine Act cases.[18]

Respondent differentiates Schueman from the case *sub judice*. According to respondent, "the special master relied upon her analysis from a previous case to find that the "forum rate" for Mr. Dannenberg fell between $275.00 and $360.00 per hour. . . . [and] found these rates were not 'significantly higher' than the geographic rate of $300.00 per hour determined for Mr. Dannenberg." R Reply at 5 (citing Schueman, 2010 WL 3421956, *4). From that finding, the special master in Schueman found the Davis exception did not apply. First, respondent disagrees with the finding in Schueman that Mr. Dannenberg's local rate is $300.00, demonstrated by the same affidavits submitted herein; notably, the local affidavits supplied by petitioner show attorneys with more years of experience than Mr. Dannenberg charging less per hour. R Reply at 6. Further, respondent notes petitioner here requests an even higher forum rate, $465, thus making the difference between the requested forum rate and the professed $300 local rate significant and triggering the application of the Davis exception. R Reply at 6-7. Based upon this reasoning, and assuming the local rate *is* $300 per hour, petitioner would still be awarded $300, as was found in Schueman. Schueman, 2010 WL 3421956, at *5.

2. Determination of the Hourly Rate for Petitioner's Counsel

Regarding counsel's forum rate, petitioner's evidence of Mr. Dannenberg's forum rate is meager and not well fleshed out. Petitioner relies upon Mr. Eisen's affidavit, which shows a standard hourly rate of $406.[19] P Ex. 9. Mr. Eisen practices in the areas

[18] Further, in her Sur-reply, petitioner discusses the range of attorney rates presented in petitioner's evidence, namely the affidavits and the Laffey Matrices. Petitioner states, "[r]espondent was in error when [she] claimed that the range of rates in evidence in this case is between $185 and $325 per hour . . . . Respondent neglects to cite the affidavit of Eric Eisen, Esq., who testified that his normal hourly rate is $400 per hour for litigation in [DC], as well as evidence regarding the Laffey matrix . . . . Therefore the range of rates in evidence in this case is between $185 and $465." P Sur-reply at 4. Petitioner does not distinguish between local rates and forum rates for the purpose of examining whether the Davis exception applies.

[19] Mr. Eisen's affidavit is from 2009 and the hourly rate is adjusted by the Consumer Price Index online inflation calculator suggested by petitioner. P Fee Pet. at 2, n. 1; http://www.bls.gov/data/inflation_calculator.htm (last visited July 8, 2011).

of commercial, employment, civil rights and other civil litigation. Additionally, Mr. Eisen has nine more years of experience than Mr. Dannenberg. The undersigned finds little value in Mr. Eisen's affidavit since there appears to be no comparison between Mr. Eisen's law practice and the Vaccine Act work performed by Mr. Dannenberg. See Rodriguez, 2009 WL 2568468, at *10-13, aff'd 91 Fed. Cl. 453; aff'd 632 F.3d. 1381 (discussing the nature of Vaccine Act cases in comparison with complex federal litigation). Further, petitioner makes no effort to liken Mr. Dannenberg's skill or reputation to that of Mr. Eisen. Avera, 515 F.3d at 1348 (citing Blum, 465 U.S. 886, 888 (1984)); Masias, No. 99-697V, 2009 WL 1838979, at *7 (Fed. Cl. Spec. Mstr. Jun. 12, 2009)(discussing affidavits of non-comparable attorneys), aff'd, 634 F.3d 1283 (Fed. Cir. 2011).

Petitioner also utilizes the Laffey Matrices to evidence the forum rate, which set an attorney rate between $465 and $686 for attorneys with Mr. Dannenberg's years of experience. P Ex.7; P Ex.8. As with Mr. Eisen's affidavit, the undersigned finds little value in the rates set by the Laffey Matrices as petitioner makes no attempt to liken Vaccine Act work to the types of cases utilizing the Laffey Matrices. In fact, the undersigned fully agrees with the decisions in Rodriguez and Masias regarding the dissimilarities between this program and Laffey Matrix cases. Rodriguez, 632 F.3d 1384-86; Masias, 634 F.3d at 1288, n. 6; Rodriguez v. Sec'y of the Dept. of Health & Human Servs., 91 Fed. Cl. 453, 468-76 (Fed. Cl. 2010); Rodriguez, 2009 WL 2568468, at *11-14. Beyond approving of the special masters' refusal to use the Laffey Matrices as evidence of the forum rate, the Circuit itself discussed the dissimilarities between the Vaccine Act and complex federal litigation. Supra p. 16 (quoting Rodriguez, 632 F.3d at 1385; see also Masias, No. 99-697V, 2009 WL 1838979, at *16-22 (discussing in detail the applicability of the Laffey Matrix to the Vaccine Act and differences between Laffey and Vaccine Act practice)). In Rodriguez, the Federal Circuit stated that the special master considered appropriate evidence, including the Laffey Matrix, and approved of the special master not awarding Laffey Matrix rates.[20]

Ultimately, Mr. Eisen's affidavit and the Matrices are the only evidence in the record of a forum rate.[21] The special master was faced with the same situation in Schueman. In Schueman, the case involving the same petitioner's counsel, the special master found forum rates for experienced Vaccine Act attorneys to range from $275 to $360 per hour. Schueman, 2010 WL 3421956, *4 (citing Rodriguez, 2009 WL 2568468,

[20] In Ray v. Sec'y of the Dept. of Health & Human Servs., No. 04-184V, 2006 WL 1006587, at *5-6 (Fed. Cl. Spec. Mstr. Mar. 30, 2006), the undersigned declined utilizing Laffey Matrix rates as petitioner had failed to evidence work under the Act was similar to the complex litigation found in the case underlying the Laffey Matrix. The special master in Rodriguez did an admirable and comprehensive analysis of work under the Vaccine Act in comparison to that of complex federal litigation, Rodriguez, 2009 WL 2568468, at *10-12, and this reasoning was affirmed by the Federal Circuit. Rodriguez, 632 F.3d 1381; see also Masias, 634 F.3d at 1288, n. 6.

[21] The undersigned notes that the record on Mr. Dannenberg's local and forum rates here is sparse, particularly regarding the similarity in practice areas and the skill and reputation of the attorneys, and urges petitioner's counsel to develop more fully the evidence for the forum and local hourly rates in future applications for attorney fees.

*15); Rodriguez v. Sec'y of the Dept. of Health & Human Servs., No. 06-559V, 2009 WL 2568468, at *15 (Fed. Cl. Spec. Mstr. Jul. 27, 2009)(finding the "'forum rate' for an attorney with more than 20 years experience . . . is in the range of $275-360.00 per hour"). As was also noted in Schueman, another special master calculated similar forum rates. Masias v. Sec'y of the Dept. of Health & Human Servs., No. 99-697V, 2009 WL 1838979, at *25 (Fed. Cl. Spec. Mstr. June 12, 2009)(finding a "reasonable range for attorneys with ten or more years of experience providing services in the Vaccine Program in Washington, D.C. is $250 to $375 per hour."); see also Adde v. United States, -- Fed. Cl. --, 2011 WL 2144706, at *10 (Fed. Cl. 2011)(discussing an appropriate rate for counsel considering their performance before the court and comparing to rates awarded in the Vaccine Program, citing Rodriguez, 2009 WL 2568468, at *13, n. 43). The undersigned accepts these findings as evidence of the appropriate forum rate and finds the forum rate for petitioner's attorney would be approximately $300 per hour by referencing the rates found by the special masters in Rodriguez and Masias.

Next, the undersigned must determine whether the first part of Davis exception applies and thus whether it is necessary to determine the local rate for petitioner's counsel. The Davis exception applies if the bulk of the work was performed outside the forum, D.C., and if there is a significant difference between the local and forum rates, favoring the forum. Avera, 515 F.3d at 1349.

Petitioner herein argues a qualitative interpretation of "bulk of an attorney's work," stating that this phrase describes the most important phases of the case. P Fee Pet at 4-6 (citing P Ex.10, interlocutory Order in Stewart, No. 06-287V, 2008 WL 5024924 (Fed. Cl. Spec. Mstr. Oct. 23, 2008). Petitioner equates "bulk" with "important." According to petitioner, those important parts of this litigation were the expert hearing on June 17, 2003, and oral argument on February 4, 2010, both of which were held in the forum. Id. Beyond citing the interlocutory Order of a fellow special master, petitioner provides no other analysis, case citations or other support for this interpretation of "bulk of the work."

The Davis exception was meant to prevent a windfall to attorneys practicing in locations less costly than the forum, Washington, D.C. "Recognizing a limited exception to the forum rule under these circumstances, the District of Columbia Circuit reasoned, 'would prevent the occasional erratic result where the successful petitioner is vastly overcompensated.'" Avera, 515 F.3d at 1349 (citing Davis, 169 F.3d at 758). "The court found that the exception 'better reflects the purpose of fee shifting statutes' since it prevents a result that 'would produce windfalls inconsistent with congressional intent.'" Id. (citing Davis, 169 F.3d at 759-60). In Davis, the Court of Appeals for the District of Columbia discussed the time spent in the forum, "[t]he only time spent in Washington by Davis County's lawyers, as far as the record reflects, was for the purpose of examining the administrative docket and participating in a short oral argument. In a case where out-of-town lawyers must spend **much more time** in Washington-for example, when a **lengthy** trial is held-a different analysis favoring an award of D.C. rates is appropriate." Davis, 169 F.3d 755, 760, (D.C. Cir. 1999)(emphasis added). It is clear from this passage of Davis that the "bulk" is a quantitative, not qualitative, determination.

Considering the length of this case, two proceedings that did not last longer than one day seem insignificant in comparison to the remainder of this case; indeed, two days, assuming they were full eight-hour days, is negligible when compared to the number of attorney hours petitioner claims in the entire case. Petitioner's counsel worked sixteen hours, plus a handful of hours before and after the proceedings, in the forum and claims over 1,100 hours in total; even if one estimates counsel worked twenty-four hours in total in the forum, this is only about 2% of the hours claimed. Based upon this record, two proceedings in the forum cannot reasonably be said to constitute the bulk of proceedings when 98% of the proceedings took place outside the forum. To award forum rates based upon such a small amount of time, the "windfall" meant to be avoided by the Davis exception would occur here. The time spent on work outside the forum in Davis, which was the majority of the work, is similar to that performed outside the forum in the case *sub judice*.

Based upon the application of "bulk of work" in Davis, the undersigned accepts and agrees with respondent's argument that "bulk of the work" is quantitative in nature. However, even if one accepted this was a qualitative descriptor, one would argue that the hearings and oral argument are merely the tip of the iceberg; the lead up to those proceedings is where critical work is performed, including developing the record, consulting experts and acquiring expert opinions. Thus, utilizing either a qualitative or quantitative analysis, the bulk of the attorney's work was performed outside the forum, in Vermont.

If it were found that the bulk of the work was performed in the forum, there would be no need to determine the local rate for petitioner's attorney and the forum rate would be awarded. However, the bulk of the word was performed outside of the forum; thus the local rate will be determined and compared to the forum rate to find whether the Davis exception applies.

Regarding his local rates, petitioner proffered Mr. Dannenberg's 2010 affidavit (alleging a rate of $300 with no explanation or support concerning his "skill, experience, or reputation" beyond his present practice area and 1986 entry into law), Mr. Spink's affidavit (alleging a rate of $195 to $263,[22] his practice area of general tort litigation and mediation and his entry into law in 1980), Mr. Kohn's affidavit (alleging a rate of $195 to $225, his practice area of litigation primarily on behalf of plaintiffs and his entry into law in 1972), and Mr. Troy's affidavit (alleging an hourly rate of $325, his practice areas of intellectual property matters and his entry into law in 1986).

Initially regarding the Vermont attorney affidavits, the undersigned does not find Mr. Troy's affidavit very persuasive as Mr. Troy's areas of practice do not appear comparable to the work Mr. Dannenberg performs under the Vaccine Act. Other than

[22] The undersigned utilized the Consumer Price Index online inflation calculator suggested by petitioner to update Mr. Spink's hourly rate to 2010 values in order to facilitate comparison. P Fee Pet. at 2, n. 1; http://www.bls.gov/data/inflation_calculator.htm (last visited July 8, 2011).

conclusory assertions that Mr. Troy and Mr. Dannenberg both perform "federal complex litigation," petitioner provided no evidence or argument upon which to make such a finding. As the Federal Circuit found in Rodriguez, it is mistaken to summarily state that the Vaccine Act is tantamount to complex federal litigation; significant differences abound. Rodriguez, 632 F.3d at 1384-85; Masias, 634 F.3d at 1288, n. 6. Therefore, Mr. Troy's affidavit is considered but carries little persuasive value.[23]

In viewing the remaining affidavits, the undersigned is mindful that the legally appropriate comparison is between counsel of comparable skill, experience and reputation. Avera, 515 F.3d at 1348 (citing Blum, 465 U.S. 886, 888 (1984)). These affidavits are devoid of information allowing such a comparison, except as to the attorneys' years in practice.

Regarding Mr. Dannenberg's affidavit, this affidavit fails to make any showing to support this local hourly rate. In fact, as respondent noted, $300 per hour is higher than the rates charged by two local attorneys with six and fourteen years more experience. First, based upon years of experience alone, since petitioner did not address the attorneys' skill or reputation, Mr. Dannenberg's local rate is appropriately placed at the lower end of the spectrum evidenced by Mr. Kohn and Mr. Spink. Second, despite having no evidence of the affiants' comparable skill level and reputation, Mr. Dannenberg's skill level as evidenced before the undersigned would also place him at the lower end of this range. Cf. Adde v. United States, -- Fed. Cl. --, 2011 WL 2144706, at *10 (Fed. Cl. 2011)(discussing attorneys' "lack of understanding of this court's rules, an inattention to the court's directives, . . . failure to discern pertinent statutory, regulatory and precedential authority" in determining their hourly rates). Third, in light of the Vaccine Act's "relaxed legal standards of causation" and "eased procedural rules compared to other federal civil litigation," Rodriguez, 632 F.3d at 1385, petitioner has made no showing that Mr. Dannenberg is entitled to an hourly rate identical to that of Mr. Spink and Mr. Kohn who practice traditional litigation with more stringent legal standards and procedural rules. Based upon the evidence presented in the record, counsel's years of experience and the affidavits submitted, the undersigned finds a reasonable, local hourly rate for petitioner's attorney to be $200.

At this point, an examination of the difference between the forum and local rates is reason to apply the Davis exception. Comparing the forum rate, $300, to the local rate, $200, the forum rate is 50% greater than the local rate, which the undersigned finds to be very significant. This percentage difference is "within the parameters of the cases" that have found a significant difference. In Hall, the Federal Circuit referenced cases evidencing a significant difference ranging from 46% to 60%. Hall, 2011 WL 1204399, at *5-6.[24]

[23] The undersigned also questions the usefulness of Mr. Kohn's affidavit as it states with no specificity the sort of litigation Mr. Kohn practices. P Ex. 2, 2. However, this affidavit evidences an hourly rate that is subsumed within the rate alleged in Mr. Spink's affidavit. This bolsters the evidence of a local rate to some degree, although only marginally.

[24] In Schueman, the special master found there was not a very significant difference between the forum rate and the local rate despite the bulk of the work being performed outside of the forum, and awarded

Petitioner's attorney local and forum rates are significantly different in favor of the forum and the bulk of the work was done outside the forum in Vermont. Therefore, the Davis exception applies and petitioner is awarded $200 as an hourly rate in 2010. The rate awarded to petitioner for her attorney will be discounted utilizing the Consumer Price Index, supra n. 22, to award a rate appropriate for the years the work was performed. The petitioner is awarded the following hourly rates: 2008-2010 at $200 per hour; 2005-2007 at $191 per hour; 2002-2004 at $174 per hour; and 1999-2001 at $163 per hour.[25]

3. Whether 2010 Hourly Attorney Rate Should be Applied to Compensate for Delay

This case began in 1999. Counsel's rate determined above was based upon information for 2010. Obviously, the rate for 1999 and years thereafter would be lower than the 2010 rate. Thus, the question arises whether an adjustment should be made to petitioner's attorney's rate for the earlier years of work. Petitioner argues that awarding the entirety of the hours claimed at the current rate is appropriate due to the delay petitioners in the Vaccine Program endure to be reimbursed for attorney fees and costs. P Fee App. at 6-7. Petitioner notes the case's long history as grounds for this enhancement. As discussed previously, much of this case was drawn out due to petitioner's unreasonable handling of the case.

Respondent addresses and objects to petitioner's contention that awarding the current rate for all attorney hours is appropriate. First, regarding petitioner's allegation of delayed proceedings and payment, respondent notes that any delay in this case was due to petitioner's own "motions, appeals, and overall procedural handling of this case." R Resp. at 16. Second, "[c]ompensating for delay would be equivalent to paying interest on attorneys' fees" in cases against the United States, id., and interest "cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." Id. at 16-17 (quoting Applegate v. U.S., 52 Fed. Cl. 751, 770 (2002)).

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petitioner the attorney rate of $300 per hour. Schueman, 2010 WL 3421956, at *5. The undersigned is mindful of my colleague's decision but reaches a different result based upon the evidence before me. As discussed above, petitioner's affidavits support the lower local rate of $200. Compared to the forum rate of $300 per hour, there is a significant difference implicating the Davis exception. Thus, the local rate of $200 per hour is awarded here. In addition, it is noted that $200 per hour compares favorably with rates awarded to much more skilled attorneys who also practice in lower costs areas comparable to counsel at issue. E.g., Hammitt v. Sec'y of the Dept. of Health & Human Servs., No. 07-170V, 2011 WL 1827221, *1 (awarding a local rate of $240 per hour for an attorney with approximately 27 years of experience), Hall, 640 F.3d at 1354 (awarding a local rate of $240 for an attorney of approximately 21 years of experience).

[25] The undersigned again utilizes the Consumer Price Index online inflation calculator suggested by petitioner. P Fee Pet. at 2, n. 1; http://www.bls.gov/data/inflation_calculator.htm (last visited July 8, 2011). Utilizing $200 in year 2010, the hourly rate for previous years is adjusted every three years. The undersigned utilizes the deflated rate in the last year of each of the three years; e.g., generously awarding petitioner the 2010 rate for years 2008, 2009, and 2010; awarding the 2007 rate for 2005, 2006, and 2007, etc.

Petitioner counters, relying upon Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463 (1989)("Jenkins"), to support her request for an attorney rate equivalent to the 2010 rate to account for delayed payment. Jenkins was an attorney fees case under the Civil Rights Attorney's Fees Awards Act of 1979, 42 U.S.C. § 1988, following a desegregation litigation in Kansas City, Missouri. Jenkins, 491 U.S. at 275. That Act required the party prevail in order to receive attorney fees. 42 U.S.C. § 1988. The issues discussed in the case included whether the Eleventh Amendment prohibits enhancement of a fee award under § 1988 against a State to compensate for delay of payment, relevant here, and whether to reimburse rates for paralegals, law clerks and recent law graduates at market rates or their cost to the attorney. Jenkins, 491 U.S. at 278, 284. The Supreme Court held that the Eleventh Amendment does not prohibit enhancement of a fee award against a state. This holding was based upon Hutto v. Finney, 437 U.S. 678 (1978), wherein attorney fees "were held to be 'costs' not subject to Eleventh Amendment strictures." Jenkins, 491 U.S. at 281, n. 3.

Petitioner also cites Savoie v. Merchants Bank, 166 F.3d 456 (2d Cir. 1999), which dealt with violations of federal securities, antiracketeering laws and other causes of action against a trust account. Although these cases from the Second Circuit approve, in dicta, of awarding current market rates to account for delay of payment, neither of these cases addresses the issue herein. Leblanc-Sternberg, Savoie and Jenkins do not deal with the United States as the answering party. In short, "[n]one of the cases cited by plaintiffs, however, are apposite. They are not cases against the United States and thus were not required to account for the axiom that 'interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest.'" Applegate, 52 Fed. Cl. at 770 (quoting Shaw, 478 U.S. at 311).

As respondent states, "[i]n a case against the U.S. government, a court cannot increase a fee award because of a delay in payment." R Response at 16 (citing Applegate v. U.S., 52 Fed. Cl. 751, 770 (2002)(citing Library of Congress v. Shaw, 478 U.S. 310, 321 (1986)(holding that adjusting the lodestar rate in order to accommodate delays in payment of attorney's fees is an impermissible award of interest against the U.S. government)). "Congress has not provided an express statute that authorizes this court to award interest in vaccine cases." Edgar v. Sec'y of the Dept. of Health & Human Servs., 29 Fed. Cl. 339, 343-44 (1993)(denying petitioners' request for remand to the special master with instructions to award post-judgment interest); see Jeffries v. Sec'y of the Dept. of Health & Human Servs., No. 99–670V, 2006 WL 3903710, at *18-19 (Fed. Cl. Spec. Mstr. Dec. 15, 2006) (finding that a finance charge applied by experts to a total outstanding bill constituted interest that cannot be assessed against the U.S.); see also Silver v. Sec'y of the Dept. of Health & Human Servs., 2009 WL 2950503, at *10 n.12 (Fed. Cl. Spec. Mstr. Aug. 24, 2009)("It is true that, consistent with well-established case law holding that interest against the United States may not be awarded absent an express waiver of sovereign immunity, interest has been held not to be available to augment an award of attorney's fees and costs under the Act.").

As the Court stated in Short v. U.S.:

> As stated in this court's first opinion on the interest issue, and as argued by the government, despite the general waiver of sovereign immunity allowing suit, interest is **not** allowable in claims against the United States unless a Fifth Amendment taking has occurred, or unless interest is provided for in an express contractual provision or by statute. 28 U.S.C. § 2516(a) (1982); Library of Congress v. Shaw, 478 U.S. at 314; United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951); United States v. Mescalero Apache Tribe, 207 Ct.Cl. 369, 380 (1975), cert. denied, 425 U.S. 911, (1976). Interest can not be awarded on the basis of policy, United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 658-59 (1947), or implied notions of just compensation, United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588-90 (1947).

Short v. U.S., 25 Cl. Ct. 722, 724 (1992)(emphasis in original).

In her Reply, petitioner attempts to distinguish Library of Congress v. Shaw, stating that the party requesting fees in that case requested 30% enhancement of the award to compensate for delay. P Reply at 9. This is a distinction without a difference. Petitioner's "request to be compensated for 'delay' is tantamount to a request for interest on their attorneys fees. As the Court indicated in Shaw, in which the court barred recovery of a delay enhancement on an award of reasonable attorneys fees, 'the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.'" Applegate, 52 Fed. Cl. at 770 (citing Shaw, 478 U.S. at 321, 106 S.Ct. 2957). "More specifically, the court stated "[i]nterest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money." Id. (citing 478 U.S. at 322); see also Chiu v. United States, 948 F.2d 711, 719–20 (Fed. Cir.1991)(refusing to enhance attorneys fee for "adjustment for loss of use of the money by reason of delay"); United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369, 518 F.2d 1309, 1322 (1975), cert. denied, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); see also 10 Moore's Federal Practice § 54.190[3][e] (Mathew Bender 3d ed. 2002) (noting general approval of a delay adjustment, but observing that "[i]f the opponent is the United States, sovereign immunity prevents the implementation of any delay enhancement.").

Petitioner makes the argument that, through the Vaccine Act, the United States "'has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.'" P Reply at 10. Petitioner claims the United States has "taken on the persona of a commercial enterprise" through the Vaccine Act. Id. Petitioner cites a 1925 decision from the Supreme Court, Standard Oil Co. of New Jersey v. United States, 267 U.S. 76 (1925), which concerned an insurance policy issued by the Bureau of War Risk Insurance. The policies issued granted the right to sue the United States in the event of a disagreement and the Court assumed the United States "accepted the ordinary incidents of suits in such business." Standard Oil, 267 U.S. at 79. The undersigned does not find the alternative compensation system of the Vaccine Act to be synonymous with the government's issuance of insurance policies. Nothing in the Vaccine Act is congruent with commercial enterprise. Other than her sweeping, conclusory statements, petitioner provides no support for a contrary view.

Petitioner also attempts to suggest interest or enhancement is appropriate because legislative history of the Act discusses increases in awards for death, pain and suffering to account for inflation. P Reply at 10 (citing National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, § 2118, 100 Stat. 3771 (1986)). Petitioner's citations to "2118" is to a section of the Act, "Increase for Inflation," that was repealed and thus clearly inapplicable. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-233 (1987). Petitioner's arguments are unavailing. The existing precedent is clear; the award of interest is not permissible against the government in this situation. Petitioner will be awarded rates in relation to the years in which the work was performed. The hourly attorney rates will be adjusted downward for years past, supra n. 21, n. 25.

B. Number of hours

The second step in calculating reasonable attorney's fees is determining the reasonable number of hours to be awarded. To that end, the Federal Circuit provided the following guidance:

> The [special master] also should exclude from this initial fee calculation hours that were not 'reasonably expended.' . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority.

Saxton, 3 F.3d 1517, 1521 (Fed. Cir. 1993)(emphasis in original)(quoting Hensley v. Eckerhart, 461 U.S. 424, 433-3 (1983)).

Several approaches may be taken in analyzing the reasonableness of the hours claimed. One could undertake a line-by-line approach, literally evaluating each entry and determining its reasonableness. Given the number of hours claimed, such an approach would be unwieldy, and it has been found to be unnecessary. Fox v. Vice, -- U.S. --, 131 S.Ct. 2205, 2011 WL 2175211, *8 (2011)(citing Hensley, 461 U.S. at 437)("But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."); Wasson, 24 Cl. Ct. at 484 (affirming the special master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff'd, 988 F.2d 131 (Fed. Cir. 1993); Saxton, 3 F.3d 1521 (approving of the special master's 50% reduction of attorney hours); Sabella, 86 Fed. Cl. 201, 206 (Fed. Cl. 2009). The undersigned is entitled to rely upon past experience and determine based upon that

experience what a reasonable number of hours would be given the extent of the proceedings. Wasson, 24 Cl. Ct. at 486, aff'd, 988 F.2d 131 (Fed. Cir. 1993); Saxton, 3 F.3d at 1521.

Given the nature of the proceedings, a reasonable and more manageable approach is to review the component parts of the proceedings and to determine the reasonableness of the hours spent during each segment of the case. The case segments were discussed summarily in the background section, supra pp. 1-8. In doing so, I considered not only respondent's objections and petitioner's rejoinder, but also concerns that appeared to me. The resultant reductions, quite frankly, are significant. Thus, to ensure fairness to petitioner, two additional steps were undertaken. First, given what was seen as significant unreasonable and thus non-compensable time, the application was scrutinized for the categories of unreasonable time to get a sense of the extent of the time that is not compensable. In doing so, the parties' respective arguments are addressed. Finally, the undersigned reviewed a number of cases for comparison purposes to ensure the petitioner is being treated fairly as compared to other counsel handling vaccine cases.

First, general, overarching concerns are addressed, which apply to each segment of the case.

1. Overarching issues

Reviewing counsel's hours discloses incredible numbers of entries that are either unproductive time, activities not related to this case, or tasks insufficiently described, making it impossible to determine whether or not the time should be compensated as part of the proceedings on the Petition in this matter. These entries include, but are not limited to:

a. phone calls and letters to other petitioners' counsel (see, e.g., 3/30/99,6/12/00, 2/5/03, 2/11/03, 2/12/03, 2/13/03, 2/14/03);

b. extensive communications throughout the case with Casey's parents, even though Casey is a competent adult and thus petitioner in the case (see, e.g., 12/1/98, 7/20/99, 10/6/00, 9/13/02, 6/23/03, 9/21/05, 5/17/06, 2/8/08, 4/10/08);

c. communications with "NVIC" (National Vaccine Information Center is a parents' vaccine information group – internet site), (see, e.g., 6/3/99, 7/21/99, 9/14/99, 3/1/00, 3/17/00);

d. monitoring client trust account throughout case (see, e.g., 7/15/99, 5/26/00, 6/12/00, 9/7/00, 7/23/01, 11/30/01, 4/22/04, 6/15/07);[26]

[26] The undersigned gave petitioner an opportunity to address the reasonableness of these charges. Order, filed June 9, 2011. Petitioner responded that she would not pursue these charges. Response to Order, filed June 27, 2011.

e. excessive time spent on drafting and mailing status reports and letters.

Mr. Dannenberg does not utilize a secretary or paralegal. See P Reply at 22. Thus, necessarily, all activities are performed by Mr. Dannenberg, who bills all such tasks at his attorney rate. This results in much non-billable time. This issue has been addressed frequently in the past with the same result – attorneys should not be compensated at their hourly rate for performing paralegal tasks.

"The Supreme Court has made clear that it is the nature of the work, not the title or education of the person performing it, that determines whether it is legal, paralegal, or secretarial/clerical in nature and the reasonable hourly rate at which the work is to be compensated." Doe/11 v. Sec'y of the Dept. of Health & Human Servs., 2010 WL 529425, at *9 (Fed. Cl. Spec. Mstr. Jan. 29, 2010) (citing Missouri v. Jenkins, 491 U.S. 274, 288, (1989)). The special master cannot reimburse at the attorney rate for hours spent on routine tasks more properly delegated to a paralegal. See Riggins v. Sec'y of the Dept. of Health & Human Servs., No. 99–382V, 2009 WL 3319818, at *20 (Fed. Cl. Spec. Mstr. Jun. 15, 2009)("If counsel elects to have an attorney perform these activities, it is in counsel's discretion. However, the time spent by an attorney performing work that a paralegal can accomplish should be billed at a paralegal's hourly rate, not an attorney's."), aff'd 406 F. App'x 479 (Fed. Cir. 2011); see also Broekelschen v. Sec'y of the Dept. of Health & Human Servs., No. 07–137V, 2008 WL 5456319, at *5 (Fed. Cl. Spec. Mstr. Dec. 17, 2008)(explaining that a firm's staffing practices is not the issue; a firm may choose to employ or not employ paralegals); LeBlanc v. Sec'y of the Dept. of Health & Human Servs., No. 90–1607V, 1995 WL 695202, at *2 (Fed. Cl. Spec. Mstr. Nov. 8, 1995)("Counsel may spend his time on such tasks, but he will only be reimbursed at a paralegal's hourly rate for that type of work.").

Previous decisions have refrained from compensating all of the attorney's work at the rate typically paid to an attorney. See, e.g., Turpin v. Sec'y of the Dept. of Health & Human Servs., No. 99–535V, 2008 WL 5747914, at *5-7 (Fed. Cl. Spec. Mstr. Dec. 23, 2008); Lamar v. Sec'y of the Dept. of Health & Human Servs., No. 99–583V, 2008 WL 3845165, at *14 (Fed. Cl. Spec. Mstr. Jul. 30, 2008)("Tasks that can be completed by a paralegal or a legal assistant should not be billed at an attorney's rate.").

It is reasonable that many tasks can be more economically performed by a person commanding a lower hourly rate. See, e.g., Borden v. Sec'y of the Dept. of Health & Human Servs., No. 90–1169V, 1992 WL 78691 *1 (Cl. Ct. Mar. 31, 1992)("reviewing and summarizing records, scheduling appointments, calling records custodians, review[ing] medical literature."); LeBlanc v. Sec'y of the Dept. of Health & Human Servs., No. 90–1607V, 1995 WL 695202, at *2 (Fed. Cl. Spec. Mstr. Nov. 8, 1995)("assembling exhibits, preparing medical releases, obtaining medical records, packaging and sending the petition to the clerk"); Riggins v. Sec'y of the Dept. of Health & Human Servs., No. 99–382V, 2009 WL 3319818, at *20 (Fed. Cl. Spec. Mstr. Jun. 15, 2009)("traveling to the court to file pleadings"); Turpin v. Sec'y of the Dept. of Health &

Human Servs., No. 99–535V, 2008 WL 5747914, at *5–7 (Fed. Cl. Spec. Mstr. Dec. 23, 2008)(reviewing file for names and addresses of doctors, reviewing medical records, emails to and from client regarding medical records, preparing subpoena, preparing exhibits for filing, filing exhibits, reviewing the docket sheet, noting deadlines on a calendar); Valdes v. Sec'y of the Dept. of Health & Human Servs., No. 99–310V, 2009 WL 1456437, at *4 (Fed. Cl. Spec. Mstr. Apr. 30, 2009)(preparing subpoenas for medical records, contacting providers to follow up on requests for records, and locating names and addresses of medical providers), aff'd in part & rev'd in part, 89 Fed. Cl. 415 (Fed. Cl. 2009); Gabbard v. Sec'y of the Dept. of Health & Human Servs., No. 99–451V, 2009 WL 1456434, at *6 (Fed. Cl. Spec. Mstr. Apr. 30, 2009)(e-mailing client for information about medical providers and witnesses, preparing subpoenas, preparing an exhibit for filing and filing the exhibit); Broekelschen v. Sec'y of the Dept. of Health & Human Servs., No. 07–137V, 2008 WL 5456319, at *7 (Fed. Cl. Spec. Mstr. Dec. 17, 2008)(summarizing medical records, indexing a transcript).

Further, tasks that are secretarial or administrative are not compensable in the Program. See Riggins v. Sec'y of the Dept. of Health & Human Servs., No. 99–382V, 2009 WL 3319818, at *20 (Fed. Cl. Spec. Mstr. Jun. 15, 2009) (meetings regarding scanning and computer issues, consultation with Legal Nurses Association to discuss reviewing cases and preparing chronologies are not compensable); see also Cowan v. Sec'y of the Dept. of Health & Human Servs., No. 90–1189V, 1993 WL 410090 (Fed. Cl. Spec. Mstr. Sep. 30, 1998) (faxing, delivering and mailing information, conferring with staff, planning travel arrangements was administrative, secretarial and not compensable); see also Vickery v. Sec'y of the Dept. of Health & Human Servs., No. 90–997V, 1992 WL 281073 (Cl. Ct. Sep. 24, 1992) (telephonically leaving a message, filing records in a drawer are secretarial tasks and not compensable); see Duncan, No. 99–455V, 2008 WL 2465811, at *5 (Fed. Cl. Spec. Mstr. May 30, 2008) ("Merely updating a database is a clerical task."); see Lamar v. Sec'y of the Dept. of Health & Human Servs., No. 99–583V, 2008 WL 3845165, at *14 (Fed. Cl. Spec. Mstr. Jul. 30, 2008) (reducing the number of hours spent by an attorney on tasks that do not "require an attorney's time or attention."); Mueller v. Sec'y of the Dept. of Health & Human Servs., No. 06–775V (Not reported in WL, May 27, 2010)(general file work including indexing and scheduling is administrative).

Herein, petitioner requests reimbursement for substantial hours of attorney work that could have been performed by a person commanding a lower rate or work that is administrative in nature and not compensable. A review of virtually any page of counsel's billing record, see P Ex. 3, discloses charges for tasks that are either paralegal or administrative in nature.

This inefficient practice can be seen by reviewing any of the numerous status reports filed by petitioner and the concomitant billing. For example, petitioner filed three status reports on May 15, June 12 and August 9, 2000 responding to the court's September 9, 1999, Order. The status reports contained the exact same language, as follows:

> NOW COMES Casey Hocraffer, by her attorney of record Paul S. Dannenberg, who hereby files this Status Report pursuant to the Order of the Court dated Sept. 7, 1999. Petitioner is reviewing the medical records which were obtained from the hospitals and physicians who treated petitioner and is requesting further records. These records will be filed with the Court as soon as this review is completed. Petitioner will further file future status reports every 30 days pursuant to said Order.

This six-line status report generated .4 hours billed on 5/8/00; .6 hours billed on 6/7/00; and .6 hours billed on 8/4/00, for a total of 1.6 hours of time. This time was spent, "draft[ing] the report, "draft[ing] a certificate of service, "fax[ing]" a copy to the court, mailing a copy to opposing counsel, and mailing a copy to the court's clerk. At the requested $465 per hour rate, counsel is requesting $744 for producing and filing the six lines quoted above. There were twenty-one such status reports filed in this case by December 5, 2001. The record is replete with substantially similar billings. It simply is unreasonable to bill thirty-six minutes to file a status report, especially one that is the exact duplicate of an earlier report. A review of the billings reveals page after page of one and two tenths entries for what amounts to administrative work, and what is either billed by other firms, or is found by the court, as paralegal time or as overhead. Mr. Dannenberg's choice of not employing either a secretary or paralegal does not convert the efforts into billable attorney time.

Petitioner argues that "[a]warding paralegal rate fees for work by an attorney deemed, in the special master's opinion, capable of being performed by a paralegal is an abuse of discretion." P Reply at 22. Petitioner lifts the following sentence out of context from Gruber as support:

> Moreover, the claim submitted by petitioners does not reference or claim any paralegal hours expended, making the Special Master's award of paralegal hours a fiction and giving the appearance of being arbitrary and capricious.

Gruber, 91 Fed. Cl. 773, 778. In context, it is clear that the reviewing judge found the special master's decision to reduce the attorney's time for finding an expert arbitrary and capricious. Id. The comment regarding the paralegal being a "fiction" was an additional comment. The judge did not say it was prohibited to pay and attorney the paralegal rate for paralegal duties and case law, cited above, makes it clear that it is appropriate to do so.

f. Legal Research Performed at Law Libraries

Petitioner billed time to drive to law libraries to conduct legal research and billed time for communicating with law libraries. Respondent totaled 9.3 hours billed driving to the libraries and 8.2 hours communicating with the same. R Response at 21. Petitioner does not address this issue in her Reply. Petitioner averred that counsel's office is "highly computerized." Petitioner's Reply to Respondent's Response to

Petitioner's Application for Award of Interim Attorney Fees and Costs at 5. Counsel billed for "Internet research." P Ex. 3 at 9, entry for 3/29/01. Counsel sent e-mails. Id. at 32, entry for 1/27/05. Absent a cogent explanation, it is unreasonable to bill a client for the costs of off-site research. Electronic access to the internet is a staple of the modern home. Certainly it is a must for any business. Counsel evidently has access to the internet, from which access to Westlaw and Lexis is available. Counsel presented no argument, and quite frankly I am hard pressed to think of one, why an attorney asking to be compensated at $465 per hour should not have the basic tools of research available from his office.

g. Hourly Rate for Travel

Petitioner in this case requests her attorney be compensated at his full rate for travel time. P Am. Fee App. at 1. Special masters consistently award compensation for travel time at 50% of the billing rate in the Vaccine Program. Whether counsel bills at half rate during travel depends on whether counsel is working while travelling. "[T]he fact of traveling by itself is not determinative." Kuttner v. Sec'y of Dep't of Health & Human Servs., No. 06–195V, 2009 WL 256447, at *10 (Fed. Cl. Spec. Mstr. Jan. 16, 2009); see also Rodriguez v. Sec'y of Dep't of Health and Human Servs., No. 06–559V, 2009 WL 2568468, *1, *21 (Fed. Cl. Spec. Mstr. Jul. 27, 2009)(finding it was reasonable to compensate the attorney at 50% of the forum rate for travel time when attorney travelled by car and did not perform any work on the case), aff'd 632 F.3d 1381 (Fed. Cir. 2011). If counsel can establish how much time during travel was devoted to work they will be fully compensated. Kuttner, 2009 WL 256447 at *10.

Gruber v. Sec'y of Dep't of Health & Human Servs., 91 Fed. Cl. 773, 791 (Fed. Cl. 2010), provided useful guidance in determining how to compensate travel. Therein, the standard practice of cutting 50% for travel time was called into question.

> [A]lthough in appropriate cases, a Petitioner's attorney may be able to present a basis for an award of full attorney rates for travel time, there is no basis to make such an award in the instant case. In the future, Vaccine Program Special Masters, if presented with sufficient documentation, may find that the Vaccine Act and Crumbaker allow full attorney travel time compensation. Attorneys, however, should not automatically assume that it is reasonable to assess any and all travel time to a client-based destination as billable to that client. Each case should be assessed on its own merits, without resort to a convenient or "[f]or ease of calculation" formula to award travel time attorneys' fees. See Knox ex rel. Knox v. Sec'y of Health & Human Servs., 1991 WL 33242, at *8. **Even an automatic 50% award may be too high for an undocumented claim, given the possibility that an attorney may use the travel time to work on another matter or not to work at all while traveling.**

Gruber, 91 Fed. Cl. at 791 (emphasis added). A final pronouncement on whether and how to award the attorney rate for travel was not reached in Gruber. The case was

remanded and the parties settled the issue of attorney fees and costs on remand. Gruber, No. 00-749V, slip op., 2010 WL 1253000 (Fed. Cl. Spec. Mstr. Mar. 10, 2010)(awarding attorney fees and costs based upon the parties' joint stipulation). To claim the full hourly rate for travel, petitioner relies on Gruber and her attorney's assertion that he exclusively practices under the Vaccine Act and all of his clients will be billed at full hourly rates for travel. P Am. Fee App. at 2. Petitioner provides no other documentation to substantiate the full hourly rate during travel.

As pointed out by the Court in Gruber, even a "50% award may be too high for an undocumented claim . . . ." Gruber, 91 Fed. Cl. at 791. From petitioner's billing records, it is not possible to determine whether or not counsel worked on this case during travel. For example, on February 3, 2010, travel is noted from 6 a.m. until 6 p.m. P Ex. 3 at 83. The next two entries encompass this 12 hour period; 9.5 hours presumably was for travel and 2.5 hours for hearing preparation. Id. However, mileage covered was 302 miles. Id. It does not take 9.5 hours to travel 302 miles. In addition, entries of 2.1 hours for "draft hearing outline" and 1.5 hours for "oral argument prep" are entered on the same day. Id. From this information, it is not possible to determine what, if any, work was performed during the travel time. Similar issues were encountered with other travel entries. See id. at 28-29, 61-64.

Petitioner seems to think that it is sufficient to simply state that her attorney charges the full hourly rate for travel time. P Am. Fee App. at 1-2. The undersigned notes that the Court's decision in Gruber, filed February of 2010, was issued just prior to petitioner's Motion for final fees, which was filed in April of 2010. An effort to comply with the recently filed decision in Gruber may explain petitioner's minimal evidence regarding work performed during travel time or consistency in billing travel time at the full attorney rate.[27] However, without evidence or argument, the undersigned cannot find it reasonable to award the full hourly rate for travel time. Given the lack of substantiation, petitioner's attorney is awarded travel at 50% rate. In the future, petitioner's attorney shall better document time spent on case work during travel if petitioner's attorney will seek full rate reimbursement for travel time.

h. Attorney time spent reviewing and properly filing billing entries

Respondent questioned the 15.4 hours billed for reviewing the re-filed, typewritten Exhibit 3. R Response at 21 citing P Ex. 3 at 88-9. Petitioner rejoins that only 3.8 hours were billed on the cited pages. P Reply at 25. However, petitioner's Exhibit 3 states explicitly that "[t]his matter took an additional 15.4 hours of attorney time and $133.57 of additional costs, not including supplemental typist time and expenses." P Ex. 3 at 5. The task referred to was typing the handwritten billing entries, many of which are illegible, so that respondent and the court could evaluate petitioner's fees request. See Petition for Fees and Costs under National Childhood Vaccine Injury Act, Ex. 3. The burden lies with petitioner to provide adequate documentation at the time

[27] Mr. Dannenberg was awarded travel time at the 50% rate in Schueman, 2010 WL 3421956, at *8 (Fed. Cl. Spec. Mstr. Aug. 11, 2010).

he submits his fee application that the fees and costs petitioner is requesting are reasonable. Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484, n. 1(1991). The Federal Circuit, in examining the documentation requirements in other legal contexts, made clear that the documentation must be sufficiently detailed to enable the reviewing judge to determine its reasonableness.

> The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case. **In the absence of such an itemized statement, the court is unable to determine whether the hours, fees and expenses, are reasonable for any individual item.**

Naporano, 825 F.2d at 404 (emphasis added)(citing St. Paul Fire and Marine Insurance v. United States, 4 Cl. Ct. 762, 771 (Cl. Ct. 1984). It follows logically that if the court cannot read the documentation, the documentation is inadequate and the time is unallowable. Petitioner was granted an opportunity to correct this deficiency. Petitioner did so. P Am. Fee Pet., Ex. 3. The time spent and costs incurred correcting the deficiency are unallowable.

i. Attorney time spent performing medical research

Counsel performed hours of medical research. Respondent represented that the time amounted to 39.5 hours. R Resp. at 21. Petitioner rejoins that such research is an "essential part of developing a petition for vaccine injury compensation." P Reply at 21. However, while it is important for counsel to read the medical literature to familiarize himself for purposes of developing the case and questioning witnesses, it is the expert that is in the best position to identify the relevant literature. In this case, petitioner consulted a number of experts in developing both the entitlement and damages, and billed for those contacts. For example, billings are seen for consulting Dr. Kinsbourne on 7/12/99, Dr. Tellili on 2/8/00, Dr. Ratanasamy on 3/26/01, Dr. Ahrendsen on 3/30/01, Dr. Crozier on 6/7/01, Dr. Heubi on 10/23/01, and Dr. Jacobson on 5/17/06. The primary medical research is performed appropriately by the experts, not counsel. See Riggins, No. 99-382V, 2009 WL 3319818, at *10 (Fed. Cl. Spec. Mstr. Jun. 15, 2009)(citing Ray v. Sec'y of the Dept. of Health & Human Servs., No. 04-184V, 2006 WL 1006587)(discussing the use of expert consultant to perform research); see also Hammitt v. Sec'y of the Dept. of Health & Human Servs., No. 07-170V, 2011 WL 1827221, at *5 (Fed. Cl. Spec. Mstr. Apr. 7, 2011)(reducing counsel's time for medical research, noting that "[a]lthough an attorney must review and understand medical literature to prosecute a case, most attorneys are not qualified to actually conduct the research on medical issues.").

Petitioner's citation to Marbled Murrelet v. Pac. Lumber Co., 163 F.R.D. 308, 324-325 (N.D. Ca 1995), is not inconsistent with this proposition. P Reply at 21-22. In Marbled, the court awarded fees for counsel to review scientific research in order to

prepare the trial team to cross-examine a witness, stating that "[t]his was not a task that could be performed by an expert witness who is not trained in the law." Id. at 325. Applied to this case, the expert should perform the primary research as they are required to provide a reliable medical opinion. Having identified the pertinent literature, counsel is obligated to study and understand that literature for application to the case. That time is compensable.

As recognized in Gruber, while it is generally accepted that the attorney may assist the expert "by offering supervision, conducting research for the expert, or even by drafting portions of his or her report," the ultimate question is reasonableness of the efforts and time claimed. Gruber, 91 Fed. Cl. at 792.

In Gruber, the special master found inefficiencies in the attorney doing extensive research while the expert claimed a high hourly rate, finding it "patently unreasonable to bill over 60 hours of attorney and paralegal time to perform many tasks for a medical expert who should be able to perform them in substantially less time." Gruber, 2009 WL 2135739, at *8; Gruber, 91 Fed. Cl. at 781, 792. However, on review, counsel explained the exigent circumstances requiring counsel to assist the medical expert and representing that "her research into the relevant medical literature in this case was informed by [the expert's] prior substantive input as well as her 'understanding of [the expert's] general opinions regarding'" the alleged vaccine injury. Gruber, 91 Fed. Cl. at 795. As stated previously, the case was remanded and the parties' settled.

No similar substantiation of counsel's efforts appears in this case. Petitioner consulted treating doctors and medical experts throughout the prosecution of this case. While counsel states that medical research "is an essential part of developing a petition for vaccine injury compensation," P Reply at 21, the first entry for medical research appears on May 25, 2001, P Ex. 3 at 10, after discussing the case with two experts known to the undersigned and telephone calls with at least two of Casey's treating doctors. Unlike in Gruber, no representation is made as to why counsel, and not the doctors, was performing the medical research. Counsel engaged Dr. Heubi early in the case on October 23, 2001. P Ex. 3 at 16. As an expert on Reye's Syndrome, Dr. Heubi is in the best position to direct counsel to the necessary literature. With the input from experts, large blocks of research are unnecessary; reading, understanding and preparation is essential. See generally Marbled, 163 F.R.D. at 325. It should be noted that counsel engaged the experts and treaters extensively throughout the history of this case, as seen by the numerous calls to the doctors.

For example, the pitfalls of counsel researching and providing medical literature are seen in this case from counsel's submission of articles pertaining to intracranial pressure. See Doe/34, 2009 WL 1955140, at *9. As indicated in that decision, petitioner's expert agreed that there was **no** evidence of intracranial pressure. Id. Thus, counsel's efforts were not only inefficient, they were unnecessary.

With these overarching criticisms of counsel's time in mind, the undersigned reviewed the Application by logical segments of the case progression. Although the

Application was reviewed page-by-page and line-by-line, the review led to the discussion above, the determination of reasonable hours was made based upon experience and comparison to other cases. Fox v. Vice, -- U.S. --, 131 S. Ct. 2205, 2011 WL 2175211, at *8 ("So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."); Wasson, 24 Cl. Ct. 482, 483 (Fed. Cl. 1991), aff'd 988 F.2d 131 (Fed. Cir. 1993)(the special master may rely upon both her own general experience and her understanding of the issues raised" in awarding fees). My colleague encountered a similar issue in addressing Mr. Dannenberg's fees, finding it "difficult to pinpoint just what tasks resulted in the excessive number of hours claimed." Schueman, No. 04-693V, 2010 WL 3421956, at *7. These segments will track the case as discussed in the Introduction section of the decision. Supra pp. 1-8.

2. Initial Development of the Record, Leading to Respondent's Rule 4(c) Report

Counsel billed 169.1 hours from the point of his first billable contact with petitioner on 12/1/98 up to the court ordering respondent to file his responsive Rule 4 Report on 4/30/2002. Petitioner filed her case on July 29, 1999. Thus, counsel worked on the case for eight months prior to its filing. The Statute requires an extensive set of documents to accompany a Petition. § 11(c)(2). However, in practice, additional records are generally required to be filed after the filing of the Petition. Again, in practice, the special masters order respondent to file a Rule 4 Report when it is agreed by the parties that petitioner has filed the records required by the statute. Order, filed January 15, 2002. In essence, petitioner is billing 169.1 hours to file a complete Petition. In this case, it took petitioner two and one-half years to complete the Petition. This is unreasonable. While a review of the billed hours on pages 1-17, of P Ex. 3, disclose much allowable time (contacting doctors, basic research on the claim, client contact to procure medical records and to file the required affidavit, and communications with the court), there is page after page of billable time that is simply unreasonable. On the whole, the actions counsel is billing for, and certainly the quantity of those actions, do not mesh with the processing of a vaccine case.

The routine, followed by all special masters and well known and accepted by vaccine counsel, is to file the Petition, complete the Petition with any outstanding medical records, and get respondent's Rule 4 Report which sets out completely respondent's view of the Petition at that time. The next steps in the process are dictated by respondent's position. In this case it was petitioner filing a medical opinion on 8/20/02 - four months after respondent's Report was filed.

Petitioner filed this Petition on July 29, 1999, accompanied by 52 numbered pages of medical records. As is standard practice with Vaccine Act cases, the goal at this point in the proceedings is to ensure that the medical records are complete to enable respondent to give a full and complete response to the Petition. Order, filed September 7, 1999. To that end, petitioner filed 227 pages of additional records on November 22, 2000. This was followed by the report and *curriculum vitae* of Dr. Ratnasamy, filed on December 5, 2001. With the filing of Dr. Ratnasamy's report, respondent was ordered to respond to the Petition. Viewing the substantive filings and considering them in the context of other

cases under the Act, it is inconceivable how so much time was spent in producing so little. This amount of effort and productivity is typically seen over the period of a few months at the start of a case, not over 2 ½ years.

Reviewing this block of time of petitioner's application juxtaposed with the process taking place during this period of time leads to the inevitable conclusion that counsel billed for much unproductive time. It goes without saying that time that would not be billed to a client should not be billed to the Program. See, e.g., Saxton, 3 F.3d at 1621 (citing Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). Considering what was accomplished over this two and one-half year period and comparing it to my experience in general and to other cases specifically leads to the conclusion that counsel is entitled to 60 hours for this period. See, e.g., Kantor v. Sec'y of the Dept. of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at *10 (Fed. Cl. Spec. Mstr. Mar. 21, 2007)(holding less than twenty hours is reasonable to prepare a petition including fact witness affidavits and medical records); Broekelschen v. Sec'y of Dep't of Health & Human Servs., No. 07-137V, 2008 WL 5456319, at *7 (Fed. Cl. Spec. Mstr. December 17, 2008)(holding thirty-eight hours reasonable for preparing and filing the petition when the petition included all the relevant medical records and an expert report). Not only is that a reasonable amount of time, it is a very generous amount given the efforts that transpired.

3. Respondent's Rule 4(c) Report through First Special Master Decision on Entitlement

For the period following respondent's filing of the Rule 4 Report on 4/30/02 through the issuance of Special Master French's opinion on 3/11/04, petitioner billed 157.5 hours. See P Ex. 3, p. 17-30. The primary activities during this time were communicating with and filing the expert report, preparing for trial and participating in the trial. The time dedicated to those specific activities is all reasonable and compensable. However, within that same period it is obvious that much non-productive time was billed. For example, time was billed to research "compensation" on 5/20, another billing on 10/30/02 is related to compensation at a time when entitlement is yet to be determined, a block billing of 5.5 hours on 8/7/02 simply is too vague to give any credence. Reviewing further e-mails from the parent group, NVIC, and numerous calls to "Malcom" and attorneys Homer and Shoemaker is also non-compensable. The entries for one-tenth hour are continuous and numerous, and they reflect non-productive time. Non-productive time should not be billed to a client and is thus not compensable. For this period, 40 hours is deducted. Petitioner is awarded 117.5 hours.

4. First Motion for Review before the Court of Federal Claims

Following the issuance of Special Master French's opinion on 3/11/04, petitioner filed a Motion for Review (MFR) contesting that decision. Judge Firestone issued her opinion on 1/26/05 reversing and remanding the petition for a determination of damages. During this period petitioner billed a reasonable 44.9 hours. This time is allowed in full.

5. Initial Damages Period following Remand

The next period of time is troublesome. Petitioner billed 95.5 hours from 1/26/05, the filing date of Judge Firestone's opinion, to 5/15/06, the filing date of petitioner's Amended Damage's Notice. See P Ex. 3, p. 32-41. Much of this time was wasted effort as petitioner pursued one theory of damages and then subsequently withdrew her request in favor of pursuing a more extensive request for damages. See generally Order filed July 14, 2006 detailing the damages proceedings up to that date. Before changing tactics, petitioner filed three legal memoranda on damages and two affidavits from Dr. Heubi. Notably, in both affidavits Dr. Heubi provided support for a 30-day period of damages. This is the same 30-day period that Dr. Heubi ultimately testified to at the August 7, 2008 Hearing which resulted in the final award in this case. One could argue that these large blocks of this time were unreasonably spent and unproductive. Counsel was spending hours without grasping the fundamental import of what Dr. Heubi was saying, that the damages are limited to a 30-day period and thus are relatively minor. Judge Firestone's opinion said likewise. Hocraffer, 63 Fed. Cl. 765, 779. Counsel continued to plow forward with a damages request that defied the evidence. However, the legal memoranda did provide legal arguments related to pain and suffering and lost wages, that if accepted would have provided greater compensation to petitioner. While ultimately rejected, counsel cannot be faulted for pursuing the arguments. Thus, petitioner is awarded 30 hours for efforts pertaining to the legal arguments.

6. Revised Damages Request until First Special Master Decision on Damages

Following what I described as petitioner tossing a "legal bomb into the process,"[28] on May 15, 2006 through the undersigned issuing the first Remand Decision on February 28, 2007, petitioner billed for 78.7 hours. P Ex. 3, p. 41-48. These efforts were devoted to petitioner arguing to present testimony of a neurologist, which the undersigned denied as beyond the scope of the Remand Order. See July 14, 2006 Order at 3-4. The undersigned suggested that petitioner move the Court to consider petitioner's arguments and if inclined to revise the Remand Order. Id. Petitioner filed such Motion, which respondent opposed. The Court denied petitioner's Motion on September 11, 2006. In her denial, Judge Firestone noted that her earlier opinion concluded that petitioner had "not established that she suffered any long-term effects from her illness." Order filed September 11, 2006 at 1. Throughout this time, one sees the billing in tenths of an hour, efforts appropriately performed by a paralegal or secretary, and trust review time; all of which appear inconsequential as individual entries, but quickly adds up to substantial unreasonable time given the consistent and extensive nature of these billings. Counsel's time is reduced 10 hours for this unproductive time and is awarded 68.7 hours for this period.

7. Second Motion for Review before Judge Firestone

The Decision on Remand was filed 2/28/07. Petitioner filed a Motion for Review on 3/26/07 of the undersigned's Decision on Remand. The Court remanded the case a

[28] Order at 3, filed July 14, 2006.

second time on 7/13/07. Petitioner billed a reasonable 36 hours during this period. Except for the two-tenths billed relating to the trust account, this time is allowed. Petitioner is awarded 35.8 hours.

8. Second Damages Phase before Special Master

While finding petitioner's effort to add a new expert at this late stage of the proceedings "very problematic," the Court permitted the introduction of additional evidence regarding the extent of Petitioner's damages. Order at 4-5, filed July 13, 2007. For the period beginning with the remand through the issuance of the undersigned's Decision on Remand on 1/30/09, counsel billed another 165 hours. See P Ex. 3, pp. 50-68. It must be kept in mind that this is on top of the 95.5 hours billed for pursuing damages from 1/26/05 through 5/15/06 which ended with petitioner's filing of an Amended Damages Notice effectively beginning the damages process anew, and the 78.7 hours billed from 5/15/06 through 2/28/07 pursuing damages ending in the undersigned's determination of damages. Thus, counsel billed 339.2 hours pursuing damages in this case for what Dr. Heubi consistently stated was a 30-day period of injury and for what Judge Firestone found, "Petitioner did not prove by a preponderance of the evidence that she had any sequelae from Reye's Syndrome after it resolved itself shortly after she was released from the hospital in late 1996." Hocraffer, 63 Fed. Cl. 765, 779, aff'd 366 F. App'x 161, 2010 WL 569524 (Fed. Cir. 2010). To say the least, the foundation for any damages claim had not only been established, those efforts had been exhaustively presented. What remained was the presentation of a proffered pediatric neurologist, the testimony the undersigned declined to hear as outside the scope of the initial remand but found permissible by the court. Counsel's time records do not reflect the efforts devoted to this focused task of adding evidence from a pediatric neurologist, but amount to efforts seen in full-blown damages cases from start to finish. It is simply inconceivable how counsel spent so much time presenting so little. To say there is evidence of lack of billing judgment is the grossest of understatements. Suffice it to say, counsel did not support the reasonableness of the billed time, counsel's efforts did not reflect the time claimed, and the undersigned did not experience the benefits from the time claimed. The efforts devoted to presenting the evidence from Dr. Jacobson is allowable, much of the remaining billed time was simply not supported.

Again, it must be remembered that at this point the case had proceeded for eight years, and counsel had billed over 339 hours to date just on damages. Up until the second remand on 7/13/07, counsel had billed over 580 hours. For some perspective, the highly publicized and often relied upon (in fact, counsel relies heavily upon part of this case's rationale to justify some of the litigation in this case), Andreu case, resulted in an agreed upon award of attorney's fees of $200,000. Andreu v. Sec'y of the Dept. of Health & Human Servs., No. 98-817V, 2011 WL 760170 (Fed. Cl. Spec. Mstr. Jan. 25, 2011). This case involved two special master decisions, two Court of Federal Claims decisions, a Federal Circuit decision and a damages determination. There was a fact hearing, expert hearing, and a second hearing to take testimony from the treating doctors. With all of that process, the parties agreed to an award of fees that reflected 571 hours of effort ($200,000 divided by counsel's hourly rate of $350.) There is no comparison

between the degree of difficulty of the medical and legal issues and the level of process involved in Andreu compared to the case at hand, yet counsel in this case has litigated this case as if there is comparability. There is not.

As one reviews the time sheets, extensive efforts were being made to gather information from medical providers, schools and petitioner and her mother. Information gathering was already compensated. Counsel billed .5 hours on 3/6/08 to review the undersigned's damages Order - that Order was issued on 2/10/05! Counsel billed one hour on 3/19/08 to review a decision regarding "surgical intervention." That issue is an entitlement issue, not damages. Again, there is page after page of one to three tenths billings that add up to hours but do not advance the damages issues. Quite frankly, counsel's efforts appear to be unfocused, thus leading to inefficient efforts which translate into extensive billings. After reviewing the time records, the undersigned found 76.4 hours related (using very liberal criteria) to Dr. Jacobson, the Hearing and post-Hearing proceedings. This is incredibly generous as this number of hours is claimed by counsel for full-blown evidentiary proceedings in other cases, not the limited proceeding that took place in this case.

9. Third Motion for Review

Petitioner filed a Motion for Review on February 26, 2009. This period will be measured from the undersigned's second Damages Decision, filed January 30, 2009, to the Court's Decision denying the Motion for Review on June 5, 2009. Petitioner billed 79.3 hours during this four month period. Reviewing the time sheets for this period discloses approximately 40 hours devoted to the drafting of the Motion for Review, time that is clearly allowable. See P Ex. 3, p. 68-9. The time spent from 3/4/09 through Judge Firestone's opinion on 6/5/09 is far more problematic. Some time was spent on fees, which is reasonable. However, other time was spent on non-productive efforts which are unallowable. Thus, 40 hours is allowed for this period of time.[29]

10. Appeal to the Federal Circuit

Following the Court's affirmance on June 5, 2009 through the Federal Circuit's affirmance on February 16, 2010, counsel billed 156.1 hours for this appellate effort. See P Ex. 3 at 74-84. A review of the time sheets discloses much unreimbursable, unreasonable time. For example, there are numerous phone calls to Casey's mother, Dr. Jacobson, and Dr. Heubi. There were nine calls to the clerk's office. Id. at pp. 74-6. There were 0.2 hours spent on jury research, although no jury was involved. Id. at p. 75. Of the first 33.1 hours claimed, id. at pp. 74-76, 15 hours are allowed. That is an extremely liberal determination in petitioner's favor. Of the remaining 123 hours, the undersigned applies a 20% reduction to eliminate excessive calls, travel to the state

[29] This time period includes billings for petitioner's Interim Attorney Fees request. That time is not awarded here, but is awarded in section 11, infra pp. 39-40.

library, basic research of court rules and sending letters. Thus, 98.4 hours are allowed. Added to the 15 hours previously found allowable, petitioner is awarded 111.4 hours.[30]

11. Fees Awarded for Fee Application

Respondent questioned the reasonableness of 93.9 hours spent on attorney's fees work. R Resp. at 21. Petitioner represents that his review of the billings discloses 89.2 hours. P Reply at 24, n. 3. Petitioner explains that the time was necessary to address a number of issues in the two submissions, one an interim fee request and the second a final fee request. Id. at 24-25. In addition, petitioner states that respondent's oppositions to both requests raised a number of issues that petitioner was forced to address. Id. There is much validity to petitioner's arguments, but not enough to justify 90 hours of work.

The issue of interim attorney's fees is contested by respondent, which forces petitioners to file legal briefs in support of their request. See, e.g., McKellar v. Sec'y of the Dept. of Health & Human Servs., No. 09-841V, slip op. (Fed. Cl. Spec. Mstr. Jun. 3, 2011), appeal docketed, No. 09-841V (Fed. Cl. Jul. 5, 2011). In addition, respondent did question a number of requested items forcing petitioner to justify the requests. However, that is petitioner's initial burden. Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1(1991)(finding the burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the fees and costs petitioner is requesting are reasonable). Further, much of petitioner's legal argument is recycled, as can be seen in comparing the interim fees briefs to the final fees briefs. Much similarity is also seen in comparing petitioner's briefs in Schueman to those submitted here. There is nothing wrong with petitioner's efforts, however the efficiency in recycling sections of briefs should translate into fewer hours expended. See Broekelschen, 2011 WL 2531199, at *9, appeal docketed, No. 07-137V (Fed. Cl. Jun. 16, 2011)(reducing hours claimed for a brief since only 17 pages of 58 were new work product).

For comparison purposes, in Torday, counsel therein requested 20 hours for preparing an interim fee application and 22 hours for a final request submission. Torday v. Sec'y of the Dept. of Health & Human Servs., No. 07-732V, 2011 WL 2680687, at *3-5. Both submissions were accompanied by briefs. Petitioner was awarded 11 hours of attorney time and 7 hours of paralegal time. Id. at *4-5. In addition, 13 hours was awarded to address respondent's objections. Thus, 24 attorney hours and 7 paralegal hours were awarded for both the interim and final fee submissions. Id.

In Broekelschen, counsel was awarded 16 hours for interim fees and 19 hours of attorney time and 7.8 hours of paralegal time. Broekelschen, 2011 WL 2531199, at *11,

[30] Respondent argued petitioner's appeal to the Federal Circuit was frivolous and the attendant fees and costs should be denied as unreasonable. R Reply at 22, n.15. As stated earlier, the undersigned is disinclined to make such a finding in the absence of some direction from the reviewing court. Supra p. 6, n. 12.

appeal docketed, No. 07-137V (Fed. Cl. Jun. 16, 2011). Again, briefs were involved in both submissions.

As noted in Torday, past cases had found that 2 hours was sufficient to submit a request for fees and costs. Torday, 2011 WL 2680687, at *4. However, for a variety of reasons, especially the legal issues surrounding interim fees, it would be unreasonable and legally incorrect to apply those decisions reflexively to today's fee requests. That said, many counsel are still requesting and being awarded relatively small sums related to their fees requests. See Savin, No. 99-537V, 2008 WL 20666111 (Fed. Cl. Spec. Mstr. Apr. 22, 2008)(awarding 4 hours when 6 were requested). Special circumstances may dictate larger awards when evidenced.

However, after reviewing petitioner's requests and considering the requests in other cases, the undersigned awards petitioner a total of 20 hours related to petitioner's interim fees request filed on May 1, 2009. Petitioner is also awarded 25 hours for the final fee application. It is noted that while more briefing was involved with the final application, there was much overlap with the interim submission.

12. Additional Fees for Reply Brief

Petitioner requested an additional 47.1 hours of attorney time and $98.33 of additional costs related to her Reply to Respondent's Response to the Final Fee Application. This is an unconscionable amount of time, equating to six full days of billable work for a 26 page product – 9 pages of which relate to hourly rates which counsel billed for as part of the interim fees application. See P Reply. Counsel was awarded 20 hours for that effort. Supra p. 40, section 11. Once again, the time sheets for this period are littered with one and two tenths billings that quickly add up to unproductive hours. There are also the communications with other counsel, and inexplicably with Casey's mother. Counsel billed 2 hours on 8/27/10 for research of the Act's legislative history that proved not only unhelpful, but incorrect. Supra p. 25. Counsel is awarded 32 hours, the equivalent of four full days for this effort. Again, this represents a very generous amount of time for the work product produced.

13. Summary of Hours

The fee application does not present an issue of whether counsel actually spent the time requested, but whether the time spent was reasonable. E.g., Sabella v. Sec'y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201, 211 (Fed. Cl. 2009). As detailed above, counsel's failure to grasp the significance of the opinions of her own expert, Dr. Heubi, regarding the duration of injury led this case down an unnecessarily lengthy litigation path. Ultimately, the decision here does not penalize petitioner for this drawn out litigation, but focuses on the unreasonable billings throughout the course of the lengthy litigation.

The undersigned reviewed the totality of petitioner's fee application. In doing so, representative, but not exhaustive examples of petitioner's unreasonable hours were

detailed. In determining the number of reasonable hours, the undersigned relied upon experience and comparisons to other cases. The resultant award is not only reasonable, it is extremely generous.

Period	Hours Awarded	Rate	Total
12/1998 to 4/30/2002	60	$163	$9,780.00
4/30/2002 to 3/11/2004	117.5	$174	$20,445.00
3/11/2004 to 1/26/2005	44.9	$174	$7,812.60
1/26/2005 to 5/15/2006	30	$191	$5,730.00
5/15/2006 to 2/28/2007	68.7	$191	$13,121.70
2/28/2007 to 7/13/2007	35.8	$191	$6,837.80
7/13/2007 to 1/30/2009	76.4	$195.50[31]	$14,936.20
1/30/2009 to 6/5/2009	40	$200	$8,000.00
6/5/2009 to 2/16/2010	111.4	$200	$22,280.00
Fee Application Work	45	$200	$9,000.00
Fees Reply Brief Work	32	$200	$6,400.00
Totals	**661.7**		**$124,343.30**

14. Comparison to Other Cases

In addition to relying upon my own experience to evaluate the reasonableness of the ultimate determination of awardable hours, the results were compared to other cases with extensive litigation histories. As will be shown, petitioner here did in fact receive a generous and reasonable award.

The Andreu litigation was discussed earlier. As discussed, that case was far more medically and legally challenging with litigation resulting in an agreed upon award of 571 hours. Supra p. 36-37.

The well-known and often cited case of Capizzano, also involved greater medical and legal issues as compared to the case *sub judice*. The entitlement issue involved five decisions, including the Federal Circuit. In addition, there was a substantial damages component to the case. Petitioner requested and was awarded 602 hours for both attorney and paralegal time. Capizzano v. Sec'y of the Dept. of Health & Human Servs., No. 00-759V, slip op. (Fed. Cl. Spec. Mstr. Oct. 15, 2007); Capizzano, No. 00-759, Billing sheets, Tab A, attached to Petitioner's Application for Fees and Costs, filed Aug. 27, 2007.

In Moberly, the case presented both a lengthy history of proceedings, spanning 12 years, and was of extreme complexity. Moberly v. Sec'y of the Dept. of Health & Human Servs., No. 98-910V, 2010 WL 2730496 (Fed. Cl. Spec. Mstr. Jun. 11, 2010). During its course of proceedings, there were two special master opinions, two Court of Federal Claims' decisions and the decision by the Federal Circuit affirming the denial of compensation. Despite this lengthy history and the degree of difficulty presented by the

[31] This figure is an average of the rate for two time periods that are spanned by these dates.

medical and legal issues involved, counsel requested and was awarded a total of $212,000 for fees. Id. Based upon a $290 rate for the member of the law firm involved, counsel was awarded approximately 731 hours. Id.; Moberly, No. 98-910v, Unopposed Motion for Attorney Fees, filed Jun. 10, 2010.

Another contentious case is Walther. Walther v. Sec'y of the Dept. of Health & Human Servs., No. 00-426V, 2008 WL 5102523 (Fed. Cl. Spec. Mstr. Nov. 14, 2008). This case had an eight year history that included an extensive period of mediation (conducted by the undersigned), a special master hearing and Decision, a Motion for Review and Decision, thereupon a Federal Circuit argument and Decision remanding the case for further findings, a second special master hearing and a second decision, which concluded the case. The fees awarded totaled $164,706 ($25,953 for first counsel who handled the case through mediation and $137,753 to the second counsel). Id. The number of awarded hours is not noted; however, using the second attorney's rate of $240 per hour, approximately 682 hours were compensated. See Hall, 640 F.3d 1351, 1357 (awarding Attorney Gage $240 per hour).

There is no comparison between the case at hand and these four cases discussed above. These four cases presented, by multiples, far more complex legal, factual and medical issues. Yet counsel in those cases claimed and were awarded approximately the same amount of hours petitioner is being awarded herein. That would appear to argue for futher reduction to the hours that undersigned has found reasonable. However, the comparison was conducted to roughly gauge my findings, not as a final determinant. But one can see that petitioner is being treated fairly, even generously, by this award.

C. Costs

Respondent did not object to petitioner's costs, with the exception of costs incurred on appeal to the Federal Circuit. R Resp. at 22. Since the undersigned does not find that appeal unreasonable, supra pp. 38-39, those costs are allowed. However, since the undersigned found petitioner's mileage and parking to the law library for legal research unreasonable, those costs are denied. These costs total $222.98. The $133.57 petitioner claims for typing the billing entries is also denied, supra p. 32. Petitioner is denied costs for an NVIC membership of $25.00 and the purchase of a book, Nutshell series on Appellate Advocacy, $31.00. P Ex. 3. A total of $412.55 is denied. The total award of costs is $24,421.98.[32]

4. Conclusion

Petitioner is awarded a total of 661.7 attorney hours in this case. The court hereby awards the petitioner attorney fees in the amount of $124,343.30 and costs in the amount of $24,421.98. **Specifically, petitioner is awarded a lump sum of $143,565.28 in the form of a check payable jointly to petitioner and petitioner's attorney;**

[32] Two status conferences were held on July 22, 2011, wherein the undersigned asked for clarification regarding a minor discrepancy in petitioner's requested costs. After petitioner's review of costs and discussion with counsel, these discrepancies were explained to the satisfaction of all involved.

petitioner is also awarded a lump sum of $5,200.00 in the form of a check payable to petitioners.

The Clerk of the Court is directed to enter judgment accordingly.[33]

IT IS SO ORDERED.

_____
Gary J. Golkiewicz
Special Master

[33] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge. Furthermore, this amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of the Dept. of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).