IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

JOHNATHAN FRIEDMAN,	*	
	*	No. 02-1467V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: December 4, 2009
	*	
SECRETARY OF HEALTH	*	Attorneys' fees and costs, Laffey
AND HUMAN SERVICES,	*	matrix, attorneys' fees and costs
	*	awarded in whole without an
Respondent.	*	interim award
	*	

Robert T. Moxley, Robert T. Moxley, P.C., Cheyenne, WY., for petitioner;
Melonie J. McCall & Ann D. Martin, United States Dep't of Justice, Washington, D.C., for respondent.

PUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS[*]

Johnathan Friedman alleged that the hepatitis B vaccine caused him to suffer acute juvenile spondyloarthropathy. The parties resolved this case without the need for formal adjudication and Mr. Friedman was awarded compensation. Decision, filed Aug. 29, 2008.

Mr. Friedman now seeks an award of attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e) (2006). Respondent has objected to the hourly rate sought by his attorneys and the hourly rate sought by his expert. Mr. Friedman is awarded $26,248.75 in attorneys' fees and $3,916.98 in costs.

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[*] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

I. Procedural History

Mr. Friedman filed a verified petition for reimbursement of attorneys' fees requested and costs on March 31, 2009 ("Pet'r Appl'n"). This appeared to be a complete and final (as opposed to interim) request for attorneys' fees and costs. (However, as issues regarding the attorney fee application proceeded, the March 31, 2009 application was neither complete nor final.) Mr. Friedman sought compensation for his attorney, Mr. Moxley, pursuant to the Laffey matrix. Pet'r Appl'n, exhibit 24. Mr. Friedman requested that the undersigned consider the material submitted in connection with Masias v. Sec'y of Health & Human Servs., Fed. Cl. No. 99-697V, which was pending before the undersigned.

Respondent filed an opposition, outlining four broad objections. First, respondent objected to the request for compensation at the hourly rates equal to rates set forth in the Laffey matrix. Like Mr. Friedman, respondent referenced materials submitted in Masias. Second, respondent objected to the number of hours claimed by Mr. Moxley. Third, respondent asserted that the hourly rate for a paralegal was not substantiated. Fourth, respondent objected to an hourly rate sought by an expert retained by Mr. Friedman, Dr. Alan Levin.

Mr. Friedman filed a reply. Because Mr. Friedman's reply introduced new information, respondent was given an opportunity to file a response. Respondent did so on September 2, 2009. This filing appeared to complete the briefing process. However, on October 6, 2009, Mr. Friedman filed a motion to stay adjudication. (For reasons discussed in section IV, this motion is denied.)

A decision addressing Mr. Friedman's motion for attorneys' fees and costs was filed on October 21, 2009. Two days later, Mr. Friedman filed a motion for reconsideration, raising a number of points. The most important point was that Mr. Friedman's current counsel of record (Mr. Moxley) asserted that the undersigned had overlooked an application for attorneys' fees and costs filed by Mr. Friedman's former counsel of record, Mr. Homer. Due to this potential error, the undersigned vacated the October 21, 2009 decision and allowed respondent, pursuant to Vaccine Rule 10(e), an opportunity to address the argument that Mr. Homer's application for attorneys' fees was not adjudicated. In other respects, Mr. Friedman's motion for reconsideration was denied. Ruling, filed Nov. 3, 2009.

When Mr. Moxley, acting as the attorney for Mr. Friedman, submitted the billing records from Mr. Homer, Mr. Moxley took the opportunity to press again arguments that had been rejected in the motion for reconsideration. Pet'r Notice of Filing and Renewed Motion for Appropriate Relief in Fees Determination, filed Nov. 10, 2009. These arguments exceeded the scope of the November 3, 2009 ruling, which granted reconsideration only for the issue regarding Mr. Homer's fees and costs. Nevertheless, Mr. Friedman's "renewed motion" has been considered, but the arguments do not change the outcome of the October 21, 2009 decision.

The following sections explain the basis for the decision regarding the amount of attorneys' fees (section II), the amount of costs (section III), and whether any portion of this award of attorneys' fees and costs should be segregated as an interim award (section IV). Much of the following analysis is taken verbatim from the vacated October 21, 2009 decision. However, some portions are changed to address the submissions made by Mr. Friedman after October 21, 2009.

II. Attorneys' Fees

A. Introduction

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. Like other litigation allowing a shift in attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa–15(e)(1) (2006).

Reasonable attorneys' fees are determined using a two-part process. The initial determination uses the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upwards or downward. Id. at 1348.

Here, Mr. Friedman has requested attorneys' fees for attorneys at two different law firms. The first firm to represent Mr. Friedman was Conway, Homer, & Chin-Caplan, P.C. The second firm is Robert T. Moxley, P.C. These requests are addressed separately.

B. Conway, Homer & Chin-Caplan, P.C.

The procedural history of the request for attorneys' fees from this firm contains some uncertainties. A paralegal from this firm completed a certificate of service, stating that she mailed a copy of the application to Mr. Moxley and the respondent on May 15, 2008. However, the Clerk's Office does not include this application on the docket sheet, which is available to the public. A review of the file in the Clerk's Office does not reveal this document.

When Mr. Friedman, acting through Mr. Moxley, filed his original request for attorneys' fees and costs on March 31, 2009, Mr. Friedman did not include Mr. Homer's request as part of his application. The March 31, 2009 motion for attorneys' fees does not refer to Mr. Homer's application. Respondent's response does not mention Mr. Homer's application. See Resp't Resp., filed April 24, 2009.

However, the petitioner's reply mentions Mr. Homer's application in a footnote. Pet'r Reply, filed June 6, 2009, at 1 n.2. After Mr. Friedman filed his October 23, 2009 motion for reconsideration, the undersigned accepted that this reference constituted a ground for

reconsidering the October 21, 2009 decision. However, the undersigned also noted that Mr. Friedman could have done more to highlight the issue. Order, filed Nov. 3, 2009, at 3 n.2 (citing Emenaker v. Peake, 551 F.3d 1332, 1338-39 (Fed. Cir. 2008) and SmithKline Beecham, Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006)).

In any event, Mr. Moxley submitted a copy of Mr. Homer's fee application on November 10, 2009. Mr. Homer requested an award of $14,164.25 in attorneys' fees. Respondent has had an opportunity to review this submission and has not objected to an award in this amount. Resp't Resp., filed Nov. 13, 2009.

The amount requested on behalf of Conway, Homer, Chin-Caplan, P.C. is reasonable. Therefore, Mr. Friedman is awarded $14,164.25 in attorneys' fees for work performed by Conway, Homer, Chin-Caplan, P.C.

C. Robert T. Moxley, P.C.

The second law firm for which Mr. Friedman requests compensation is Robert T. Moxley, P.C. The reasonable amount of attorneys' fees was addressed in the October 21, 2009 vacated decision. Because Mr. Friedman's filings after October 21, 2009 fail to persuade the undersigned that the October 21, 2009 decision was wrong, much of the analysis is repeated in the paragraphs below.

1. Hourly Rate

The predominant issue is whether Mr. Moxley should be compensated at an hourly rate established by the Laffey matrix. The undersigned has previously determined that Mr. Moxley is not entitled to compensation at those rates in Masias v. Sec'y of Health & Human Servs., No. 99-697V, 2009 WL 1838979, at *13-31 (Fed. Cl. Spec. Mstr. June 12, 2009). On July 13, 2009, Mr. Masias filed a motion for review with a judge at the United States Court of Federal Claims, which has been assigned to the Honorable Robert H. Hodges, Jr.[1] Whether use of the Laffey matrix is appropriate will probably be resolved by the Federal Circuit.

Repeating the undersigned's analysis from Masias is not necessary. However, Mr. Friedman presented two pieces of evidence that were not included in the materials submitted in Masias. These are reviewed below to explain why they do not change the outcome.

[1] Mr. Masias also is represented by Mr. Moxley.

a. Mr. Mark Friedman's Affidavit

Mr. Friedman presented an affidavit from his father, Mark Friedman. The senior Mr. Friedman generally described his difficulties in finding an attorney to represent him.[2] Mr. Friedman praised Mr. Moxley for how Mr. Moxley represented his son's interests and asserts that Mr. Moxley's "services had equal or greater value to me and my son" than the services provided by a law firm in Boston, which is Conway, Homer & Chin-Caplan, P.C.. Pet'r Appl'n, exhibit 25.

The petitioner did not explain directly how Mr. Mark Friedman's affidavit affects the outcome in this case. After Avera, the determination of an attorney's hourly rate of compensation in the Vaccine Program contains three steps. First, the hourly rate in the attorneys' local area must be established. Second, the hourly rate for attorneys in Washington, D.C. must be established. Third, these two rates must be compared to determine whether there is a very significant difference in compensation. See Avera, 515 F.3d at 1353 (Rader, J., concurring).

Other than complimenting Mr. Moxley's legal services, the relevance of Mr. Mark Friedman's affidavit is not clear. Mr. Friedman says nothing about the hourly rates for attorneys in Washington, D.C. Therefore, it is not useful in the second step. Mr. Friedman could be understood as commenting on the validity of comparing attorneys in one city (Boston, Massachusetts) with attorneys in another city (Cheyenne, Wyoming). But, the determination of whether there is a significant difference in compensation – the Davis County exception – appears to be a mathematical calculation. Step three does not compare the attorneys based on the quality of the representation. Thus, by process of eliminating the second step and the third step, Mr. Friedman's affidavit could be considered as presenting some information about the first step establishing the local rate, at best.

Even with regard to the process of establishing the local rate, Mr. Friedman's affidavit contains no helpful information. Masias reviewed the evidence about the range of reasonable hourly rates for attorneys in Cheyenne, Wyoming, where Mr. Moxley practices. Masias, 2009 WL 1838979, at *6-16. Mr. Friedman's affidavit does not provide any information about the reasonableness of rates in that locality. See exhibit 25. Thus, the affidavit is not helpful in establishing an hourly rate in Cheyenne.

Mr. Friedman's affidavit describes his difficulty of locating an attorney to represent his son's interest. Exhibit 25. This account is not legally relevant to establishing a reasonable rate in

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[2] When the petition was filed, Mr. Mark Friedman was the petitioner because his son had not attained the age of majority. After the lawsuit remained pending for several years, Mr. Johnathan Friedman was designated as "petitioner." Order, filed June 10, 2008.

Cheyenne.[3] Mr. Friedman does not argue that the difficulty is a factor to consider in setting the reasonable hourly rate for an attorney in Cheyenne, Wyoming.[4] See Pet'r Appl'n. Although Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 731 (1987) (Delaware Valley II), suggested that the difficulty in finding counsel could support an enhancement to the lodestar in rare cases to promote attorneys taking cases on a contingency, the Supreme Court subsequently ruled that an enhancement to the lodestar for contingency rate cases is not permitted. Burlington v. Dague, 505 U.S. 557, 564 (1992).

Considering whether a petitioner retained an attorney with ease or with difficulty would present many problems. For example, if a petitioner possessed a relatively strong case, such as a case alleging a Table-injury, attorneys would probably accept the case readily. Should these attorneys receive a lower hourly rate? Would petitioners be obligated to search beyond the first acceptance to try to find an attorney willing to work at a lower hourly rate? How would a petitioner demonstrate that attorneys declined to accept the case?

Two cases from the D.C. Circuit illustrate the practical difficulties of considering whether the difficulty of finding an attorney should be considered in determining the reasonable amount of attorneys' fees. In McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989), a panel of the

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[3] Because Mr. Friedman's difficulty in locating an attorney is not legally relevant, it is not necessary to review his factual assertions for accuracy.

Nonetheless, it is important to note that the Clerk's Office maintains a list of attorneys who are willing to represent petitioners in the Vaccine Program. It is not clear whether Mr. Friedman had the benefit of this list. See Masias, 2009 WL 1838979, at *28-29 (describing the increase in the number of attorneys representing petitioners in the Vaccine Program).

[4] The difficulty in finding an attorney within the area where the trial court sits may support a client's decision to retain an attorney from outside the forum who happens to charge more than local counsel. E.g. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 191-92 (2d Cir. 2008); Schwarz v. Sec'y of Health & Human Servs., 73 F.3d 895, 907 (9th Cir. 1995) (affirming trial court's decision to award attorneys' fees based upon rates prevailing in the forum, which was first Phoenix, Arizona, and later Portland, Oregon, rather than the rates prevailing where the plaintiff's attorney worked, which was New Jersey).

But, this point does not assist Mr. Friedman. The rates prevailing in a particular locale are set by local forces, such as supply and demand. The fact that Mr. Friedman may have first sought an attorney in Texas has no bearing on the reasonableness of particular rates in Cheyenne, Wyoming. Additionally, unlike the typical case in which the client is forced to resort to an attorney from a more expensive area, Mr. Friedman journeyed from Boston, Massachusetts to Cheyenne, Wyoming. In effect, Mr. Friedman happened to find an attorney whose hourly rates were lower than his first attorneys' hourly rates. To increase the local hourly rate because another attorney turned down the case would award constitute a windfall, which is not permitted. See Avera, 515 F.3d at 1349.

D.C. Circuit affirmed the trial court's enhancement of an award of attorneys' fees. The panel identified Justice O'Connor's concurring opinion in Delaware Valley II as the controlling opinion from the Supreme Court. In affirming an enhancement, the panel held that the evidence about difficulty in retaining counsel was not required because to require actual evidence would encourage a "charade" in which "public interest lawyers would accept a case only after announcing loudly that they were doing so on the assumption of a contingency enhancement." Id. at 338.

However, the panel's opinion in McKenzie was overruled two years later. Acting en banc, the D.C. Circuit determined that Justice O'Connor's concurring opinion in Delaware Valley II was actually not the controlling opinion. After reaching this conclusion, the D.C. Circuit held that enhancements to a lodestar determination to account for contingent risk, an approach that would theoretically reduce the difficulty in locating counsel, was not permitted. King v. Palmer, 950 F.2d 771, 785 (D.C. Cir. 1991) (en banc). The en banc decision turned out to be prescient in the sense that, as noted above, in 1992, a majority of the Supreme Court disagreed with Justice O'Connor's opinion. Burlington, 505 U.S. 557.

Mr. Friedman's story of the challenges in finding an attorney to represent his son carries a certain emotional appeal. However, Mr. Friedman's affidavit does not present any information relevant to the question of how to set Mr. Moxley's hourly rate.

b. Mr. Michael J. Snider's Affidavit

The second piece of evidence that was not in the Masias materials is an affidavit from attorney Michael J. Snider. Mr. Friedman filed this affidavit with his reply memorandum as exhibit 29. Mr. Snider is an attorney in Baltimore, Maryland, with approximately 13 years of experience. Mr. Snider does not assert that he has litigated any cases in the Vaccine Program. Exhibit 29.

Mr. Friedman's reply brief argues that Mr. Snider's affidavit demonstrates that the analysis of the forum rate in Masias was flawed. Pet'r Reply, filed July 6, 2009, at 10. The undersigned is not persuaded.

First, Mr. Snider appears to have no understanding of representing petitioners in the Vaccine Program. Thus, his opinion about the reasonable hourly rate for attorneys in the Vaccine Program is entitled to little, if any, weight. As discussed extensively, work in the Vaccine Program differs from other types of litigation. Masias, 2009 WL 1838979, at *13-25. Mr. Snider has litigated various types of employment actions. Exhibit 29 ¶ 5. But, Mr. Snider offers no suggestion that litigating a case pursuant to the Fair Labor Standards Act, for example, is comparable to litigating a case in the Vaccine Program.

Second, Mr. Snider's affidavit is reminiscent of affidavits from other attorneys that were filed in Masias. Masias quoted at length from a decision by the Eleventh Circuit, which is

currently upon review by the Supreme Court. In regard to affidavits from attorneys on the question of reasonable hourly rates, the Eleventh Circuit stated:

> Aside from the need to support those who support them, the lawyers who signed the affidavits have a financial interest in keeping the fee award in this case and every case like it as high as possible. The higher this fee award is the more useful it will be as precedent for the lawyer signing the affidavit when he seeks a high fee award in his own cases. The affiants are anything but "disinterested." The lodestar amount will never suffice for attorneys who practice in this area. They will always believe, in all sincerity, that they deserve more and that the justice system will function better if they are paid more. Lawyers who handle these kinds of cases cannot be disinterested witnesses because they are financially interested. To state this is not to slam lawyers in general or plaintiffs' lawyers in particular. It simply recognizes that because self-interest is hard-wired into human circuitry, no group is disinterested when it comes to the question of what members of the group are to be paid. Cf. H.L. Mencken, A Little Book in C Major 22 (John Lane Co.1916) ("It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.").

Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209, 1231-32, reh'g en banc denied, 547 F.3d 1319 (11th Cir.2008), cert. granted, --- U.S. ----, 2009 WL 229762, 77 USLW 3442, 77 USLW 3553, 77 USLW 3557 (U.S. Apr 06, 2009) (No. 08-970).[5] This description appears to fit Mr. Snider. Mr. Snider appears to have an interest in establishing a higher hourly rate for Mr. Moxley based on the Laffey matrix because rates based upon the Laffey matrix may influence the rate that he is awarded in litigation. The greater number of courts that follow the Laffey matrix, the greater the likelihood that another court will follow it. Mr. Snider may be sincere and he may be passionate, but his affidavit lacks persuasive reasoning.

Third, Mr. Snider makes at least one assertion that is not correct. Mr. Snider asserts that the "rate of $375 per hour would not be reasonable for any experienced attorney in the Baltimore-Washington area, for any species of litigation against the Department of Justice." Exhibit 29 at 3. This statement is contradicted by First Federal Sav. and Loan Ass'n of Rochester v. United States, 88 Fed. Cl. 572, 586 (2009), appeal docketed, No. 2010-5007 (Fed. Cir. Oct. 2, 2009). In First Federal, the court noted that the plaintiff and its law firm negotiated an hourly rate that reached a maximum of $315 per hour. This contradiction indicates that Mr. Snider is not knowledgeable about all aspects of the market for legal services in Washington, D.C.

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[5] The Supreme Court heard oral argument in this case on October 14, 2009.

Finally, it is not clear how Mr. Snider's affidavit, if even fully credited, promotes an award of rates to Mr. Moxley equivalent to the rates found in the Laffey matrix. If Mr. Snider's assertion that $350 is too low a rate to attract attorneys in Washington, D.C. were accepted, Mr. Moxley would be even less likely to receive the forum rates. Hypothetically, if a reasonable hourly rate in the forum were $450, then the difference between the local rate and the forum rate would increase. Because the third step of Avera requires the special master to compare the local rate and the forum rate, Avera, 515 F.3d at 1349; increasing the difference between the two rates means that the special master is compelled by the Davis County exception to award the lower rate. See Masias, 2009 WL 1838979, at *26 n.17.

Consequently, Mr. Snider's comments do not persuade the undersigned to revise the conclusions in Masias.

c. Other Arguments Regarding Reasonable Hourly Rate

Mr. Friedman offers various arguments that Masias was decided wrongly. Primarily, Mr. Friedman contends that the hourly rate for Mr. Moxley as set in Masias is not adequate to allow Mr. Moxley to earn a profit. Pet'r Reply, filed July 6, 2009, at 3 n.4 & 10 n.8. A secondary argument is that the undersigned's decision in Masias, which awarded Mr. Moxley $220 per hour, conflicts with the decision of another special master in Avila. Avila v. Sec'y of Health & Human Servs., No. 05-685V, 2009 WL 2033063 (Fed. Cl. Spec. Mstr. June 26, 2009). Neither argument is persuasive. Finally, the undersigned observes that information about Mr. Homer's attorneys' fees tends to contradict the argument that Mr. Moxley should be paid more than $400 per hour for work performed in Cheyenne, Wyoming.

(1) Profitability

Masias already rejected an argument about profitability. Masias, 2009 WL 1838979, at *29 (explaining that profitability is determined by revenue and cost). Robert T. Moxley, P.C. incurs a myriad of costs, including costs for paying its employees, such as Mr. Moxley. If Robert T. Moxley, P.C. is not a profitable venture (a proposition for which there has been no persuasive evidence), the lack of profitability may be due to excessive costs, not inadequate revenues. Moreover, fee-shifting statutes are "not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986), quoted in Masias, 2009 WL 1838979, at *26.

Reference to profitability is fundamentally flawed. In arguing that Mr. Moxley, an attorney in Cheyenne, Wyoming, should be paid at rates equal to rates attained by attorneys in Washington, D.C., Mr. Friedman seeks to increase Mr. Moxley's revenues, but Mr. Friedman seems unconcerned about Mr. Moxley's costs. There is no evidence in this case that Mr. Moxley's costs of maintaining a law practice in Cheyenne, Wyoming are in any way comparable

to the costs of maintaining a law practice in Washington, D.C. This omission was particularly noted previously. Masias, 2009 WL 1838979, at *25 n.16. The failure of Mr. Moxley to submit evidence about the similarity in costs between Cheyenne, Wyoming and Washington, D.C. strongly suggests that there is little evidence to show a similarity.[6] A situation in which attorneys earn revenue for Washington, D.C., but pay costs for Cheyenne, Wyoming is highly likely to produce a windfall for the attorney. See Avera v. Sec'y of Health & Human Servs., 75 Fed. Cl. 400, 405 (2007) (stating "In Cheyenne, a practicing lawyer does not have anywhere near the operational costs, such as office space, clerical support, and associate lawyers, as in Washington, D.C."), aff'd on different ground, 515 F.3d 1343.

Additionally, a basic principle of economic theory – competition among suppliers should decrease price – is missing in the Vaccine Program. Attorneys, who supply legal services, have no reason to offer their potential clients a lower hourly rate because the attorneys do not compete for clients on the basis of the attorneys' hourly rate. The hourly rate almost certainly cannot affect Mr. Friedman's decision to retain Mr. Moxley.[7] Mr. Friedman does not pay Mr. Moxley. The Vaccine Injury Compensation Trust Fund does. Moreover, Mr. Moxley may not charge more for attorneys' fees than the amount of attorneys' fees awarded in the litigation. Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1034-35 (Fed. Cir. 1991). Thus, as the beneficiary of a fee-shifting statute, Mr. Friedman has no concern for Mr. Moxley's hourly rate. See Delaware Valley II, 483 U.S. at 722 (noting that fee-shifting statutes remove the client's incentive to manage the attorney economically).

The regime is different when clients pay attorneys directly. For fee-paying clients, law firms have an incentive to charge only a rate that the market will support. If the law firm charges a client more than the market rate for legal services of comparable quality, the law firm risks losing that client to another law firm that offers a lower hourly rate for services of approximately the same quality. This competition ensures that the law firm's hourly rates are reasonable.

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[6] On the other hand, an attorney is not limited to recovering only the "costs" of services without any consideration of profit. See Richlin Security Service Co. v. Chertoff, ___ U.S. ___, 128 S.Ct. 2007 (2008), overruling Richlin Security Service Co. v. Chertoff, 472 F.3d 1370 (Fed. Cir. 2006); Missouri v. Jenkins, 491 U.S. 274, 285 (1989).

Attorneys are awarded reasonable rates. Assuming a rational functioning market, reasonable rates will be high enough to generate a reasonable profit and low enough that the profit is not excessive. If Mr. Moxley's firm cannot generate a profit with awards of reasonable market rates, then a problem might be with the costs incurred by the law firm.

[7] The only remote exception might be a case in which the Court of Federal Claims lacked jurisdiction to award attorneys' fees. In such a case, the attorney may have negotiated to be paid on an hourly basis. See Brice v. Sec'y of Health & Human Servs., 358 F.3d 865, 869 (Fed. Cir. 2004). There is no evidence that Mr. Friedman and Mr. Moxley entered into such an arrangement.

A recent decision by a judge of the Court of Federal Claims illustrates how competition among suppliers of legal services (law firms) can lower prices for consumers of legal services (clients). A bank retained a law firm to represent it in asserting that the passage of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) breached a contract between the bank and the government. The bank eventually prevailed at trial and was awarded almost $100 million in damages. First Federal Sav. and Loan Ass'n of Rochester v. United States, 76 Fed. Cl. 106 (2007), modified in part, 76 Fed. Cl. 765 (2007), aff'd, 290 Fed. Appx. 349 (Fed. Cir. 2008).

The plaintiff sought its attorneys' fees. The bank and its law firm had "negotiated an initial blended rate at the outset of the litigation and periodically adjusted the rate upward to a maximum of $315 per hour." First Federal Sav. and Loan Ass'n of Rochester v. United States, 88 Fed. Cl. at 586-87 (2009). The blended, negotiated rate was lower than the rate set forth in the Laffey matrix. Id. at 587-88. The judge eventually found that the rate requested by a large law firm based in Washington, D.C. – a maximum of $315 per hour – was reasonable.

If one assumes that the market for attorneys in Washington, D.C. in 1995, which is when the lawsuit was filed, was rational, then First Federal strongly contracts any argument that attorneys in Cheyenne, Wyoming need to be paid $350 per hour to be profitable. The law firm in First Federal agreed to represent the bank at a rate lower than the rate found in the Laffey matrix. Presumably, if the law firm believed that it would not earn a profit on its work, the law firm would have not agreed to work at the rates that reached $315 per hour after 13 years of litigation.

For these reasons, arguments about profitability are not persuasive. First, Mr. Friedman has not established that profitability (or the lack thereof) is a legally relevant criterion. Second, Mr. Friedman has failed to establish that a lack of profitability (assuming there is one) on the part of Robert T. Moxley, P.C. is due to low revenues as opposed to excessive expenditures.

(2) Avila

In support of an argument to increase the rate prevailing in Cheyenne, Wyoming, Mr. Friedman cited to Avila v. Sec'y of Health & Human Servs., No. 05-685V, 2009 WL 2033063 (Fed. Cl. Spec. Mstr. June 26, 2009). Pet'r Reply, filed July 6, 2009, at 2 n.3.

Avila emphasized that Mr. Moxley has received $250 per hour from some paying clients. Avila, 2009 WL 2033063, at *4. This information previously was considered, but was not considered dispositive. Masias, 2009 WL 1838979, at *10-13.

Moreover, $220 and $250 are within the same range. The selection of a particular hourly rate is a question about which reasonable people can disagree reasonably. Therefore, in the

absence of any persuasive new evidence, there appears to be no reason to change the outcome in Masias.[8]

(3) Comparison to Rates from Conway, Homer & Chin-Caplan, P.C.

Special masters may use their experience in evaluating fee requests from attorneys in other cases when adjudicating fee requests. Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993).

Attorneys from Conway, Homer & Chin-Caplan, P.C. bill at rates ranging from $210 to $300 per hour, depending upon when the work was performed and the experience of the attorney acting. Pet'r Renewed Mot., filed Nov. 10, 2009, attachment, at page 22. These rates derive from an extensive hearing to determine a reasonable rate, see Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293 (2003), and adjustments made to these findings, see Carr v. Sec'y of Health & Human Servs., No. 00-778V, 2006 WL 1073032 (Fed. Cl. Spec. Mstr. Mar. 29, 2006).

In Mr. Friedman's most recent pleading, he asserts that "no other counsel with such experience is relegated to such niggardly fees" as Mr. Moxley. Mr. Friedman compares Mr. Moxley to Mr. Conway, an attorney who charged $300 per hour in 2006. Pet'r Renewed Mot., filed Nov. 10, 2009, at 7 n.7.

A comparison between Mr. Moxley and Mr. Conway is inapt. First, the requested amount of compensation for Mr. Moxley is not $300 per hour, the amount charged by Mr. Conway, but is more than $400 per hour. It seems fair to assume that all other matters remaining the same, Mr. Conway would prefer to be paid $400 per hour, rather than $300 per hour. People generally prefer to receive more money, rather than less money. Mr. Conway's acceptance (perhaps begrudging acceptance but acceptance nonetheless) of $300 per hour suggests that $300 per hour is a reasonable rate.

Second, Mr. Conway practices in Boston, Massachusetts, a city that is relatively expensive. Mr. Friedman, when requesting a high hourly rate for Mr. Moxley, consistently overlooks the costs of practice. Conway, Homer & Chin-Caplan, P.C. may incur costs, such as

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[8] Similarly, Mr. Friedman stated that the hourly rates awarded to Mr. Moxley were $20 lower than the rates awarded to Mr. Gage, another attorney who practices in Cheyenne, Wyoming. Pet'r Mot. for Reconsideration, filed Oct. 23, 2009, at 5 n.9 (citing Hall v. Sec'y of Health & Human Servs., No. 02-1052V, 2009 WL 3423036 (Fed. Cl. Spec. Mstr. Oct. 6, 2009), motion for review filed Nov. 5, 2009). The difference probably stems from a difference in indexing established rates. In any event, the rate awarded to Mr. Moxley in Masias, which is the same rate used here; the rate awarded to Mr. Moxley in Avila, and the rate awarded to Mr. Gage in Hall all fall within the same general range of reasonableness.

rent for office space, that are higher in Boston than Robert T. Moxley, P.C. incurs in Cheyenne, Wyoming. Mr. Friedman has not met his burden of demonstrating that the two firms are comparable. As explained by the Chief Special Master, "it cannot be emphasized strongly enough that the rates found herein are based upon evidence adduced for the Boston area and as such apply only to attorneys practicing in that relevant community. . . . [This decision] cannot be used or interpreted as evidence for attorneys outside of the Boston community." Carr, 2006 WL 1073032, at *1 n.2.

Third, the work performed by Mr. Conway differs from work performed by Mr. Moxley. Mr. Moxley works as a solo practitioner, who is assisted by some support staff. Mr. Moxley performs all the functions for which an attorney's expertise is needed. In contrast, Mr. Conway is a senior attorney with whom other attorneys work. Conway, Homer & Chin-Caplan, P.C. divides responsibilities so that Mr. Conway handles some duties requiring his level of expertise and Mr. Homer, a well-qualified attorney, handles other tasks, such as participating in relatively routine status conferences. Mr. Homer's billing rate is less than Mr. Conway's billing rate. Thus, even if Robert T. Moxley, P.C. were located in the same geographic locale as Conway, Homer & Chin-Caplan, P.C., Mr. Moxley is not necessarily comparable to Mr. Conway in all respects.

d. Conclusion regarding Mr. Moxley's Hourly Rate

The undersigned has reviewed the evidence including Mr. Friedman's arguments presented in several submissions, and the decision in Masias. The undersigned is not persuaded that Masias was decided wrongly.

A reasonable hourly rate for Mr. Moxley is $220 for work performed in 2008. Masias, 2009 WL 1838979, at *12. In the forum, a reasonable hourly rate for Mr. Moxley is $350. This determination was based upon a finding that the reasonable hourly rate for an attorney with Mr. Moxley's experience ranged from $250 to $375. Masias, 2009 WL 1838979, at *25.[9]

Consequently, Mr. Moxley will be compensated at the same rates he was awarded in Masias. Mr. Moxley worked on Mr. Friedman's case from October 2006 to the present. Depending upon when the work was performed, the rates range from $210 to $220 per hour.

2. Reasonable Number of Hours

In determining the reasonable number of hours, Mr. Moxley's fee request can be divided into two groups. The first group contains time requested before October 21, 2009. The second

[9] Rodriguez v. Sec'y of Health & Human Servs., No. 06-559V, 2009 WL 2568468, at *15 (Fed. Cl. Spec. Mstr. July 27, 2009), found that reasonable rates for an experienced attorney in Washington, D.C. ranged between $275 and $360 per hour. A motion for review has been filed in Rodriguez.

group contains time requested after October 21, 2009. As the analysis below shows, it is significant that the second group includes activities that although requested after October 21, 2009, the work was actually performed before October 21, 2009.

a. Requests before October 21, 2009

When Mr. Friedman's fee application was pending initially, respondent questioned the number of hours charged by Mr. Moxley. Respondent stated that the number of hours should be reduced because some of the activities were not reasonably related to Mr. Friedman's case and because some of the activities were not adequately documented, due to billing some activities in blocks. Resp't Opp'n at 4-5.

Respondent failed to specify which entries impermissibly lumped discrete tasks into one large block of time. A review of Mr. Moxley's time sheets indicates that only four entries were for amounts of time more than 1.5 hours and that the longest entry was for three hours. Mr. Moxley's descriptions of his activities provide sufficient information so that they can be reviewed for reasonableness.

Respondent identified five specific tasks that she asserts are examples of unreasonable activities. The undersigned's review of the time sheets did not locate any other possible examples. The five tasks to which a specific challenge has been made fall into three groups.

The first group contains two entries referring to the "omnibus materials" (entry for Feb. 8. 2007) and discussing the autism proceeding with Mr. Friedman (entry for Jan. 31, 2008). Although Mr. Friedman discusses this issue in his reply at page 5, Mr. Friedman did not identify explicitly what omnibus proceeding to which Mr. Moxley was referring. Although it may be assumed that the omnibus refers to the autism omnibus proceeding, special masters have conducted other omnibus proceedings. In any event, Mr. Friedman has not established how Mr. Moxley's review of the "omnibus materials" (whatever they are) advanced Mr. Friedman's case. The reply brief argues why the review of omnibus materials might help Mr. Moxley advance cases generally and this is a fair argument. However, staying current on the field of law is a basic responsibility of an attorney. Mr. Moxley represents his clients in the Vaccine Program well. The undersigned believes that Mr. Moxley would be able to command a relatively high hourly rate if he competed for clients in the Vaccine Program based, to some degree, on price because

Mr. Moxley is knowledgeable.[10] But, Mr. Moxley should not bill individual clients for acquiring this knowledge. Therefore, the time spent reviewing omnibus materials (2.0 hours) is deducted.

Another item is for speaking to Mr. Friedman about the autism omnibus proceeding. Whether it is reasonable to seek compensation for this item is relatively close. Mr. Friedman apparently called Mr. Moxley, and it is difficult to see how an attorney could decline to speak with the client. On the other hand, Mr. Friedman's case did not involve autism, so information from the autism omnibus proceeding was unlikely to advance Mr. Friedman's case. Additionally, the time could have been eliminated by the "attorney's billing judgment."

Mr. Friedman will be compensated for this activity. It is notable that the amount requested is small and appears to be isolated.

The second group of items contains two activities relating to inquiries made by Mr. Moxley during the settlement phase of this case. Although Mr. Moxley probably knows something about the range at which cases have been settled, Mr. Moxley solicited additional information from other attorneys representing petitioners with regard to Mr. Friedman's case specifically. These activities are reasonable. Mr. Moxley is probably better able to advise Mr. Friedman about the strength and weaknesses of a particular settlement proposal if Mr. Moxley compares the proposal in this case to other cases. Thus, this time is awarded in full.

The final item relates to gathering information for the forum rate on January 8, 2009. Although this information might be used in successive cases, the information was also relevant to Mr. Friedman's case specifically. Thus, Mr. Moxley will be compensated for this work. Of course, since Mr. Moxley has now been compensated for this activity, he should not seek compensation for it again in any other case.

Thus, in short, Mr. Friedman has demonstrated that most of Mr. Moxley's time was reasonable. The only exception is 2.0 hours spent reviewing omnibus materials.

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[10] This praise for Mr. Moxley may appear to contradict the hourly rate actually awarded to Mr. Moxley. Such contradiction is superficial.

The primary issue is whether attorneys for petitioners are entitled to receive rates set by the Laffey matrix. This issue has nothing to do with Mr. Moxley's skills as an attorney.

Moreover, for the Cheyenne rate, the undersigned determined that $220 per hour is a reasonable rate for work in a Vaccine Program based, in part, upon Mr. Moxley's own statement that $250 per hour is a "very high rate in Cheyenne." See Masias, 2009 WL 1838979, at *5 (quoting an affidavit filed by Mr. Moxley). For the forum rate, after determining that the rate for someone with Mr. Moxley's experience ranges from $250 to $375, the undersigned determined that Mr. Moxley's rate is $350, which is near the top of this range. Id. at *25.

b. Requests after October 21, 2009

After the undersigned issued the October 21, 2009 decision, Mr. Friedman filed a motion for reconsideration. One ground offered by Mr. Friedman was that the issuance of the decision "prevented counsel from making a supplemental application for the attorneys fees and costs associated with the fee application itself." Pet'r Mot. for Reconsideration, filed Oct. 23, 2009, at 2. Mr. Friedman, apparently, anticipated that another fee application would be filed after the October 6, 2009 motion for stay.

The November 3, 2009 ruling rejected this argument. As discussed in that ruling, Mr. Friedman could have sought fees for prosecuting his fee application, but he did not. Ruling, filed Nov. 3, 2009, at 4-5. Thus, reconsideration was not granted on this issue.

Although the November 3, 2009 ruling addressed whether Mr. Friedman's request that Mr. Moxley be paid fees for work performed before October 21, 2009, Mr. Friedman's most recent pleading, again, seeks payment of fees for those activities. This argument remains unpersuasive. Mr. Friedman attempts to excuse the omission of any demand for attorneys' fees in seeking fees for Mr. Friedman's March 31, 2009 motion for attorneys' fees, Mr. Friedman's July 6, 2009 reply, and Mr. Friedman's October 6, 2009 motion for stay by asserting that respondent objected to this procedure. Pet'r Renewed Mot., filed Nov. 10, 2009, at 3. This argument is strange because the undersigned has previously approved the repeated submission of requests for attorneys' fees. Masias, 2009 WL 183879, at *34-35. Thus, the objection of respondent holds little consequence. Respondent's objection to repeated requests for attorneys' fees did not deter Mr. Moxley from submitting multiple requests for fees in Masias and should not have prevented Mr. Friedman from making similar requests here. Thus, Mr. Friedman has not established that Mr. Moxley is entitled to compensation for invoices submitted after October 21, 2009 for work performed before October 20, 2009.

Fee applications should be as complete as possible when they are submitted. Disclosing the (full) amount requested promotes efficient administration of the fee application. A complete fee application allows the respondent to object to some portions of the fee application. If Mr. Friedman had waited until he filed a reply for the October 6, 2009 motion for stay to include a request for Mr. Moxley's compensation from April 1, 2009 through the date of the reply, then respondent would have been offered an opportunity to evaluate this new request. If respondent objected – and there seems to be a fair chance that respondent would have objected, then Mr. Friedman would have been offered an opportunity to address respondent's objections. The course anticipated by Mr. Friedman – which, again, is not the course followed by Mr. Masias – would have frustrated respondent's opportunity to object.

Similarly, judicial officials should not have to anticipate that additional fees will be requested for work that has already been filed. "[I]t is clear that the Special Master has every right to insist upon receiving accurate bills in the first instance and was not obligated to offer petitioner's counsel a second chance to do what he should have done ab initio. As this court

recently stated, 'the request for fees must be complete when submitted.'" Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 317 (2008) (quoting Duncan v. Sec'y of Health & Human Servs., No. 99-455V, 2008 WL 3895488, at *1 (Fed. Cl. Aug. 4, 2008).

The October 21, 2009 decision adjudicated all the request for fees that were in the record. The simple reason that Mr. Friedman was not awarded any compensation for work that Mr. Moxley performed between April 1, 2009 and October 20, 2009 was that Mr. Friedman had failed to ask for compensation for those activities. Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201, 217 (2009). The October 21, 2009 decision was vacated for the limited purpose to allow presentation of attorneys' fees and costs from Conway, Homer & Chin-Caplan, P.C., because, giving that firm the benefit of the doubt, it appears that there was a good faith effort to submit a request for fees within the proper time. Ruling, filed Nov. 3, 2009. Reconsideration was not granted as to matters that could have been raised before October 21, 2009. Thus, there is no basis to change the result of the October 21, 2009 decision with respect to Mr. Moxley's work performed as of that date.

On the other hand, after October 21, 2009, Mr. Moxley has performed some work of value. Mr. Moxley filed a motion for reconsideration seeking an award of attorneys' fees for Conway, Homer & Chin-Caplan, P.C. In accord with the November 3, 2009 ruling, Mr. Moxley performed the relatively ministerial act of filing the fee application of former counsel. A reasonable amount of time to perform these two tasks – and only these two tasks – is one hour. Thus, Mr. Friedman will receive additional compensation.

Mr. Friedman will not be compensated for other aspects of the motion for reconsideration and the renewed motion for attorneys' fees. The undersigned has considered the arguments contained in those two submissions. However, the arguments (except for those pertaining to Conway, Homer & Chin-Caplan, P.C.) are points that could have been raised in earlier pleadings. Compensating an attorney for repeated litigation would only encourage incomplete submissions. Thus, Mr. Friedman will not be compensated for all work performed by Mr. Moxley in preparing the October 23, 2009 motion for reconsideration and the November 10, 2009 renewed motion.

3. Calculation of Mr. Moxley's Lodestar Value

The following chart shows the calculation of Mr. Moxley's lodestar value.

Calculations for Mr. Moxley				
Time Period	**Number of Hours Requested**	**Number of Hours Awarded**	**Hourly Rate Awarded**	**Subtotal for Period**
10/06 to 05/07	18.00	16.00	$210	$3,360.00
06/07 to 05/08	28.70	28.70	$215	$6,170.50

Calculations for Mr. Moxley				
Time Period	**Number of Hours Requested**	**Number of Hours Awarded**	**Hourly Rate Awarded**	**Subtotal for Period**
06/08 to 03/09	6.20	6.20	$220	$1,364.00
03/09 to 11/09*	22.00	1.00	$220	$220.00
				$11,114.50
* The source of the number of hours is the supplemental fee invoice, filed Oct. 23, 2009, (19.5 hours) and the renewed motion, filed Nov. 10, 2009, at 2 n.2 (2.5 hours). The chart lists time sought by Mr. Moxley and excludes three hours of work by Ms. Gollobith.				

Thus, Mr. Friedman will be awarded $11,114.50 for work performed by Mr. Moxley.

4. Paralegal Support

As part of his application for attorneys' fees, Mr. Friedman seeks an award for work performed by Carol Gollobith, who is a paralegal at Robert T. Moxley, P.C. The invoice seeks $970 for Ms. Gollobith's work. This amount is for 9.7 hours of work at $100 per hour. Verified Petition at 4.

Respondent objected to compensating Ms. Gollobith at a rate exceeding $85 per hour. Resp't Resp. at 6-7.

The interim fee decision in Masias compensated Ms. Gollobith at a rate of $100 per hour. Masias v. Sec'y of Health & Human Servs., No. 99-697V, 2009 WL 899703, at *5 (Fed. Cl. Spec. Mstr. Mar. 12, 2009). The respondent appears not to have objected to this rate.

Respondent has not explained why she has taken a different position with regard to Ms. Gollobith's rates. Respondent also has not explained why the decision in Masias was in error. Consequently, Ms. Gollobith will be compensated at the same rate. Mr. Friedman will be awarded $970.00 for her work.

III. Costs

Mr. Friedman is entitled to an award for the reasonable costs incurred. 42 U.S.C. § 300aa–15(e). Costs were incurred by three different entities – Conway, Homer & Chin-Caplan, P.C., Robert T. Moxley, P.C. and Mr. Mark Friedman. Conway, Homer & Chin-Caplan, P.C. incurred costs totaling $1,018.35. The amount requested for costs incurred by Robert T. Moxley, P.C. and Mr. Mark Friedman totals $3,338.63. The predominant cost is an expense for Dr. Alan Levin, which was for $3,080.00. Exhibit 26. It appears that Mr. Mark Friedman and the law firm shared this expense.

Respondent objected only to the cost for Dr. Levin. The other items appear to be reasonable and adequately documented.[11] Thus, these items, including the costs incurred by Conway, Homer & Chin-Caplan, P.C., will be compensated.

Dr. Levin has charged $3,080, which is 8.8 hours of work at $350 per hour. Exhibit 26. Respondent asserted that there was no evidence to support $350 per hour. Resp't Opp'n at 7.

Mr. Friedman bears the burden of producing evidence, not just argument, and the failure to submit evidence can justify denying the award of fees and costs. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault v. United States, 52 Fed. Cl. at 667, 670 & 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970); Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005). Thus, due to Mr. Friedman's failure to submit any evidence, Dr. Levin will be compensated at the rate to which respondent has not objected, $300. Dr. Levin will be awarded $2,640, which is 8.8 hours at $300 per hour.

Costs	
Amount requested initially	$3,338.63
Deduction for Dr. Levin ($3,080 - $2,640)	($440.00)
TOTAL	$2,898.63

Because Mr. Mark Friedman and Robert T. Moxley, P.C. appear to have shared in the costs, this amount is awarded to Mr. Mark Friedman and Robert T. Moxley, P.C., jointly.

IV. Requests for an Interim Award, Stay, and a Hearing

In pleadings filed after his primary motion for attorneys' fees and costs, Mr. Friedman made various requests. First, in Mr. Friedman's reply, he requested that he be given an interim award, which would contain the items that cannot be reasonably disputed, and a final award, which would contain the disputed items. This separation would allow Mr. Friedman to receive some payment now if the case is appealed.

Second, Mr. Friedman filed, on October 6, 2009, a document captioned "Motion for Interim Award of Fees and Stay Pending Dispositive Appeals." In this document, Mr. Friedman

[11] There is one exception to the adequate documentation. Mr. Friedman requested reimbursement of $2,150.00 for his costs. Mr. Friedman submitted a check for $2,000, which is assumed to be a partial payment for Dr. Levin. The difference ($150.00) is not explained. However, it is probably the fee for filing the petition.

requested that the matter be set for a hearing and that the Laffey matrix portion of the case be stayed. Incidentally, the text of Mr. Friedman's motion does not request an award of interim fees, although that request is made in the title of the document.

Separating awards into an interim award and a final award will not be made in this case. With respect to the appropriateness of an interim award of attorneys' fees, Mr. Friedman's case is comparable to Avera. In Avera, the special master determined that the Averas had failed to establish that they were entitled to compensation in December 2005. In February 2006, the Averas sought an award of their attorneys' fees and costs. After the special master did not award the entire amount requested, the Averas filed a motion to vacate and asserted that they were entitled to an award of interim fees while the case was being appealed. This motion was denied in September 2006. Avera, 515 F.3d at 1346; Avera, 75 Fed. Cl. at 402. In ruling on a motion for review, the judge held that an award of interim attorneys' fees was not permitted as a matter of law. Avera, 75 Fed. Cl. at 404-05.

On the question of whether an award of attorneys' fees on an interim basis was appropriate, the precise holding of the Federal Circuit was to affirm the denial of an interim award. The Federal Circuit stated that although "the special master and the Court of Federal Claims erred in holding that the statute bans interim fee awards, we find that there is no basis for an interim fee award here." Among other points, the Federal Circuit observed that the Averas "only sought interim fees pending appeal." Avera, 515 F.3d at 1352.

Mr. Friedman's case resembles Avera. In both cases, the entitlement phase of the case had concluded. Neither Mr. Friedman nor the Averas required an award of interim fees to continue to prosecute their claim for entitlement.[12] Both Mr. Friedman and the Averas sought an award of interim fees for the appellate litigation to resolve the amount of fees. Given that the Federal Circuit held that an interim award of attorneys' fees was not necessary for the Averas, it follows that an interim award is not necessary in all cases, especially ones that share the same procedural posture as Avera.

Arguably, Mr. Friedman's case is also comparable to Masias, in which the undersigned divided a fee award into an interim portion, which contained the amount to which a reasonable litigant could not object, and a final portion, which resolved the disputed items. However, Masias does not require the same result in Mr. Friedman's case.

The decision to award attorneys' fees and costs is a matter of discretion. Dubuc v. Green Oak Tp., 312 F.3d 736, 744 (6th Cir.2002); Sunrise Development, Inc. v. Town of Huntington, New York, 62 F.Supp.2d 762, 779 (E.D.N.Y.1999). Discretion, in turn, suggests that one outcome is not required. See Kao Corp. v. Unilever U.S., 441 F.3d 963, 972 (Fed. Cir. 2006)

[12] Thus, Mr. Friedman's case differs from Doe 11 v. Sec'y of Health & Human Servs., No. 99-212V, 2009 WL 4276948 (Fed. Cl. Nov. 10, 2009) because the entitlement phase remains open due to an appeal pending in the Federal Circuit.

(finding that the trial court did not abuse its discretion in finding that an applicant for a patent did not omit material from the application with an intent to deceive the patent examiner); Spezzaferro v. Fed. Aviation Admin., 807 F.2d 169, 173 (Fed. Cir. 1986) ("In procedural matters such as discovery or an attempt to reopen a record, as here, the discretion accorded to the [Merit Systems Protection Board] and its officials must be shown to have been abused. . . We do not second-guess the trial tribunal on procedures except where the abuse of discretion is clear and harmful.").

One reason for awarding attorneys' fees and costs on an interim basis in Masias was to avoid preventing an appeal regarding whether attorneys from around the country should be awarded rates set by the Laffey matrix. Masias v. Sec'y of Health & Human Servs., No. 99-697V, 2009 WL 899703, at *2 (Fed. Cl. Spec. Mstr. Mar. 12, 2009).

This factor is not present in Mr. Friedman's case. A motion for review has already been filed in Masias. (A motion for review has also been filed in Avila, which also refrained from compensating Mr. Moxley at rates set by the Laffey matrix.) Masias and Avila are vehicles that Mr. Moxley and the respondent can use to obtain further guidance from the Federal Circuit regarding the determination of the reasonable rate for attorneys practicing in Washington, D.C.

In Mr. Friedman's October 6, 2009 motion, Mr. Friedman argued that judicial efficiency would be promoted if no decision is entered here until after there is a final adjudication of the Laffey rates. Mr. Friedman's November 10, 2009 renewed motion also makes this argument. This point has some validity. However, it is not persuasive for several reasons. First, unbeknownst to Mr. Friedman, the present decision was nearly completed before Mr. Friedman filed his October 6, 2009 motion. Completing the October 21, 2009 decision took relatively little fine-tuning. Second, this decision may have some value to the appellate authorities who are deciding the Laffey issue. See First Federal Sav. and Loan Ass'n of Rochester v. United States, 88 Fed. Cl. at 586 (citing the undersigned's decision in Masias). Further, if Mr. Friedman chooses to appeal, then another judge at the Court of Federal Claims may have an opportunity to present his or her views before the Federal Circuit makes its decision. The Federal Circuit may appreciate receiving a multitude of (non-binding) viewpoints before reaching its decision. Third, Mr. Friedman's motion for review – assuming one is filed – will probably entail relatively little work for the attorneys. As Mr. Friedman noted, two motions for review are already pending. These documents will serve as a template for the motion for review that could be filed in Mr. Friedman's case. Then, after the motion for review and response to the motion for review is filed, the judge to whom Mr. Friedman's motion for review is assigned can determine whether resolution should be stayed.

Mr. Friedman's case also differs from Masias due to the amount of money at stake. The total amount of money requested, even with Mr. Moxley requesting compensation at a rate set by the Laffey matrix, is less than the amount in dispute in Masias. Mr. Friedman's personal share is, at most, $2,150. Thus, any appeal of this case will delay payment primarily to Mr. Moxley, and affect Mr. Friedman only slightly.

Mr. Friedman's October 23, 2009 motion for reconsideration and November 10, 2009 renewed motion call for either a stay or an award of only interim fees. Although the undersigned has considered these arguments, they are not persuasive for the reasons set forth above and in the November 3, 2009 ruling on the motion for reconsideration.

For all these reasons, Mr. Friedman's requests either to split the award into an interim component and a final component or to stay the case are DENIED. The remaining issue is Mr. Friedman's request for a hearing. This request, too, is DENIED. Mr. Friedman's October 6, 2009 motion offered no reason why a hearing to obtain testimonial evidence is necessary. Mr. Friedman had ample opportunity to present written evidence supporting the request for attorneys' fees and costs. Further, Mr. Friedman has not demonstrated that oral argument is necessary.

V. Summary

Mr. Friedman is awarded the following items:

Summary of Attorneys' Fees and Costs

Attorneys' Fees - Conway, Homer, & Chin-Caplan, P.C.	$14,164.25	
Attorneys' Fees - Mr. Moxley	$11,114.50	
Attorneys' Fees - Mr. Moxley's paralegal support (Ms. Gollobith)	$970.00	
Subtotal for Attorneys' Fees		$26,248.75
Costs - Conway, Homer, & Chin-Caplan, P.C.	$1,018.35	
Costs - Robert T. Moxley, P.C. and Mark Friedman	$2,898.63	
Subtotal for Costs		$3,916.98
TOTAL		$30,165.73

The Clerk's Office is ordered to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master