IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

DONALD R. MASIAS	*	No. 99-697V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	Filed: June 12, 2009
v.	*	Posted: June 23, 2009
	*	
SECRETARY OF HEALTH	*	Attorneys' fees; reasonable hourly
AND HUMAN SERVICES,	*	rate; Avera; reasonable number of
	*	hours; reasonable cost for experts;
Respondent.	*	Laffey matrix

Robert T. Moxley, Esq., Robert T. Moxley, P.C., Cheyenne, Wyoming, for Petitioner;
Catharine Reeves, Esq., U.S. Department of Justice, Washington, D.C., for Respondent

PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS[*]

The petitioner, Donald R. Masias, filed a petition alleging that he suffered arthritis as the result of a March 8, 1994 hepatitis B vaccination. The parties resolved this dispute. The special master issued a decision adopting the parties' stipulation. Decision, filed Dec. 27, 2007, at 1.

Mr. Masias now seeks reimbursement for his attorneys' fees and costs. However, respondent has objected to a number of items.

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[*] When this decision was issued initially, the parties were notified that the decision would posted 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). The parties were given an opportunity to propose redactions pursuant to 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

On June 22, 2009, the parties informed the undersigned's law clerk that they did not request any redactions. Thus, the decision is being made available for posting now. The only change is this footnote.

The amount that could not be reasonably disputed is $42,065.50 in attorneys' fees and $6,302.15 in Mr. Masias's costs. This amount was awarded on March 12, 2009. Decision, 2009 WL 899703.

This decision resolves the remaining objections and disputed items. After Mr. Masias's request and respondent's objections are considered, Mr. Masias is awarded an additional $19,035.25 in attorneys' fees and $14,873.32 in attorneys' costs.

To facilitate review, the following outline is provided.

I. Procedural History of Request for Attorneys' Fees and Costs

On March 10, 2008, Mr. Masias, through his counsel, Robert Moxley, filed his fee petition. In his fee petition, Mr. Masias requested a total award of $135,732.04 in "reasonable fees and costs." Fee Petition at 1. This fee petition included a request that Mr. Moxley be compensated at a rate of $290 to $440 per hour, which, according to Mr. Masias, is the rate appropriate for attorneys practicing in Washington, D.C. Exhibit 52. Mr. Masias argued that Mr. Moxley is entitled to the rate for attorneys practicing in Washington, D.C., even though Mr. Moxley's practice is in Cheyenne, Wyoming, because the forum where this case is pending, the United States Court of Federal Claims, is located in Washington, D.C. See Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008).

Respondent opposed Mr. Masias's fee application, in part. Most significantly, respondent challenged whether Mr. Moxley was entitled to a forum rate. See Resp't Resp., filed Mar. 24, 2008, at 1.

Mr. Masias filed a reply. Notably, his reply included a request for additional attorneys' fees and costs of $14,014.83. Exhibit 76 at 1-4. As will be seen shortly, whenever Mr. Masias filed a document relating to his request for attorneys' fees and costs, Mr. Masias requested additional money.

The special master stayed proceedings, pending the resolution of the petitioner's / appellant's appeal before the Court of Appeals for the Federal Circuit in Avera v. Sec'y of Health and Human Servs., No. 07-5098 (Fed. Cir.). Order, filed April 11, 2008. The special master vacated the stay upon receiving notice that the Federal Circuit issued a mandate denying petitioner's motion for rehearing en banc in Avera. Order, filed May 8, 2008.

On May 27, 2008, Mr. Masias filed a motion for interim payment of "irreducible minimum" fees. See Verified Motion for Interim Payment of "Irreducible minimum" fees and costs at 1 (Interim Fee Petition). At Mr. Masias's request, the special master convened a status conference on June 12, 2008, to discuss his fee application. Mr. Moxley represented that he filed the interim fee application because he anticipated that the fee petition would take a significant amount of time to litigate. See generally Interim Fee Petition.

On June 25, 2008, Mr. Masias filed a supplemental petition for attorneys' fees and costs, requesting an additional $1,716. Exhibit 78 at 1. The respondent objected to Mr. Masias's request for attorneys' fees and costs incurred during the preparation of the interim fee petition. See generally Resp't Resp., filed June 20, 2008, at 17.

This case was transferred to the undersigned on August 5, 2008, upon the departure of the previously assigned special master. The undersigned allowed time for additional briefing, which the parties submitted.

On March 12, 2009, Mr. Masias was provided an interim award of a portion of Mr. Moxley's attorneys' fees and also Mr. Masias's own costs. Decision, 2009 WL 899703. The interim fee decision awarded, in attorneys' fees, an amount that could not be disputed reasonably. The decision also awarded costs that were not disputed, leaving until this decision the more contentious issues.

On May 5, 2009, a decision was issued resolving the disputed issues. However, on May 26, 2009, Mr. Masias filed a motion for reconsideration pursuant to Vaccine Rule 10(c). An order, filed May 28, 2009, granted Mr. Masias's request for reconsideration to the extent that the May 5, 2009 decision was withdrawn. Respondent filed a response.

Thus, the matters are again ready for adjudication. Mr. Masias requested reconsideration of relatively few issues. His motion for reconsideration is addressed in sections II.B.1.a(1) & (4) (regarding the reasonable rate in Cheyenne, Wyoming), II.B.1.b.(5) n.15 (regarding Mr. Shoemaker's hourly rates), III.B.1 (regarding Dr. Geier), and III.D (regarding Dr. Levin) below. The motion for reconsideration did not change the amount of attorneys' fees or costs awarded to Mr. Masias.

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).

When a party seeks an award of attorneys' fees, the fee-applicant bears the burden of showing the reasonableness of the request. "The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero. In the process and especially in the end result, [trial] courts must continue to be accorded wide latitude." Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986).[1]

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, 515 F.3d at 1347-48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upward or downward. Id. at 1348.

In this case, both variables of the lodestar method are disputed. The basis of the dispute for attorneys' fees concerns whether Mr. Masias's counsel, Mr. Moxley, should be reimbursed based on the Laffey matrix rates endorsed by the United States Court of Appeals for the District of Columbia. For the reasons that follow, in section II.B.1, below, Mr. Moxley is not entitled to these hourly rates. Instead, Mr. Moxley is compensated at a rate of $160-$220 per hour.

The other variable in the lodestar method is the reasonable number of hours. Primarily, respondent objects to the number of hours Mr. Moxley has billed for preparing and litigating the fee application. As explained in section II.B.2, below, Mr. Moxley's hours are generally reasonable.

In addition, Mr. Masias seeks compensation for people who supported Mr. Moxley. This issue is addressed briefly in section II.C.

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[1] Although Mares did not interpret the attorneys' fee provision of the Vaccine Act, fee-shifting statutes are interpreted similarly. Avera, 515 F.3d at 1348.

B. Part One: Determining the Lodestar

1. Reasonable Hourly Rate for Mr. Moxley

In the lodestar analysis, "a reasonable hourly rate is 'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348, quoting Blum, 465 U.S. at 896 n.11. In Avera, the Federal Circuit authorized an award of attorneys' fees based upon the prevailing rate in the forum. Counsel for petitioners are entitled to Washington, D.C. rates except "'where the bulk of [an attorney's] work is done outside the jurisdiction of the court and where there is a *very significant* difference in compensation favoring D.C.'" Avera, 515 F.3d at 1349 (quoting Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 755, 758 (D.C. Cir. 1999)) (emphasis in Davis).

Notably, Mr. Moxley represented the petitioner / appellant in Avera. In Avera, the Federal Circuit stated that Mr. Moxley had initially requested $200 per hour, then increased his requested hourly rate to $598. Avera, 515 F.3d at 1349. The Federal Circuit held that the special master did not err in compensating Mr. Moxley at a rate of $200 per hour. Id. at 1350.

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).

a. Determination of the Reasonable Local Hourly Rate for Mr. Moxley

(1) Standards for Establishing Hourly Rate

The hourly rate is "'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 at 1348 (Fed. Cir. 2008), quoting Blum, 465 U.S. at 896 n. 11.

Determining the reasonable hourly rate can be difficult because there is relatively little guidance about how to determine what the prevailing market rate is for similar services. A determination about the prevailing market rate "cannot be made with the same certainty as ascertaining the value of a futures contract for pork bellies or wheat on a given day." Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1300 (11th Cir. 1988). Furthermore, what are "similar services" is disputed. There appears to be only one appellate case determining what work is similar to the work performed by attorneys representing petitioners in the Vaccine Program, Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293, 304 (2003) (Rupert IV).

Rupert IV is not binding upon special masters, except as an order on remand. Although not binding authority, Rupert IV is entitled to consideration. See Barber v. Sec'y of Health & Human Servs., No. 99-434V, 2008 WL 4145653 *5-11 (Fed. Cl. Spec. Mstr. Aug. 21, 2008), citing Rupert IV. Section II.B.1.b. sets forth additional information about the standards to be followed in determining the reasonable hourly rate.

The information about the reasonableness of hourly rates for attorneys in Cheyenne, Wyoming is somewhat sparse. The information includes one affidavit submitted by Mr. Masias, Mr. Moxley's own description of his billing practices, and statements of reasonable rates for attorneys in Cheyenne, Wyoming from decisions both inside and outside of the Vaccine Program.

The May 5, 2009 decision found that an analysis of this information reveals that a reasonable hourly rate was $220 per hour in 2008. As part of the motion for reconsideration, Mr. Masias presented additional information about the appropriate hourly rate for an attorney in Cheyenne. Pet'r Mot. for Recons. at 3-7. This information did not change the result.

(2) Mr. Masias's Evidence (Affidavits)

Mr. Masias presented relatively little information about the reasonable rate for attorneys in Cheyenne, Wyoming. The evidence that Mr. Masias presented consisted of affidavits, and the Order Amending Judgment in Avera.

Mr. Masias filed affidavits from Mr. Moxley in which Mr. Moxley described his billing rates. Exhibit 59 ¶ 46 (stating that the rate of $250 per hour as of September 1, 2006, "is a very high hourly rate for the Cheyenne market."); exhibit 75 ¶¶ 4-7.

Donald I. Schultz, Esq., is a principal in the Cheyenne, Wyoming law firm of Schultz & Belcher LLP, specializing primarily in "complex federal litigation, concentrating in commercial, construction and energy litigation." See Exhibit 70 at 1-2. Mr. Schultz asserted that because of his experience, both as a court appointed defendant's liaison counsel for a complicated multi-district federal litigation lawsuit in Wyoming and as former Holland & Hart attorney, he is familiar with the hourly rates of attorneys who litigate complex cases before federal courts "around the nation." Exhibit 70 at 2. Mr. Schultz did not indicate that he has been admitted to the Court of Federal Claims bar or practiced in the Vaccine Program. However, in his affidavit, Mr. Schultz stated his belief that Program litigation is akin to complex federal litigation, which demands a rate higher than the hourly rates of regular practitioners in Cheyenne, Wyoming. Exhibit 70 at 3. Mr. Schultz averred that, he has "personal knowledge" that attorneys in Cheyenne, Wyoming, who practice in the area of complex litigation, receive $375 to $405 per hour. Id. at 3.

Mr. Masias filed two affidavits from David F. Evans, a senior partner at the firm of Hickey and Evans LLP with offices in Cheyenne, Wyoming. Mr. Evans does not provide any

evidence of hourly rates in Wyoming, or an opinion on what attorneys in the Program should be paid. Exhibit 61, exhibit 56.

(3) Decisions Setting Reasonable Hourly Rates for Attorneys in Wyoming

Mr. Moxley has practiced in the Vaccine Program for more than 18 years. Exhibit 55 at 1. Thus, special masters have determined the reasonableness of his hourly rate (or the hourly rate of other attorneys from Cheyenne, Wyoming with whom he practiced) in a series of decisions. As set forth below, the most recent decisions have determined that the reasonable hourly rate for attorneys practicing in Cheyenne, Wyoming falls between $200-$250 per hour.

In addition to cases from within the Vaccine Program, other decisions have set the reasonable hourly rate for attorneys in Wyoming. These decisions, which were made by either federal judges or state judges, have the advantage of being made by courts in the relevant forum. They suggest that the reasonable hourly rate for an attorney is between $165 and $200 per hour.

(a) Cases within the Vaccine Program

Table 1, found in the appendix, provides a list of published attorneys' fees decisions for cases in the Vaccine Program from 1991 through 2008 for attorneys in Cheyenne, Wyoming. The hourly rates have increased from $160 in 1999 to $200 in 2004.

In 1999, "Mr. Moxley request[ed] compensation at an hourly rate ranging from $110 to $160." The range of rates reflected two changes in Mr. Moxley's billing rates while the case was pending. Barnes v. Sec'y of Health & Human Servs., No. 90-1101V, 1999 WL 797468 at *2 (Fed. Cl. Spec. Mstr. Sept. 17, 1999). David Evans opined that $160 per hour was a reasonable rate of compensation. The special master, despite respondent's objection, awarded Mr. Moxley $160 per hour for work performed after October 1, 1998. Id. at 3.

In 2004, Richard Gage, an attorney in Cheyenne, Wyoming, sought compensation for attorneys' fees and costs for himself and two other attorneys, including Mr. Moxley. The special master found that $200 per hour was a reasonable hourly rate for Mr. Gage and Mr. Moxley. The special master based his decision on a combination of evidence including affidavits from attorneys who specified the rates their firms charged and a 2003 bar survey of attorney rates. Therefore the special master found the $200 per hour was a reasonable rate. Hart v. Sec'y of Health & Human Servs., No. 01-357V, 2004 WL 3049766 at *2-3 (Fed. Cl. Spec. Mstr. Dec. 17, 2004).

After originally seeking $200 per hour in attorneys fees in the Avera case, Mr. Moxley revised his fee application, and requested an hourly rate of $598 for his services. Avera, 515 F.3d at 1350. The special master denied Mr. Moxley's revised request and awarded Mr. Moxley $200 per hour. Id. at 1351. On review, the Court of Appeals for the Federal Circuit upheld the

special master's original award of $200 per hour for Mr. Moxley. See generally, 515 F.3d 1343 (Fed. Cir. 2008).

In June 2008, a judge at the Court of Federal Claims awarded petitioner $69,003.50 in attorneys' fees and $5,093.44 in attorneys' costs incurred by Mr. Moxley during the appellate proceedings for the Avera fee application. See Order Amending Judgment, Avera v. Sec'y of Health and Human Servs., No. 04-1385, filed June 24, 2008. According to Mr. Moxley's calculation, this represented an award of $250 per hour. Verified Traverse, filed July 28, 2008, at 3-4; see also Exhibit 79.

(b) Cases outside the Vaccine Program

Other cases discussing the reasonableness of Wyoming attorneys' hourly rates have advantages and disadvantages. When the case is decided by a judicial officer from Wyoming, the decision benefits from that judicial official's knowledge about what is happening in his (or her) local legal community. It is difficult for special masters, who are based in Washington, D.C., to develop this same sense.

On the other hand, these decisions about the reasonableness of hourly rates for attorneys from Wyoming cannot consider circumstances about litigation in the Vaccine Program. Further, the decisions provide relatively little information about the attorneys whose hourly rate is being established.

These weaknesses do not eliminate all value to considering these cases from outside the Vaccine Program. The information is summarized in table 2, which appears in the appendix. These cases show that courts in Wyoming have awarded attorneys' fees from $125 per hour in 1997 to $200 per hour in 2008. In addition, one case appears to have awarded some attorneys as much as $400 per hour.

(4) Analysis of Evidence

The primary evidence submitted by Mr. Masias, consisting of the affidavits from Mr. Schultz and Mr. Evans, is not persuasive. Mr. Schultz compares the Vaccine Program to complex federal litigation, which, according to him, warrants a payment of $375 - $405 per hour.[2]

Using Mr. Schultz's affidavit, which states that attorneys practicing complex litigation received $375 to $405 per hour, Mr. Masias argued that the attorney rates for Cheyenne, Wyoming are close to the locality-adjusted Laffey matrix rate. Pet'r Reply at 19.

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[2] Whether litigation in the Vaccine Program constitutes complex litigation is discussed in section II.B.1.b(3)(b)ii) below.

Mr. Masias has not established that Mr. Schultz's rates are a valid basis for comparison. Mr. Schultz does not have any experience in Program litigation. Exhibit 70 at 2-3. In addition, the rates used by Mr. Schultz appear to come from his experience in a national firm with multiple offices. Mr. Moxley practices in a small firm (fewer than ten attorneys) with a single location. Rates from a much larger firm, with a different type of practice, are not useful in determining the appropriate rate for a small firm in Cheyenne.

Mr. Moxley indicated that he charges $250 per hour to local clients for non-vaccine related litigation. Verified Traverse, filed July 28, 2008, at 3. In the Order Amending Judgment for fees related to the appellate review of Avera, the Court of Federal Claims awarded Mr. Moxley his highest hourly rate in the Vaccine Program of $250 per hour.[3]

Ultimately, Mr. Moxley has not been awarded more than $250 per hour for either his vaccine-related or non-vaccine related litigation. Cases in the Program and cases from Wyoming related to setting hourly rates conclusively indicate that the reasonable hourly rate for Cheyenne, Wyoming is between $200 and $250 per hour.

Mr. Masias argued that cases from the Vaccine Program that determined Mr. Moxley's hourly rate are no longer valid. According to Mr. Masias, their obsolescence comes from the fact that they were decided before the Federal Circuit decided Avera, which changed the law regarding attorneys' hourly rate. Pet'r Reply, filed April 30, 2008, at 7-8.

This argument is partially correct and partially incorrect. It is true that Avera permitted special masters to award compensation based upon the forum rate. On the other hand, Avera did not displace the traditional requirement to examine reasonable rates in the attorney's local community. If the Federal Circuit believed that Avera changed the law as significantly as Mr. Masias suggests, then the Federal Circuit would probably have remanded the case for additional fact-finding pursuant to the correct legal standard. When the panel in Avera examined the factual determinations made by the special master, it affirmed the special master's determination that a reasonable hourly rate for Mr. Moxley was $200 per hour. Thus, an examination of the past decisions determining the hourly rate for attorneys in Wyoming remains appropriate.[4]

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[3] In his supplemental affidavit, Mr. Moxley stated that he charged clients at a local rate of $250 for cases that are not complex litigation. Exhibit 75. (Supplemental Declaration of Robert T. Moxley, filed April 30, 2008) at 2. He asserted that "it was not accurate or fair" for the Court of Appeals for the Federal Circuit in Avera, to compare his then $200 hourly rate with the Laffey matrix rate, because his $200 hourly rate was not his hourly rate for complex litigation cases. Id. at 2-3.

[4] To at least some extent, Mr. Masias argued that relying upon previously determined rates can be an error. Pet'r Reply, filed April 30, 2008, at 10 n.13, citing Case v. Unified School Dist. No. 233, 157 F.3d 1243, 1258 (8th Cir. 1998).

However, Case is distinguishable in that in Case, the district court ignored the evidence

Mr. Masias also maintained that Mr. Moxley's historical rates have been artificially low. See Pet'r Reply at 30. Other than Mr. Moxley's own statement, there seems to be little confirmation of that assertion.

The hourly rates awarded by special masters fit within the general range of hourly rates awarded by judicial officials in Wyoming. Table 3, which appears in the appendix, combines information in Table 1 and Table 2. This table shows that special masters have been consistent with other judicial officials in setting hourly rates for attorneys in Wyoming.

The most interesting observation is that in Hart, which was decided in December 2004, the special master awarded $200 per hour to Mr. Moxley. Almost exactly two years later, the Wyoming Supreme Court determined that $200 per hour was the limit of reasonable compensation for attorneys outside of Casper, Wyoming. Morrison v. Clay, 2006 WY 161, ¶ 19, 149 P.3d 696, 702 (Wyo. 2006). The results in these two cases suggest that special masters have been more generous than judicial officials in Wyoming.

Although the attorneys whose rates were determined in Morrison worked in Casper, Wyoming, their rates provide some information about the reasonable rate for attorneys in Cheyenne, Wyoming. First, both cities are municipalities in Wyoming. Whatever rules govern the practice of law in Wyoming, such as any requirement to attend continuing legal education, apply to lawyers in Casper and Cheyenne equally. Second, the cost of living in Casper is about the same as the cost of living in Cheyenne. Exhibit 501 (comparison of cost of living in various counties in Wyoming).

Additionally, Mr. Moxley's assertion that special masters have awarded him rates that are low historically is contradicted by the two decisions in which special masters determined Mr. Moxley's hourly rate. In both Barnes and Hart, the special masters awarded Mr. Moxley the hourly rates that were requested. This equality between the rates requested and the rates awarded certainly suggests that special masters have responded to Mr. Moxley's requests. Therefore, the historical rates continue to have some relevance in determining the reasonable hourly rates.

Another way to approach the question of what is a reasonable hourly rate for attorneys in Cheyenne is to borrow the method used in connection with the Laffey matrix, that is, start with some established rate and then increase that rate each year for inflation using the Consumer Price Index. Because Mr. Evans's affidavit was the basis of the special masters' determination of the appropriate hourly rate in Barnes and in Hart, these decisions provide the starting point.

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submitted by both parties that the reasonable hourly rate was at least $135 per hour. The Circuit Court reversed the district court's determination that the reasonable hourly rate was $125 per hour and remanded for consideration of the evidence.

The calculations appear in table 4A.[5] In the motion for reconsideration, Mr. Masias presented two arguments relating to table 4A. First, Mr. Masias proposed different starting points. Second, Mr. Masias contended that the starting points should be indexed differently. Pet'r Mot. for Recons. at 5-7.

Mr. Masias's first proposed change to table 4A was to select different starting points. See Pet'r Mot. for Recons., at 2 & Attach. 5. These alternative methods are not more reasonable than the methods used in Table 4 from the May 5, 2009 decision for two reasons.

First, the proposed starting points are unpublished decisions (DeMartino, Tucker, and Lawler) in which, according to the parties' representations, respondent agreed not to object to a certain amount of compensation.[6] The designation of a decision as unpublished may reflect a decision based upon a lack of dispute between the parties or a stipulation, which does not require extensive legal reasoning. By refraining from publishing the decision, the special master probably intended that the decision was not to have any precedential effect.

Further, respondent's decision not to object to a certain amount may be based upon numerous factors, including the cost merely to litigate the fee request itself. Resp't Resp., filed June 10, 2009, at 2-3. Thus, these decisions hold no persuasive value on their face. See Hart v. Sec'y of Health & Human Servs., No. 01-357V, 2004 WL 3049766 *3 n.6 (Fed. Cl. Spec. Mstr. Dec. 17, 2004). Moreover, if respondent's decision not to object to certain requests for fees becomes the basis for argument in future cases, then respondent may be less likely to compromise in the future. See Resp't Resp., filed June 10, 2009, at 2-3.

Second, the published decision in Hart has much greater value. In Hart, Mr. Moxley stated in a declaration that "his hourly rate was $175 from 2001 through 2003, then went to $200 at the start of 2004." Hart, 2004 WL 3049766 *3. Regardless of whether the market would have paid Mr. Moxley a rate higher than $200 per hour in 2004, Mr. Moxley was actually charging only $200 per hour in that year. Therefore, the starting point for indexing Mr. Moxley's rate is $200 per hour in 2004. This factual finding is reflected in table 4.

Mr. Masias's motion for reconsideration also offered a second argument for revising table 4. Mr. Masias contended that the index rate was wrong. Pet'r Mot. for Recons., at 5-7 & Attach. 5-6.

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[5] Table 4 presents information using two different escalating factors. Table 4A shows inflation for Wyoming. Table 4B shows inflation for the United States. The discussion in the text refers to Table 4A.

[6] Although both parties are aware that the decisions in these three cases were not published, neither party submitted a copy of the decisions.

With regard to the rate of increase, it appears that the May 5, 2009 decision may not have been clear as it was misunderstood by Mr. Masias. For purposes of analysis, the rate of increase used in the May 5, 2009 decision was the Wyoming inflation rate, which is set forth in table 4A. In contrast, table 4B presented rates using the national rate of inflation. Table 4B was presented for illustrative purposes, although it may have inadvertently interjected some confusion. See footnote 5 of the withdrawn May 5, 2009 decision.

As an alternative to a rate of increase equaling the Wyoming inflation rate, Mr. Masias also argued that the rate of escalation is inappropriate because the May 5, 2009 decision (table 4A) used the Wyoming rate of inflation as opposed to the national rate of inflation for legal costs. Mr. Masias argued that rates should be adjusted using a "nationwide legal services index" based upon an opinion by Dr. Kavanaugh. Pet'r Mot. for Recons. at 3-7 & Attach. 6.

Dr. Kavanaugh's opinion, which was considered in the earlier decision, is not persuasive. Woodland v. Viacom, Inc., 255 F.R.D. 278, 279 (D.D.C. 2008); see also footnote 7 below (explaining that Mr. Masias did not seek Laffey rates adjusted by the legal services component). Consequently, Mr. Masias's arguments to revise table 4A, which were advanced in the motion for reconsideration, are rejected. Table 4A, as originally presented in the May 5, 2009 decision, remains a reasonable method for determining a reasonable hourly rate for Mr. Moxley.

The calculations in table 4A show that increase in the hourly rate from 1999 ($160) to the hourly rate from 2004 ($200) was relatively close to the increase predicted by inflation in Wyoming. Actually, the special master's 2004 determination awarded Mr. Moxley slightly more than was expected. Nevertheless, the relative closeness of the two numbers suggests that indexing for inflation assists in establishing a reasonable range.

When this same approach is used to bring Mr. Moxley's rates to 2008, there is a significant disparity between the rates as escalated and the rate Mr. Moxley seeks now. When Mr. Evans's 1999 rate is the base, the result is $228.52 per hour. When Mr. Evans's 2004 rate is the base, the result is $238.66 per hour. In contrast, Mr. Masias contends that the reasonable rate for Cheyenne is now at least $350 per hour. Pet'r Reply, filed April 30, 2008, at 18.

Mr. Masias submitted two affidavits from Mr. Evans. Exhibit 56, exhibit 61. This is not surprising – affidavits from Mr. Evans were part of the record in both Barnes and Hart, the two cases that previously set Mr. Moxley's hourly rate. Mr. Evans's affidavit in this case, surprisingly, did not provide any information about Mr. Evans's current hourly rate.

The change in rate from Mr. Evans's affidavit in 2004 ($200 per hour) to Mr. Schultz's affidavit in 2008 ($375 per hour) is significant. The proposed increase is $150 per hour in only four years. In terms of percentage, the rates increased 87 percent (($375-$200) / $200). Mr. Schultz's affidavit would be more persuasive if it explained any reason for this increase.

Although Mr. Schultz does not refer to this case in his affidavit, Mr. Masias submitted a limited amount of information, as exhibit 89, about Hartman v. Ultra Resources, Inc., No. 2006-6843 (District Court of Sublette County, filed July 1, 2008). Mr. Masias contended that the information presented demonstrates that a reasonable rate is $400 per hour. Pet'r Verified Resp., filed Mar. 5, 2009, at 2 n.3.

In exhibit 89, Hartman does not explain how it determined the hourly rate of compensation. With respect to the trial court judge in Hartman, any analysis appears to conflict with the decisions of the Wyoming Supreme Court in Morrison. Thus, although Hartman has been considered, it does not affect the analysis.

Mr. Moxley's experience is also evidence to consider in determining the reasonable rate of compensation for attorneys in Cheyenne, Wyoming comes from. He states that he charges clients whom he represents in criminal matters pending in state courts $250 per hour. Exhibit 75 at 2 ¶ 6. Mr. Moxley does not explain what types of criminal cases, but at least some criminal cases involve constitutional issues. E.g., Mickelson v. State, 2008 WY 29, 178 P.3d 1080 (Wyo. 2008); Merchant v. State Dep't of Corrections, 2007 WY 159, 168 P.3d 856 (Wyo. 2007). Criminal cases are also tried to a jury and evidence is introduced (or excluded) pursuant to formal rules of evidence. These differences between criminal practice and work in the Vaccine Program mean that Mr. Moxley's rate for criminal work is informative, but not dispositive.

A thrust of the motion for reconsideration is that the May 5, 2009 decision either failed to consider or misunderstood Judge Wheeler's unpublished decision in Avera. Pet'r Mot. for Recons. at 4. Mr. Masias's arguments do not alter the outcome from the May 5, 2009 decision.

Preliminarily, two points are important in looking at Judge Wheeler's decision in Avera. First, Judge Wheeler's decision is not binding in this case. Hanlon v. v. Sec'y of Health & Human Servs., 40 Fed. Cl. 625, 630 (1998). Mr. Masias's motion for reconsideration states that Judge Wheeler's finding that $250 per hour is a reasonable rate for Mr. Moxley's work is "a matter of the Law of the Case from Avera, with regard to the reasonable hourly rates." Pet'r Mot. for Recons. at 2. This assertion is confused. Judge Wheeler's finding in Avera would be binding on a special master only if Judge Wheeler remanded Avera to a special master. Judge Wheeler did not remand the case.

The second preliminary point is that respondent appears not to have challenged the hourly rates before Judge Wheeler. Rather, respondent argued that a special master and not Judge Wheeler should have adjudicated the supplemental fee application in Avera. See Resp't Resp., filed June 10, 2009, at 3 n.3.

More substantively, neither Mr. Moxley's receipt of $250 per hour from some clients nor Judge Wheeler's acceptance of that rate mandates that Mr. Moxley be awarded that sum in this case. The amount that a client pays Mr. Moxley is some evidence of the market rate, but it is not dispositive evidence.

> For fee-shifting purposes in this English-rule area, use of the general market rate rather than the contract rate affords some fairness, predictability and uniformity. That a lawyer charges a particular hourly rate, and gets it, is evidence bearing on what the market rate is, because the lawyer and his clients are part of the market. But there is such a thing as a high charger and low charger, and the district judge is supposed to use the prevailing market rate for attorneys of comparable experience, skill and reputation, which may or may not be the rate charged by the individual attorney in question.

Caron v. Billings Police Dep't, 470 F.3d 889, 892 (9th Cir. 2006) (affirming district court's decision to award hourly rate approximately 25 percent lower than the rate usually charged by counsel). By itself, Mr. Moxley's own hourly rate should not substitute for evidence about the market rate. See Robinson v. Equifax Info. Srvs., LLC, 560 F.3d 235, 246 (4th Cir. 2009) (vacating attorneys' fee award and remanding when plaintiff's counsel failed to submit evidence about market rate, although counsel had submitted information about his rate).

An attorney's hourly rate does not automatically dictate the result for several reasons. First, the attorneys' rate should be "reasonable." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). "Reasonable," in turn, suggests that individuals at either extreme of a bell curve are less influential.

Second, the attorneys' rate should be appropriate for matters requiring similar skills. Mr. Moxley's hourly rate of $250.00, which he presumably charges to at least some clients who have been accused of committing crimes, may be the rate appropriate for an attorney of Mr. Moxley's skill. Mr. Moxley may be among the most talented criminal defense attorneys in Wyoming, although the record is silent on this point. But, criminal defense work differs in many respects from work in the Vaccine Program. Because of the Fourth Amendment's prohibition on unreasonable searches and seizures, criminal defense attorneys must be aware of changing Supreme Court precedent. E.g., Arizona v. Gant, __ U.S. ___, 129 S.Ct. 1710 (2009). The law in the Vaccine Program is comparatively staid. Criminal defense attorneys must be able to communicate and to persuade juries and judicial officials. In the Vaccine Program, the finder of fact is a special master, who is relatively well-informed about the case. These differences mean that Mr. Moxley's $250 per hour for some type of work does not necessarily translate dollar-for-dollar to the Vaccine Program.

Finally, various factors suggest that exclusive reliance on an attorneys' own statement about the hourly rate could present some problems. In some situations, an attorney might charge one amount, but actually be paid a lesser amount. In some situations, a client might pay an attorney an hourly rate that is higher than usual due to the specific circumstances of that particular case. While some investigation could bring forth this details, the Supreme Court has

cautioned that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Thus, the party opposing an application for fees will have difficulty confirming the attorney's own statements.

Mr. Masias's motion for reconsideration does not offer a persuasive argument for finding that because Mr. Moxley has been compensated at a rate of $250 per hour in the past, he must be awarded $250 per hour in this case. Mr. Moxley's experience is some evidence, which was considered in the May 9, 2009 decision. But, as explained originally, this evidence is not sufficient.

Here, a preponderance of the evidence supports a finding that the appropriate hourly rate for Mr. Moxley in 2008 is $220 per hour. Different methods coalesce around this number. The primary factor is the determination of the Wyoming Supreme Court in Morrison that a reasonable hourly rate is $200 per hour. Secondary factors include the historical information, which can be updated to provide current information. See table 4A. A third supporting factor is Mr. Moxley's statement that he charges clients in criminal matters $250 per hour and this is "a very high hourly rate for the Cheyenne market." Exhibit 59 (Mr. Moxley's Affidavit) ¶ 46. Although this rate is higher than the $220 per hour, $250 per hour is within the same range. See Rupert IV, 55 Fed. Cl. at 306 (2003) (determining that an attorney's hourly rate should be at the lower end of comparables due to differences in skills). A rate of $250 per hour is much closer to $220 per hour than the most recent rate that Mr. Moxley proposes – $465 per hour. See Exhibit 81. A fourth factor is that less than one year ago the Federal Circuit in Avera affirmed a determination that a reasonable hourly rate for Mr. Moxley was $200. The Special Master had awarded Mr. Moxley $200 in an unpublished decision, which is available on the Court's website, on August 29, 2006. The Federal Circuit's ruling that a reasonable rate for Mr. Moxley in 2006 was $200 per hour suggests that a reasonable hourly rate for Mr. Moxley in 2008 is $220.

For work performed in 2004, Mr. Moxley will be compensated at $200 per hour, which is the rate awarded to him in Hart. For years between 2004 and 2008, Mr. Moxley's rate will increase proportionately. These determinations complete the first step of the analysis under Avera, which is to determine the local rate.

b. Determination of the Forum rate

The second step in the process of determining the reasonable hourly rate for Mr. Moxley is to evaluate the reasonable hourly rate for attorneys in Washington, D.C. As the party seeking attorneys' fees, Mr. Masias bears the burden of producing evidence about the reasonableness of the hourly rate. Mr. Masias has largely failed to produce evidence, although Mr. Masias presents many arguments.

In support of his position, Mr. Moxley filed several affidavits from attorneys and a copy of the updated Laffey matrix published on the website of the United States Attorney's Office for the District of Columbia. See Exhibit 80; see also Pet'r Verified Traverse at 4.[7]

(1) *Laffey* And Its Progeny

Because Mr. Masias contends that Mr. Moxley is entitled to rates based upon the Laffey matrix, a review of that decision, and how that decision has been viewed, is appropriate.

In Laffey, the plaintiffs, who were female flight attendants, claimed that the defendant, Northwest Airlines, Inc., violated Title VII, which prohibits gender discrimination in employment, and the Equal Pay Act. After 13 years of litigation, the trial court awarded more than 3,000 flight attendants approximately $52 million in backpay. Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 359 & 359 n.1 (D.D.C. 1983). The ensuing fee application was "the most extensive fee petition this Court has ever received." Id. at 360.

The plaintiffs' fee application included 36 affidavits. Some of the affidavits set forth the "actual rates charged by lawyers at some of the most prestigious law firms in Washington, D.C." Id. at 367 & n. 24, & 371-72. The plaintiffs proposed a matrix of different hourly rates for different attorneys, depending upon the attorney's experience. Id. at 371. The defendant did "not challenge Plaintiffs' proposed matrix as an accurate description of the prevailing market rate for lawyers of comparable skill and ability who represent defendants in complex Title VII cases." Id. at 372. The thrust of at least this portion of the parties' dispute was that the defendant argued that the plaintiffs' attorneys could not seek an hourly rate that exceeded the hourly rate paid by their fee-paying clients. Id. The district court rejected this argument. The district court, therefore, accepted the proposed hourly rates as within the range of reasonableness, although the rates were "generous." Id. at 374.[8] After discussing other issues, the district court awarded plaintiffs attorneys' fees and costs of approximately $3.5 million.

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[7] Mr. Masias argued that Mr. Moxley is entitled to hourly rates equal to the "official" Laffey matrix. He did not seek compensation at rates from the "adjusted Laffey matrix." The adjusted Laffey matrix was developed by Michael Kavanaugh, who submitted an affidavit in this case. The difference between the two matrices is that the official Laffey matrix is adjusted by the Consumer Price Index, for the Washington, D.C. metropolitan area, while the adjusted Laffey matrix uses the legal services component of the nationwide consumer price index. Woodland v. Viacom, Inc., 255 F.R.D. 278, 279 (D.D.C. 2008); Fee Petition at 10, n.11.

[8] Rather than follow the district court's description of the rates as "generous," Mr. Masias quoted from the plaintiffs' fee application, which described the rates as "conservative." Pet'r Memorandum, filed Mar. 10, 2008, at 8, quoting Laffey, 572 F. Supp. at 372 n.33. The Laffey plaintiffs' self-interest largely makes their characterization unlikely.

The district court's order was appealed. One of the appellate issues was whether the district court was correct in using the hourly rate common in the marketplace, rather than the hourly rate charged by the plaintiff's attorneys. Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 11 (D.C. Cir. 1984). A majority of the panel determined that the district court had erred in this regard. Id. at 21-25. One judge dissented. Id. at 31. The majority discussed the matrix only in passing. Id. at 19 n.98.

The appellate court's determination, itself, was challenged in Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (en banc). The en banc Court of Appeals for the D.C. Circuit overruled the panel's decision in Laffey. Id. at 1524. However, Cumberland Mountains approved the matrix developed by the district court in Laffey. Id. at 1525.

After Laffey, the United States' Attorney's Office for the District of Columbia adopted the matrix used by the district court in Laffey. The United States Attorney's Office also updated the matrix by increasing it, annually, to reflect changes in the Consumer Price Index. Covington v. District of Columbia, 839 F. Supp. 894, 900 (D.D.C. 1993). In the litigation underlying Covington, the plaintiffs' attorneys submitted the updated Laffey matrix as support for their request for attorneys' fees. The district court determined that the reasonable hourly rate for these attorneys was reflected in the updated Laffey matrix. Id. at 898-900.

The district court's award was appealed. A majority of the panel found that the trial judge did not abuse his discretion in setting the hourly rates. Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995). In reaching this decision, the panel majority stated that the Laffey matrix is "a useful starting point." Id. at 1109. One judge dissented. Id. at 1112. According to the dissent, the D.C. Circuit has "not considered whether the broad Laffey matrix constitutes 'specific evidence' of rates charged for 'similar' work performed irrespective of the nature of the litigation." Id. at 1113 (footnote omitted).

District court judges and magistrate judges in the United States District Court for the District of Columbia have awarded attorneys' fees based on the Laffey matrix in a variety of different cases. "In the ensuing twenty-five years [after the district court's opinion in Laffey], this scheme, the Laffey matrix, has achieved broad acceptance in this Circuit and has served as a guide in nearly every conceivable type of case." Miller v. Holzmann, 575 F. Supp. 2d 2, 14 (D.D.C. 2008) (citing cases). The Circuit Court's opinion in Covington is actually a consolidated appeal of three cases involving the rights of prisoners, the First Amendment, and disability discrimination. Covington, 57 F.3d at 1103. Other examples include: Falica v. Advance Tenant Svcs., 384 F. Supp. 2d 75, 78-79 (D.D.C. 2005); Salazar v. Dist. of Columbia, 123 F. Supp. 2d 8, 13 (D.D.C. 2000); Blackman v. District of Columbia, 59 F. Supp. 2d 37, 43 (D.D.C. 1999); Jefferson v. Milvets System Technology, Inc., 986 F. Supp. 6, 11 (D.D.C. 1997); Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin., 985 F. Supp. 1, 9-10 n.3 (D.D.C. 1997); Martini v. Fed. Nat'l Mtg Ass'n, 977 F. Supp. 482, 485 n.2 (D.D.C. 1997); Park v.

Howard University, 881 F. Supp. 653, 654 (D.D.C. 1995); see also Bd. of Trustees of Hotel and Rest. Employees Local 25 v. JPR, Inc., 136 F.3d 794, 806-07 (D.C.Cir. 1998)

The widespread acceptance of the Laffey matrix is not universal. In some cases, judges have not awarded attorneys' fees in accord with the Laffey matrix.

In a "relatively simple and straightforward" case brought pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), the attorneys representing plaintiffs were not awarded Laffey matrix rates. Agapito v. District of Columbia, 525 F. Supp. 2d 150, 155 (2007), appeal dismissed No. Cir. 08-7004, 2008 WL 1868311 (D.C. Cir. Apr. 18, 2008). The district court, instead, found the reasonable hourly rate to be consistent with a matrix developed by the District of Columbia Public Schools for IDEIA cases. Id.

The Laffey matrix rates were used as a starting point, and then discounted, in Muldrow v. Re-Direct, Inc., 397 F. Supp. 2d 1 (D.D.C. 2005). The district court judge characterized the action as "a relatively straightforward negligence suit." Id. at 4. More specifically, the plaintiff established that Re-Direct's failure to care for her son, Kenneth, while he was in Re-Direct's care pursuant to a contract with the District of Columbia Youth Services Administration caused his death. Id. at 2.

For their work, the plaintiff's attorneys sought compensation at an hourly rate of $596 per hour for one attorney, and $305 per hour for another attorney. Id. at 3. The court declined to award those rates. The district reduced them by 25 percent because, in part, the attorneys' work was not comparable to complex litigation that underlies litigation for which Laffey matrix rates are appropriate. Id. at 4-5.

Agapito and Muldrow demonstrate that within the District Court for the District of Columbia, the Laffey matrix does not determine an attorney's reasonable hourly rate absolutely. Instead, further analysis is required.

(2) Relevant Legal Community

In the lodestar analysis, "a reasonable hourly rate is 'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348 (quoting Blum, 465 U.S. at 896 n.11.). As the person applying for fees, Mr. Masias bears the burden "to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Rupert v. Sec'y of Health & Human Servs., 52 Fed. Cl. 684, 687 (2002), citing Blum.

The difficulty is that there is no agreement between the parties and relatively little guidance about how to determine what the prevailing market rate is for similar services. Norman

836 F.2d at 1300. Although not binding authority, Rupert IV is entitled to consideration because it is the only appellate case to discuss the similarities of work performed by Vaccine Program attorneys.

In the decision underlying Rupert IV, the special master determined the prevailing market rate based upon testimony of three attorneys who "represent plaintiffs and defendants in a variety of matters." Rupert v. Sec'y of Health & Human Servs., No. 99-774V, 2002 WL 31441211 * 4 (Fed. Cl. Spec. Mstr. Aug. 26, 2002) (Rupert III) (citing transcript). On appeal, respondent argued that the special master's determination was in error because the special master "failed to establish the manner in which complex litigation is comparable to the services provided by an attorney in a Vaccine Act case." Rupert IV, 55 Fed. Cl. at 299. The judge of the United States Court of Federal Claims observed that respondent's criticism was "correct." Nevertheless, Rupert IV continued, stating "The record on review, however, supports a finding that certain types of civil matters are comparable to Vaccine Act practice." Id. at 300; accord id at 304 (stating "The record supports a finding that the most comparable practice to Vaccine Act work is complex civil matters, not plaintiff's personal injury, medical malpractice, and personal liability work"). This determination was based upon the judge's review of the record in Rupert, which included testimony from at least seven witnesses and two days of hearing. That record is much more extensive than the record developed in this case. Rupert IV did not explain why "complex civil matters" are comparable to work pursuant to the Vaccine Act, although the witnesses whose testimony was reviewed probably provided that basis.

Rupert IV holds that the record may support (and in Rupert did support) a finding that "certain types of civil matters are comparable to Vaccine Act practice." This holding, however, provides little direction because the "certain types of civil matters" are not defined. A close reading of Rupert IV indicates that the attorneys whose testimony was credited practice in the fields of "civil rights, commercial litigation, shareholder derivative actions, and for providing the service of 'good counsel.'" Rupert IV, 55 Fed. Cl. at 299. Beyond providing these examples, Rupert IV did reject some fields. Rupert IV stated that "[t]he court's own review of the record confirms that respondent failed to mount an adequate case for including in the lodestar analysis rates paid to defense attorneys in the personal injury, products liability, and medical malpractice fields." Rupert IV, 55 Fed. Cl. at 304.[9] These factors from Rupert IV are the basis for the analysis of the evidence presented in this case.

[9] Rupert IV appears to have rejected the comparison between work pursuant to the Vaccine Act and work performed by attorneys defending insurance companies because of the testimony of the witnesses. Rupert IV, 55 Fed. Cl. at 304. This ruling appears to leave open the question that a more persuasive factual presentation by respondent could lead to a different result. Even if that were possible, respondent has not presented any evidence in this case.

(3) Transferrability of *Laffey* Matrix Rates to Vaccine Program

(a) Required Elements

As discussed above, the market rate for attorneys must be based upon "the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348 (quoting Blum, 465 U.S. at 896 n.11.) (emphasis added). Thus, a fundamental question is whether the lawyers who are being compared provide "similar services." If the answer to this question is "no," then the comparison is inapt.[10] The burden of establishing the similarity in services is on the fee-applicant. Rupert II. 52 Fed. Cl. at 687, citing Blum.

Respondent argued that Laffey rates are not appropriate because attorneys in the Vaccine Program do not provide similar services. Resp't Resp., filed Mar. 24, 2008, at 8-9.

There appears to be some tension between, on the one hand, judges within the District Court for the District of Columbia and, on the other hand, the only appellate decision discussing how special masters should establish the hourly rate for attorneys in the Vaccine Program. The D.C. District Court has generally relied upon the Laffey matrix.[11]

Miller demonstrates the approach taken in most cases by the District Court for the District of Columbia. Mr. Miller prevailed in claim, as a relator, pursuant to the False Claims Act. The defendants were ordered to pay $90 million and Mr. Miller sought an additional $20 million in attorneys' fees and costs. Miller, 572 F. Supp. 2d at 4. Mr. Miller's attorneys sought compensation at the hourly rate they normally billed. Id. at 12-13. These hourly rates were approximately 40% higher than the rates in the updated Laffey matrix. Id. at 15.

The defendants opposed the proposed hourly rates. Their argument resembles the argument made by respondent in this case. "Whereas relator appears to define 'similar services' in terms of complex, federal-court civil litigation, defendants insist 'similar' must be construed

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[10] An extreme example is that no one suggests that an attorney who counsels large corporations about the anticipated response to a proposed merger of two competitors would provide a useful frame of reference for determining the hourly rate for an attorney in the Vaccine Program, even if the anti-trust attorney worked in the relevant community and had graduated from law school in approximately the same time as the attorney in the Vaccine Program. The differences between anti-trust work and Vaccine Program litigation would be too great.

[11] In Laffey itself, the District Court judge stated one factor to consider in setting the reasonable hourly rates is the "type of work involved" meaning "the substantive legal issues raised in the case." Laffey, 572 F.2d at 371 n.30 (citing Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 59 (D.C. Cir. 1982)).

more narrowly. . . . In their view, the hourly rates typically charged by FCA relators' counsel are the benchmark against which this Court should evaluate relator's requested rates." Id. at 14 (citation omitted).

The district court rejected the defendants' argument. The decision states "case law in this Circuit does not support the Balkanized approach to fee calculation that defendants advocate. . . . The generic matrix's use in such a diverse range of cases cuts against defendants' argument that reasonable rates can be derived from data peculiar to a case's legal specialty area." Id. The district court, therefore, compensated the attorneys, who had submitted information about their established billing rates, at those rates. Id. at 17. The district court, ultimately, awarded more than $7 million in attorneys' fees. Id. at 59.

The Vaccine Program has only one appellate case explaining how to determine the relevant comparison for attorneys within the Vaccine Program, Rupert IV. Rupert IV followed a different approach. In Rupert IV, a judge at the Court of Federal Claims determined that the evidence from some attorneys about the reasonable hourly rate was not relevant because those attorneys practiced in areas not comparable to work in the Vaccine Program.

Rupert IV explains "The record on review, however, supports a finding that certain types of civil matters are comparable to Vaccine Act practice." Id. at 300; accord id at 304 (stating "The record supports a finding that the most comparable practice to Vaccine Act work is complex civil matters, not plaintiff's personal injury, medical malpractice, and personal liability work").

Therefore, it appears that Rupert IV does require finding some similarity in the services provided by the attorney whose rates are known and the Vaccine Program attorney whose rates are being determined. Although Rupert IV is not binding precedent in this case, Rupert IV is persuasive and will be followed for three reasons.

First, Rupert IV follows the Supreme Court's statement in Blum that the hourly rate should be based upon the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum, 465 U.S. at 896 n.11. Although decisions from the D.C. District Court also cite Blum when they follow the Laffey matrix, these decisions have relatively little analysis as to why the particular attorney's work was similar to the attorneys' work in Laffey. See Covington, 57 F.3d at 1113 (Henderson, J., dissenting) (noting that the D.C. Circuit has "not considered whether the broad Laffey matrix constitutes 'specific evidence' of rates charged for 'similar' work performed irrespective of the nature of the litigation.") (footnote omitted). Although all the cases seem to involve litigation of one type or another, litigation requires different skills. To the undersigned, the dissenting judge's point that the type of litigation affects the reasonable hourly rate is persuasive.

Second, Rupert IV also appears consistent with Blanchard v. Bergeron, 489 U.S. 87, 95 (1989). In Blanchard, the Supreme Court quoted the legislative history of one of the commonly

used fee-shifting statutes as stating that "Congress 'intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation.'" Id., quoting S. Rep. No. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913. The reference to "equally complex Federal litigation" suggests that some types of Federal litigation are not as complex as other federal litigation.

Third, Agapito and Muldrow demonstrate that even within the District Court for the District of Columbia, the Laffey matrix is not the final word on the topic of hourly rates.

For these reasons, Mr. Masias is required to demonstrate that the attorneys whose rates are being compared provide similar services. This determination, while against the general trend of decisions from the District Court for the District of Columbia, is in line with the more specific guidance provided by Rupert IV and the limited views expressed by the Supreme Court in Blum and Blanchard.

(b) Evidence that Skill Sets Are Similar

i) *Laffey*

Mr. Masias has not established that the services performed by Mr. Moxley are comparable to the services performed by attorneys under the Laffey matrix. The information about Laffey itself shows significant contrasts with Mr. Masias's case. Both were litigated cases, but that appears to be about the only similarity. Laffey was a relatively early case in Title VII litigation that prompted two appellate decisions regarding the underlying litigation. It was "an important one which furthered the goals of both Title VII and the Equal Pay Act." Laffey, 572 F. Supp. at 377. The plaintiffs were represented by "one of the 'premier' employment discrimination firms in the country." Id. at 372; accord id. at 374. The case ultimately generated more than $52 million in backpay for more than 3,000 people. The district court, therefore, used its discretion to set the hourly rates in its now well-known matrix at a "generous" rate. Id. at 374.

Mr. Masias's case is much different. To resolve the merits phase of his case, no appellate review was required. His case did not present any novel issues of law. The case concerned only Mr. Masias, not a thousand other people. The litigation was simpler in Mr. Masias's case.

In addition to the difference between litigating the merits of a Title VII case and litigating the merits of a Vaccine Program case, respondent argued that Laffey is distinguishable in the attorneys' fee stage because Title VII authorizes an award of attorneys' fees to "prevailing parties." In contrast, petitioners in the Vaccine Program may receive an award of attorneys' fees and costs when their petition has a reasonable basis. Resp't Resp., filed March 24, 2008, at 10-11. Respondent seemed to argue, although this point could have been made more clearly, that Laffey rates incorporate an element of risk, and, therefore, are higher than the rates would be if payment were more certain. Exhibit E (Affidavit of Daniel F. Van Horn) ¶ 6. Although an

argument about risk and reward has some logic, it is not entirely clear that Laffey rates incorporate an element of risk.

The Laffey rates were based upon "a barrage of data, including twenty-five attorney affidavits." Laffey, 572 F. Supp. at 371. Although the practice area of the 25 affiants was not provided, the defendant did "not challenge Plaintiffs' proposed matrix as an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases." Id. at 372 (emphasis added). Because the original Laffey matrix rates seem to correspond to, if not actually derive from, the rates paid to defense counsel, it appears that the original Laffey matrix rates did not have a contingency or risk factor built into them.

Successive updates of the Laffey matrix have not injected a contingency factor into the matrix. The updates are done by indexing the rates to the Consumer Price Index, which ensures that inflation does not erode the value. Exhibit E (Affidavit of Daniel F. Van Horn) ¶ 4; see also exhibit F (print out from web site of the United States Attorney's Office for the District of Columbia); see also exhibit 80 (same). Because this updating is purely mathematical, the ultimate basis for the Laffey matrix remains the "barrage of data" submitted to the District Court in Laffey, 572 F. Supp. at 371.

On the whole, Mr. Masias has failed to establish the similarity between the skills in Laffey and the skills in a Vaccine Program case. The differences, which are also discussed in the next section, are too great.

ii) Affidavits in Support of Vaccine Litigation as Complex Litigation

Mr. Masias argued from a premise that Laffey matrix rates have been used in various types of "complex federal litigation." This premise is well-supported. See section II.B.2.b.(1) above describing cases that have awarded hourly rates based upon the Laffey matrix. From this point, Mr. Masias argued that the Vaccine Program is just another type of complex federal litigation. Thus, Laffey matrix rates can be used in the Vaccine Program, just as they have been in cases brought pursuant to Title VII, or the Clean Air Act. Exhibit 59 (Affidavit of Mr. Moxley) ¶ 6.

Mr. Masias filed several affidavits of attorneys who support the assertion that vaccine litigation is akin to complex litigation. The list of attorneys who filed affidavits includes Mr. Moxley (exhibit 55), Mari Bush (exhibit 62), A. Leroy Toliver (exhibit 64), Joel Korin (exhibit 72), and Clifford Shoemaker (exhibit 71). These attorneys have various amounts of experience with the Vaccine Program. Mr. Moxley and Mr. Shoemaker are among the most experienced attorneys. Mr. Korin represented one petitioner. Exhibit 72. Information from the Clerk's Office indicates that Ms. Bush has represented nine petitioners. This same source also shows that Mr. Toliver represented eight petitioners in cases filed in 1992 or earlier. Mr. Toliver also

represented one petitioner in a case filed in 1999, and which closed in 2000. Mr. Toliver appears not to have represented any petitioner in the Vaccine Program after 2000.

The affidavits of Mr. Moxley, Ms. Bush, and Mr. Toliver were originally filed in Avera. Thus, significant portions of these affidavits discuss the need to permit an award of attorneys' fees and costs on an interim basis.

The portions of these affidavits that assert that the Vaccine Program is complex are conclusory. The various affiants provide little, if any, reasoning that underlies their conclusion that the Vaccine Program is complex.

Determining whether litigation in the Vaccine Program is "complex" is difficult because the meaning of the term "complex litigation" is not especially clear. Comparing litigation in the Vaccine Program to other forms of litigation does not illuminate the matter. For example, is tax litigation simple or complex? Some cases involving an individual's tax return present one or two issues. E.g., Gluck v. United States, 84 Fed. Cl. 609 (2008). Other cases involving a corporation's tax return require lengthy analysis. E.g., Exxon Corp. v. United States, 45 Fed. Cl. 581 (1999), aff'd in part and rev'd in part, 244 F.3d 1341 (Fed. Cir. 2001). Similarly, decisions involving "government contracts" can be short or long. This variability in tax litigation or government contracts litigation reduces the usefulness in comparing litigation in the Vaccine Program to those forms of litigation.

To some degree, all litigation involves two different components. First, there is the subject matter of the litigation. In the Vaccine Program, the subject is how a human being responded to a vaccine. Knowledge about this topic is founded on the science of medicine as well as other related disciplines. The second component is the set of skills that an attorney learns in law school. These include obtaining information, presenting a case in an organized and persuasive manner, and advocating for a result.

On the first aspect, the Vaccine Program is complex. "Complex" is used to mean something that is not simple and not knowable. Medical science does not have perfect knowledge about how human beings respond to vaccines. There is an inherent uncertainty in the sense that what happens can be known or determined rests on (educated) opinions. Moreover, medical science continues to advance so that ideas that are generally accepted are subject to revision. Thus, the medicine is very complex.

Almost every off-Table case requires the testimony of a doctor. Usually, the witness has more training than merely medical school. The typical doctor has specialized in a particular field and is usually board-certified in one or more disciplines. Most doctors have practiced medicine for more than ten years. Many doctors have taught medical students and have published articles in peer-reviewed journals. Yet, despite years of training and experience, the two experts do not agree on the primary factual question – did the vaccine cause the petitioner any harm?

Medical science does not have perfect knowledge about how human beings respond to vaccines. There is an inherent uncertainty in the sense that what happens after a vaccination can be known or determined rests on (educated) opinions. Moreover, medical science continues to advance so that ideas that are generally accepted are subject to revision. Thus, the medicine is very complex.

Developing some knowledge about medicine assists special masters in weighing the persuasiveness of the testimony. Lampe v. Sec'y of Health & Human Servs., 219 F.3d 1357, 1362 (Fed. Cir. 2000) (deferring to special master's expertise in weighing persuasiveness of experts' theories); Sword v. United States, 44 Fed. Cl. 183, 188 (1999) ("even more than ordinary fact-finders, this Court has recognized the unique ability of Special Masters to adjudge cases in the light of their own acquired specialized knowledge and expertise"). What is good for the bench is also good for the bar. The attorneys who represent petitioners or who represent respondent usually advocate for their client more effectively when the attorneys have some familiarity with medical concepts.

One of the attorney's responsibilities is to translate the underlying medical information into a legal framework. Here, the Vaccine Program lessens the litigating attorneys' burden. The Vaccine Program was intended to be a less litigious, less adversarial form of adjudication. Although reasonable people may differ as to whether the Vaccine Program has achieved this goal, some aspects of Vaccine Program litigation are much simpler. For example, Mr. Masias was not required to establish any culpability on the part of respondent, that is, Mr. Masias was not required to show any negligence, design defect, or failure to warn that would have been required if Mr. Masias pursued one or more common law torts. In practice, Mr. Masias did not have to obtain information from respondent's files and, therefore, avoided the challenges of using various discovery devices to obtain this information.

The relative ease of litigation in the Vaccine Program is illustrated by comparing Mr. Masias's burden of proof in his litigation here with Mr. Masias's burden of proof if he pursued an analogous action in state court. Mr. Masias's burden was to establish, by a preponderance of the evidence, that the hepatitis B vaccine caused his arthritis. Althen v. Sec'y of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). If Mr. Masias were to have pursued an action in Colorado state court for either products liability or medical malpractice, he would have been required to establish causation plus some culpability on the part of the defendant. See Palmer v. A.H. Robins Co., 684 P.2d 187, 209 (Colo. 1984); see also Redden v. SCI Colo. Funeral Servs., 38 P.3d 75, 81 (Colo. Ct. App. 2001).

The legal elements are not the only way that litigation in the Vaccine Program differs from litigation in other fora. At several stages, litigation in the Vaccine Program deviates from the typical path of litigation in district courts.

The first point of departure may be the filing of the petition. The Vaccine Act states that petitions "shall contain" medical records, 42 U.S.C. § 300aa–11(c). However, this statute has not

prevented petitioners from filing petitions without medical records. See Stewart v. Sec'y of Health & Human Servs., No. 02–819V, 2002 WL 31965743 *3-7 (Fed. Cl. Spec. Mstr. Dec. 30, 2002) (denying motion to dismiss a petition filed without medical records). Here, Mr. Masias filed his first set of medical records on December 30, 1999, about four-and-a-half months after he filed his petition. Mr. Masias did not file many medical records until August and October 2002.

Mr. Masias's case did not proceed with alacrity. See, e.g., order, filed Oct. 4, 2001; order, filed Nov. 7, 2001; order, filed April 14, 2004; order, filed April 29, 2004.

The relatively slow pace of the litigation continued when Mr. Masias was obligated to file an expert report. An expert report probably was necessary for Mr. Masias to prevail. See 42 U.S.C. § 300aa–13(a)(1) (stating that special masters may not find that petitioners are entitled to compensation "based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion"). Mr. Masias did not file the report of Dr. Levin, exhibit 42, until June 6, 2005, which is nearly six years after he filed his petition. Whether plaintiffs in "complex litigation" pending at either a United States District Court or the United States Court of Federal Claims would be permitted to have six years to present some evidence that they are entitled to compensation is not known.

After both sides have filed expert reports, the next stage of a case is a hearing. A hearing in the Vaccine Program simplifies the petitioner's burden in at least two respects. First, the factual findings are made by a special master, not a jury. Due to the special master's background, petitioners are not required to explain basic medical concepts. The special master can also assist petitioners, to some degree, because the special master, sua sponte, can present evidence that supports an award of compensation. 42 U.S.C. § 300aa–12(d)(3)(B); Munn v. Sec'y of Health & Human Servs., 21 Cl. Ct. 345, 349 (1990), aff'd 970 F.2d 863 (Fed. Cir. 1992).

Another factor that makes petitioner's burden in the Vaccine Program relatively less than in a traditional tort system concerns the admission of evidence. The Vaccine Program does not require evidence to be admitted pursuant to the Federal Rules of Evidence. 42 U.S.C. § 300aa-12(d)(2)(B), (E); Vaccine Rule 8.

These distinctions should be considered in evaluating whether litigation in the Vaccine Program constitutes complex litigation. The affidavits presented by Mr. Masias do not address these differences. Instead, the affidavits assert without much reasoning that the Vaccine Program is complex litigation. See exhibit 55 (Mr. Moxley), exhibit 57 (Ms. Bush), exhibit 62 (Ms. Bush), exhibit 64 (Mr. Toliver), exhibit 71 (Mr. Shoemaker), and exhibit 72 (Mr. Korin).[12]

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[12] Mr. Korin came perhaps the closest to offering a persuasive explanation why he concluded that the Vaccine Program is complex litigation. "It is the medicine, not the pleadings or procedure that is the main complicating factor." Exhibit 72 ¶ 4.

However, Mr. Korin's experience with the Vaccine Program is limited to a single case. Mr. Korin worked with Mr. Shoemaker. Id. ¶ 4. Unfortunately, the combination of two

These affidavits are not persuasive. If future affiants explain the basis for why they conclude that the Vaccine Program is "complex," then this issue may be resolved with a more developed record.

(4) Other Evidence of Forum Rates

Respondent submitted information about what he considers to be the reasonable forum rate for attorneys practicing in the Vaccine Program. At the time of the submission, respondent was aware of one attorney that actively practiced in the Vaccine Program, Professor Peter H. Meyers. Professor Meyers has been in private practice for more than 28 years and began practicing in the Vaccine Program more than 14 years ago, in 1994. He currently supervises the George Washington University Law School Vaccine Injury Clinic (GWU Vaccine Clinic). See Resp't Submission Regarding Forum Rate, filed Oct. 14, 2008, at 2-3.

Respondent cited several unpublished fee decisions for work performed between 2004 and 2007, in which Professor Meyers was awarded $190 per hour. Recently, respondent informally agreed to Professor Meyer's requested rate of $240 per hour for the year of 2007, with an annual cost of living increase beginning in 2008.[13] Respondent noted that, despite the informal agreement with Professor Meyers, the $240 per hour rate has not, to respondent's knowledge, "been approved in a Vaccine Program decision." Respondent asserted that Professor Meyers' rates are more closely associated with the work of the Vaccine Program than the Laffey matrix. Id.

(5) Analysis of Evidence

As set forth in Avera, the forum for Vaccine Program cases is the city of Washington, D.C. Avera, 515 F.3d at 1348. Importantly, the Federal Circuit has not determined that Laffey matrix rates should "play any role in the determination of fees under the Vaccine Act where forum rates are utilized." Avera, 515 F.3d at 1350.

Although the standards used to determine an attorney's reasonable hourly rate are set forth in section above, a summary of these standards is: "In the typical lodestar analysis, the parties present a range of market rates for lawyers of differing skill levels, and the court

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attorneys with their associated staff may have increased the case's complexity needlessly. See Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), rev'd on non-relevant ground, 86 Fed. Cl. 201 (2009). Therefore, Mr. Korin's views may be based upon an incomplete understanding of typical litigation in the Vaccine Program.

[13] This agreement was made between respondent and Mr. Shoemaker, while Professor Meyers was on sabbatical.

interpolates the prevailing market rate by assessing and applying the skill demonstrated in the instant case to that range." Rupert II, 52 Fed. Cl. at 687.

First, evidence from the Laffey matrix is not relevant. As explained above, litigation in the Vaccine Program is simpler than the "complex federal litigation" that has been the subject of awards by the District Court for the District of Columbia. Mr. Masias has not met his burden of establishing that attorneys under the Laffey matrix provide "similar services."

Second, evidence about Professor Meyers provides some information about the local rate. This evidence is undoubtedly relevant because Professor Meyers practices in the Vaccine Program. Thus, the services are more than just "similar." They are identical.

However, this evidence is not entitled to much weight. The rate of compensation for Professor Meyers appears to range from $190 in 2004 to $240 in 2007. But, the circumstances suggest that these levels are not an accurate reflection of the market in Washington, D.C.[14]

Professor Meyers practices at a law school legal clinic. His livelihood probably does not depend upon the fees that his practice generates. This inference comes from the undersigned's observation that in some cases, the legal clinic has not sought attorneys' fees at all. In the law school setting, Professor Meyers probably has a goal of educating his students how to practice law. Professor Meyers's failure to seek an increase in his hourly rate from 2004 to 2007, see exhibit 85 (affidavit providing circumstances of increase in hourly rate), suggests that Professor Meyers probably possesses less interest in maximizing his revenue. In short, there is reason to believe that the economic forces that usually create the "market rate" may have been absent from the process of negotiating an hourly rate for Professor Meyers.

Comparing Professor Meyers's hourly rate with hourly rates of other attorneys in the Vaccine Program supports a finding that Professor Meyers's hourly rate is not consistent with the market rate for attorneys who practice in the Vaccine Program. For example, Clifford Shoemaker, who practices in Vienna, Virginia, has received $300 per hour.[15] David Terzian,

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[14] In challenging respondent's assertion that Professor Meyers's rate provides some information about the forum rate, Mr. Masias largely repeated his arguments why earlier adjudications about Mr. Moxley's hourly rate are not relevant today. Mr. Masias also pressed the argument that the Laffey matrix rates are determinative. Pet'r Resp. to Resp't Submission Regarding Forum Rates, filed Oct. 28, 2008.

These arguments have already been rejected for the reasons explained above.

[15] Mr. Shoemaker's affidavit states that he agreed to compensation at this level because "other special masters put all of the firm's fee petitions on hold." Exhibit 85 ¶ 6. This statement is simply wrong.

From when Mr. Shoemaker sought attorneys' fees from the special master (March 30, 2005) to when the judge issued a decision (June 23, 2006), Mr. Shoemaker's firm was awarded

who practices in Richmond, Virginia, has received $340 per hour. Barber v. Secretary of Health and Human Servs., No. 99-434V, 2008 WL 4145653 at *14 (Fed. Cl. Spec. Mstr. Aug. 21, 2008). It seems fair to view Vienna, Virginia and Richmond, Virginia as markets in which legal services typically cost less than legal services in Washington, D.C. Yet, Professor Meyers receives less per hour than these two attorneys who have roughly similar backgrounds.

For these reasons, while Professor Meyers's rate is relevant to determining the rate for Vaccine Program attorneys in Washington, D.C., Professor Meyer's rate is not definitive. See Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521-22 (discretion of special masters). Consequently, this situation is like the one anticipated by Rupert II. "In cases where the parties cannot provide reliable evidence of the prevailing market, either because they are convinced that one does not exist or because the applicant has failed to meet his burden of proof, the court is not relieved of its burden to award fees based on a demonstrably reasonable rate. In such circumstances the court entertains other evidence to derive a reasonable rate." Rupert II, 52 Fed. Cl. at 687.

Here, the other relevant evidence includes the hourly rates for Mr. Shoemaker and Mr. Terzian. The relevant evidence also includes the hourly rate set by the District Court for the District of Columbia in Agapito, in which the court declined to use rates set by the Laffey matrix. Instead, the attorneys with eight or more years of experience were awarded as much as $275.00 per hour in straightforward cases pursuant to the Individuals with Disabilities Education Improvement Act of 2004. Agapito v. District of Columbia, 525 F. Supp. 2d 150 (2007), appeal dismissed D.C. Cir. 08-7004, 2008 WL 1868311 (D.C. Cir. Apr. 18, 2008).

Based upon this information, 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. Within this range, Mr. Moxley would be compensated toward, but not at the very, top. Mr. Moxley is an experienced attorney who obtains good results for his clients, including Mr. Masias.

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attorneys' fees and costs in 15 cases. The amount awarded exceeded a half million dollars. See table 5 in the appendix. This list does not include any cases in which Mr. Shoemaker's firm was not counsel of record, but still was awarded some amount in attorneys' fees and costs.

Mr. Masias submitted additional information about Mr. Shoemaker's attorneys' fees. Pet'r Mot. for Recons. at 7-8 & Attch. 9-13. This information merely confirms that Mr. Shoemaker's affidavit was, as stated in the May 5, 2009 decision, "simply wrong."

Mr. Shoemaker asserted that "other special masters put all of the firm's fee petitions on hold." Exhibit 85 ¶ 6 (emphasis added). Of the 20 cases listed in attachment 6 to Mr. Masias's motion for reconsideration, only four were stayed. This ratio is far different from an assertion that "all" fee petitions were on hold.

Mr. Shoemaker, separately, has argued that his negotiated rate is not reasonable. This argument has already been rejected by the undersigned. Sabella, 2008 WL 4426040 *6. This reasoning was quoted in the decision on the motion for review, but without any comment from the reviewing judge. See Sabella, 86 Fed. Cl. at 208.

However, in the opinion of the undersigned, Mr. Moxley is not the very best Vaccine Program attorney. If some room is left for a more highly skilled attorney, then the reasonable rate for Mr. Moxley, if he practiced in Washington, D.C., is $350 per hour.

c. Comparison of Local Rate to Forum Rate

Avera states that "forum rates" should be used to determine an attorney's hourly rate, except when two factors identified in Davis County are met.[16] In the present case, these two factors are present**.** The first factor is fulfilled when "'the bulk of [an attorney's] work is done outside the jurisdiction of the court." Here, the relevant geographic area is Washington, D.C., where the United States Court of Federal Claims is located. Avera, 515 F.3d at 1348.

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[16] Mr. Masias argues that "The Davis case is an aberration, and cannot be allowed to become the centerpiece of fees litigation in the Program." Pet'r Memorandum, filed March 30, 2008, at 16; accord Pet'r Reply, filed April 30, 2008, at 18. Toward that end, Mr. Masias submitted an affidavit from Michael Kavanaugh, who seems to opine that the Avera panel erred. Pet'r Exhibit 58, Affidavit of Michael Kavanaugh, dated Feb. 29, 2008, ¶¶ 4-8.

This argument is misdirected. After Avera adopted the Davis County exception, this exception is part of the law for determining attorneys' fees in the Program. To change this result, Mr. Masias must seek relief from an entity with the authority to overrule Avera.

Mr. Masias describes Dr. Kavanaugh's views about the legal market as "unrebutted." This is accurate, but a finder of fact does not have to credit even unrebutted expert testimony. Applied Medical Resources Corp. v. United States Surgical Corp., 147 F.3d 1374, 1379 (Fed. Cir. 1998); Sword, 44 Fed. Cl. At 188-89 ("A fact-finder, especially one with specialized experience such as a Special Master, can accept or reject opinion testimony, in whole or in part.").

If the opinion of Dr. Kavanaugh were important, a hearing would have been held. During this hearing, Dr. Kavanaugh would have been asked to explain whether his use of the term "value" is synonymous with "price;" whether attorneys in the Vaccine Program have any incentive to keep their price (or hourly rate) low to attract clients; whether attorneys in the Vaccine Program compete for clients on the basis of price; and whether the attorneys' expenses should affect the price they set. Expenses (or costs as used in an economic, not legal, sense) vary geographically. For example, an attorney living in Cheyenne, Wyoming pays income taxes at rates set by Wyoming and an attorney living in Washington, D.C. pays taxes at rates set by the District of Columbia (setting aside the issue of congressional oversight). Similarly, Mr. Moxley's law firm pays rent (or purchased office space) at rates prevailing in Cheyenne, not Washington, D.C.

To some extent, the hourly rates for attorneys in Washington, D.C. are probably higher than the comparable rates for attorneys in Cheyenne because living and working in Washington, D.C. costs more than living and working in Cheyenne. Dr. Kavanaugh's analysis seems to focus on gross revenue (an hourly rate) and to ignore costs.

There is no evidence to indicate that Mr. Moxley or any of his associates performed any work within the District of Columbia. Although several status conferences were held, all appear to have been telephonic. (Status conferences in which the attorneys appear by telephone happen very frequently in the Vaccine Program. The contrast – in-person status conferences – is sufficiently rare that they would be noted in the docket of the case.) The mediation was held in Denver, Colorado.

The second factor is whether "there is a very significant difference in compensation favoring D.C." What constitutes a "very significant difference" is not defined. Avera, itself, indicates that a very significant difference exists when the local rate is $200 and the petitioner claims that the Washington, D.C. rate is $598. Avera, 515 F.3d at 1349-50. Avera also cited with approval the finding in Davis County that local rates were appropriate when rates in Washington, D.C. were 70 percent higher.

A few cases have determined whether a difference between proposed rates for the forum and local rates are "very significant." There appears to be only one case within the Vaccine Program, Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), rev'd on non-relevant ground, 86 Fed. Cl. 201 (2009). In Sabella, the local rate for the petitioner's attorney, Mr. Shoemaker, was $300 per hour. Sabella also assumed that the forum rate was $440 per hour, which was the lowest rate advanced by Mr. Shoemaker. The resulting difference in rates (46 percent) was found to be a "very significant difference." Id., 2008 WL 4426050 at *5.

On appeal to a judge of the Court of Federal Claims, this determination was mentioned. Sabella, 86 Fed. Cl. at 207. However, it appears that Mr. Sabella did not challenge the finding that a 46 percent difference in rates constituted a "very significant difference" because the appellate decision did not analyze this conclusion.

In a case pursuant to the Clean Air Act, an attorney for the prevailing plaintiff proposed that the forum rate for Washington, D.C. was approximately $360 per hour. The Court determined that the comparable rate in Kentucky was approximately $225 per hour. The Court ruled that this difference was significant and awarded compensation at $225 hour. Rocky Mountain Clean Air Action v. Johnson, D. D.C. Civil Action 06-1992, 2008 WL 1885333 *1-3 (Jan. 28, 2008). The difference between the proposed rates in Rocky Mountain is 60 percent ($360/$225 minus 1).

Here, the difference between the appropriate local rate, which is $220 per hour, and the appropriate forum rate, which is $350, per hour, is 59 percent.[17] (The similarity to the figures in Rocky Mountain is a coincidence.)

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[17] If Mr. Masias had established that the appropriate rate for the forum was the Laffey matrix rate, then the difference between the local rate and the forum rate would be even greater.

The determination that a difference of 59 percent is a "very significant difference" is informed by the policy behind fee-shifting statutes. 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). Rather, fee-shifting statutes "enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." Id. As stated by Avera, the exception found in Davis County is warranted because it "prevents a result that 'would produce windfalls inconsistent with congressional intent.'" Avera, 515 F.3d at 1349, quoting Davis County, 169 F.3d at 759-60.

Here, increasing Mr. Moxley's rate from $220 per hour to $350 per hour merely because he filed a petition in the Court of Federal Claims, which happens to be located in Washington, D.C. would constitute "a form of economic relief to improve the financial lot of attorneys" or a "windfall[] inconsistent with congressional intent." A judge at the Court of Federal Claims reached essentially this conclusion, albeit under different reasoning. Avera v. Sec'y of Health & Human Servs., 75 Fed. Cl. 400, 403 (2007), aff'd in relevant part under different grounds, 515 F.3d at 1348-50.

Undoubtedly, hourly rates for attorneys must be set at a rate that attracts qualified, competent attorneys to represent petitioners. See Delaware Valley, 478 U.S. at 565. This purpose, however, is not exclusive. (If attracting counsel were the only focus, attorneys could be paid two, three or four times the forum rate.) Attorneys are entitled only to "reasonable attorneys' fees." 42 U.S.C. § 300aa–15(e). Limiting attorneys to only a reasonable hourly rate recognizes that the source of payment is the "Vaccine Injury Compensation Trust Fund." 42 U.S.C. § 300aa–15(I). Payments to attorneys necessarily deplete the Trust Fund. By using the term "reasonable," Congress has charged special masters (and the judges who review decisions of special masters) to balance the competing concerns.

To show that an award at forum rates would not produce a windfall, Mr. Masias presents affidavits from several attorneys. These attorneys include Mr. Moxley (exhibit 59), Mr. Evans (exhibit 56 and exhibit 61), Ms. Bush (exhibit 62), Mr. Toliver (exhibit 64), Mr. Shoemaker (exhibit 71), and Gary Shockey (exhibit 60).

These statements are worth relatively little, if anything. Several reasons support giving less them little weight.

First, to the extent that these affidavits suggest deciding whether an attorney would receive a windfall is not relevant, the affidavits are misdirected. Avera has instructed special masters to consider whether there is a windfall.

Second, the attorneys are far from disinterested observers. Any future request for attorneys' fees would be increased if Mr. Moxley were awarded higher rates. This self-interest

does not mean that the attorneys are untruthful; it means that their comments must be evaluated with a grain of salt. A panel of the Eleventh Circuit expressed this point so persuasively that it warrants a lengthy quotation:

> 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."
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> 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).

Third, some of the attorneys appear to be operating under outdated and mistaken beliefs. In the early 1990's, when several of these attorneys appeared as attorney of record in Program cases, the Vaccine Act restricted awards of attorneys' fees and costs. First, the Act imposed a $30,000 cap for all expenses related to lost earnings, pain and suffering and reasonable attorneys' fees and costs related to any vaccine-related injury that occurred before October 1, 1988. 42 U.S.C. § 300aa-15(b) (2000). Cases that sought compensation for an injured petitioner caused by a vaccination before February 1, 1991, are referred to as "pre-Act cases." See Massard v. Sec'y of Health and Human Servs., 25 Cl. Ct. 421, 423 (1992). In these pre-Act cases, Section 15(b) of the Act limited the award of lost wages, pain and suffering and "reasonable attorneys fees and costs" to $30,000 or less. 42 U.S.C.A. § 300aa-15(b). The Federal Circuit enforced this statutory cap in Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991). The practice of awarding attorneys' fees and costs in cases that involved vaccination that occurred after the effective date of the Act are governed by section 15(e) of the Act, which imposes only a "reasonable" limit on the amount of attorneys' fees.

In addition, prior to 1999, special masters generally considered $175 per hour to be a premium hourly rate, reserved only for experienced attorneys. Corder v. Sec'y of Health & Human Servs., No. 97-125V, 1999 WL 1427753 at *5 (Fed. Cl. Spec. Mstr. Dec. 22, 1999). This $175 cap was developed from a series of cases in 1992, and was removed by the end of 1999. See Corder, 1999 WL 1427753 at *5 (Fed. Cl. Spec. Mstr. December 22, 1999); see also Mandel v. Sec'y of Health and Human Servs., No. 92-260V, 1998 WL 211914 at *1 (Fed. Cl. Spec. Mstr. April 02, 1998); McKenney v. Sec'y of Health and Human Servs., No. 90-3951V, 1998 WL 409377 at *1 (Fed. Cl. Spec. Mstr. June 08, 1998).

This history in which attorneys' fees were limited is the background for evaluation of affidavits filed by specific attorneys. As discussed in the following paragraphs, the affidavits are not entitled to much weight. David Evans was attorney of record in a single case filed in 1990 that closed in 1994.[18] Gary L. Shockey filed his only Program case, as attorney of record, in 1990 which was decided in 1992.

A. Leroy Toliver is listed as the attorney of record in ten Program cases, filed from 1990 through 1999. Seven of Mr. Toliver's cases were filed during 1990, and the remaining three cases were filed in 1992, 1995 and 1999, respectively. His final case in the Program closed in March 2000. Mr. Toliver litigated the majority of his Program cases before 1999, during a period when the court rarely awarded attorneys fees at an hourly rate more than $175.

Ms. Bush has been attorney of record in eleven cases in the Vaccine Program beginning in 1990; including an active case filed in March 2008. Four of her cases were filed in 1993 or before; the remaining cases were filed between 1997 and 2008. Ms. Bush has litigated cases and been awarded attorneys' fees and costs under the more recent regime of awarding attorneys' fees and costs.

Before 2008, there were substantive changes in the Vaccine Program that have reduced or eliminated the limitations on compensation for attorneys' fees under which Mr. Shockey, Mr. Evans, Mr. Toliver and Ms. Bush operated in the 1990's. In the 2008 Avera decision, the Federal Circuit allowed attorneys to seek interim awards of attorneys' fees and costs. In addition to these changes, hourly rates awarded to petitioners' attorneys have increased when attorneys have provided the requisite support for increasing their rates.

The method of awarding attorneys' fees and costs has changed dramatically since these attorneys, with the exception of Ms. Bush, litigated their last cases. Therefore, with the possible

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[18] Information regarding the number of cases for the various attorneys comes from queries to the Case Management database maintained by the Clerk's Office.

There are two limitations for this data. First, the Clerk's Office records only counsel of record. Second, the Clerk's Office changed systems in 1991. This switch converted all pending cases. If a case were filed and closed before 1991, the current Case Management database would not have a record of it.

exception of Ms. Bush, the undersigned finds that the experience of these attorneys is not representative of the experience of Program attorneys and gives their affidavits little weight in this decision.

Fourth, the attorneys appear simply to be incorrect in asserting that few people are willing to represent petitioners in this Program. See Resp't Resp., filed Mar. 24, 2008, at 6. Of course, an individual's statement that he or she, personally, is not willing to represent petitioners will be accurate. But, the information about the petitioner's bar as a whole available from the Clerk's Office shows that these statements appear to be isolated.[19]

In fact, the evidence available from the Clerk's Office indicates that the number of attorneys participating in the Program is expanding. (The following information excludes cases in which attorneys represent petitioners who alleged that a vaccine caused autism.) In 1996-97, six attorneys filed more than three petitions each. In 2006-07, five of these attorneys were still participating in the Program. The sixth attorney does not represent individual clients any longer. If the hourly rates were truly too low to attract attorneys, then presumably these firms would have stopped participating in the Program and would have found a better source of income. The continued involvement of these attorneys (as opposed to their arguments) suggests that the amount of compensation has been reasonable.

By 2006-07, an additional ten attorneys filed more than three petitions in a year. This increase in the number of attorneys who regularly represent petitioners also suggests that the compensation is reasonable. If these attorneys believed that the historical rates of compensation were not adequate, then these attorneys, presumably, would not have agreed to represent petitioners in the Program. See U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 722-26 (1990) (rejecting argument that fee structure in Black Lung program deprived claimants of property without due process).

Some of these attorneys seem to argue that the rates of compensation in the Vaccine Program do not generate enough revenue to run a practice profitably. Exhibit 56 (Mr. Evans' affidavit), exhibit 59 (Mr. Moxley's affidavit) ¶ 63, exhibit 60 (Mr. Shockey's affidavit). But, the profitability of a law firm appears not to be a relevant concern. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. at 565. "Profitability," of course, is determined

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[19] Mr. Shoemaker's affidavit requires some clarification. He states that "Our firm has not accepted any new cases in at least two years." Exhibit 72 ¶ 6. This statement is accurate.

Mr. Shoemaker does not express a reason for not accepting new cases. Thus, his affidavit may leave the impression that the hourly rates or the difficulty in litigating cases caused his firm to stop accepting new cases. These reasons may or may not be true. Even if they were true, they would be only a partial explanation. Another explanation is that Mr. Shoemaker is attempting to resolve more than 75 currently pending cases (including some involving autism). It appears that Mr. Shoemaker's ethical obligations to his current clients would preclude him from taking on new clients.

by comparing revenues to expenses. An assertion that a practice is not "profitable" seems to invite an examination of not only the revenues, but also the expenses. But, investigating how private law firms spend their revenues would be unseemly. Thus, "profitability" probably is not a relevant matter.

The Federal Circuit has determined that attorneys in the Vaccine Program are entitled to seek rates at the forum amount. Special masters should award forum rates except when the case falls into the two-part exception created by Davis County. Avera, 515 F.3d at 1348-49. This is the law that special masters must follow.

Avera cited one case from four courts of appeals that discuss the forum rate. One reason for adopting the forum rate is given in the earliest of these four cases, Donnell v. United States, 682 F.2d 240, 251 (D.C. Cir. 1982).

In Donnell, the plaintiffs sought a declaratory judgment from the United States District Court in the District of Columbia that a redistricting plan adopted for Warren County, Mississippi violated the Voting Rights Act. Seven people intervened as defendants. After the district court ruled against the plaintiffs, the intervening defendants sought their attorneys' fees. Some attorneys representing these defendants worked in Mississippi; other attorneys worked in Washington, D.C. Id. at 243-44.

As relevant to the discussion in Mr. Masias's case, the parties disputed whether the attorneys' fees should be calculated on the basis of where the attorney worked or where the lawsuit was filed. The D.C. Circuit explained:

> We recognize the logic on both sides of the argument, but hold that the proper rule is that the relevant community is the one in which the district court sits. This is a simple rule to follow. It requires the district court normally to determine only the prevailing market rate within its jurisdiction, an inquiry about which it should develop expertise. Moreover, it is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them. High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated. Although there may be cases, such as this one, where much of the work must be performed away from the district court's community, we do not believe that this alone provides a sufficient reason for deviating from the general rule. This position is consistent with that of other federal courts.

Donnell, 682 F.2d at 251-52.

The suggestion in Donnell that trial courts develop expertise about the fees within their jurisdiction is probably easier for the district courts than for the Office of Special Masters. The Office of Special Masters decides only one type of case, cases brought pursuant to the Vaccine Act. On the other hand, these cases arise throughout the country. Thus, although special masters have developed an expertise in evaluating the reasonableness of hourly rates for attorneys in the Vaccine Program across the country, special masters have relatively little experience in determining the reasonableness of hourly rates in the forum of the Office of Special Masters, which is Washington, D.C.[20] Mr. Masias takes this point a bit further – he argues that the special masters' expertise in setting hourly rates for attorneys in the Program is "now obsolete." Pet'r Memorandum, filed Mar. 30, 2008, at 14.

Furthermore, after Donnell, the Supreme Court has restricted, to some degree, the size of award of attorneys' fees. See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-66 (1986) (rejecting most enhancements to lodestar calculation because 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").

As applied in Mr. Masias's case, the forum rule (or, more precisely, the Davis County exception to the forum rule) does not increase the hourly rate of compensation for Mr. Moxley.

d. Determination of a reasonable hourly rate for Mr. Moxley

Over the course of the litigation, Mr. Moxley's requested an increase in his hourly rate starting with $290 per hour in 1999 to $465 per hour in 2008. According to his time sheets, Mr. Moxley's hourly rate for this case started at $290 per hour in September 1998 and increased to $465 per hour in July 2008. See generally, exhibit 52; see also exhibit 84. Mr. Moxley appears to have increased his rates in concert with annual adjustments to the Laffey matrix. Resp't Resp., filed Mar. 24, 2008, Exhibit F at 1.

Respondent argued that the increase in Mr. Moxley's hourly rate from $200 to $250 per hour for Program litigation was not adequately justified, and that perhaps it should be reduced to

[20] Judges at the Court of Federal Claims appear similar in the sense that they resolve cases within particular subjects that may arise in any location across this country. Some (but not all) of the statutes provide for attorneys' fees. But, the hourly rate for attorneys appearing before judges at the Court of Federal Claims is usually (but not always) set in the Equal Access to Justice Act.

Thus, research has not revealed any case in which a judge at the Court of Federal Claims determined, in the first instance, the hourly rate for an attorney practicing in Washington, D.C.

$200. Resp't Resp., filed Mar. 24, 2008, at 14. Respondent, however, strongly objected to an hourly rate for Mr. Moxley that is significantly more than $250 per hour. Id.

The earlier portions of this decision explain why Mr. Moxley, an attorney working in Cheyenne, Wyoming, should not be compensated at the rate used to compensate attorneys working in Washington, D.C. In short, the evidence does not support an award of forum rates to Mr. Moxley. The Davis exception removes this case from the forum rule established by Avera. Therefore, in this case, Mr. Moxley will receive an hourly rate of $160-$220 per hour.

The time periods for Mr. Moxley's rate changes appear in the chart presented as table 6 in the appendix. Although Mr. Moxley has requested ranging from $290 to $465 per hour, he will be compensated at approximately half that rate – $160 to $220 per hour.

2. Determination of the Reasonable Number of Hours for Mr. Moxley

The second factor in the lodestar formula is the reasonable number of hours. Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

> The [trial forum] 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 v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). One reason a trial court possesses discretion to reduce the number of hours is that a trial court "is somewhat of an expert in the time that is required to conduct litigation." Case v. Unified School Dist. No. 233, Johnson County, Kansas, 157 F.3d 1243, 1256 (10th Cir. 1998).

A decision by a special master to reduce the number of hours is entitled to deference because special masters are familiar with the litigation. Saxton, 3 F.3d at 1521 (reversing decision of a judge of the Court of Federal Claims ruling that the special master acted arbitrarily in reducing number of hours); Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997).

Special masters are permitted to reduce the claimed number of hours to a reasonable number of hours by means of a bulk reduction. Special masters are not required to assess fee

petitions line-by-line. Saxton, 3 F.3d at 1521 (approving special master's elimination of 50 percent of the hours claimed); see also Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming special master's reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec'y of Health & Human Servs., 32 Fed. Cl. 505 (1994) (affirming special master's awarding only 58 percent of the numbers of hours for which compensation was sought). When the trial court uses a percentage reduction, the trial court should provide a "'concise but clear' explanation of its fee reduction." Internat'l Rectifier Corp. v. Samsung Electronics, Co., 424 F.3d 1235, 1239 (Fed. Cir. 2005) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1993) and following Ninth Circuit law). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares, 801 F.2d at 1202-03 (10th Cir. 1986) (affirming district court's reduction in the number of hours claimed for pre-trial preparation by 77 percent).

In other contexts, judges at the Court of Federal Claims have reduced the number of hours in requests for attorneys' fees by percentages. See, e.g., Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 489 (2003) (reduction of 30% for supplemental fee petition); Presault v. United States, 52 Fed. Cl. 667, 681 (2002) (reduction of 20%).

Consistent with these authorities, respondent has proposed that the special master reduce or deny the total number of hours requested by Mr. Masias. Respondent argued that some of the time entries are vague, duplicative and excessive. Resp't Resp., filed March 24, 2008, at 19-20.

The decision awarding interim attorneys' fees largely compensated Mr. Moxley. Decision 2009 WL 899703 at *9. With the exception of tasks to advance the claim for attorneys' fees, respondent objected to only a few hours. The disputed items are discussed below.

(1) Merits Phase

The "merits phase" of the case consists of time spent gathering medical records, developing an expert opinion, preparing for an entitlement hearing, and mediating the dispute. Respondent generally did not challenge the reasonableness of Mr. Moxley's activities during this time. Thus, the earlier decision included all the hours to which respondent had not objected in the award.

However, during this period, respondent objected to a few entries for Mr. Moxley that total 1.4 hours. Resp't Resp. at 19. The time spent on these tasks is unreasonable. Therefore, Mr. Masias is not awarded any additional compensation.

Respondent also objected to Mr. Moxley's request for his full hourly rate during time spent traveling, rather than billing his time at 50%. Resp't Resp. at 18.

Although the decision awarding interim fees was supposed to exclude any disputed items, it actually awarded Mr. Moxley compensation for some time spent traveling. This oversight occurred because the time sheets did not clearly identify approximately 4 hours of travel to Denver in October 2007. See exhibit 52, invoice 7 at 6.

Within the Vaccine Program, special masters have awarded compensation for time spent traveling at one-half the usual rate consistently. E.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805 *12-13 (Fed. Cl. Spec. Mstr. Oct. 26, 2006); Isom v. Sec'y of Health & Human Servs., No. 94-770V, 2001 WL 101459 *3 (Fed. Cl. Spec. Mstr. Jan. 17, 2001); Scatto v. Sec'y of Health & Human Servs., No. 90-3567V, 1997 WL 588954 *5 (Fed. Cl. Spec. Mstr. Sept. 5, 1997).

Outside the Vaccine Program, courts have taken different views of the appropriate rate of compensation when an attorney travels. Importantly, the Federal Circuit reversed and remanded a decision by the Merit Systems Protection Board that compensated an attorney at only $20.00 per hour for time spent traveling. Crumbaker v. Merit Systems Protection Bd., 781 F.2d 191, 193-94 (1986), opinion modified in non-relevant part, 827 F.2d 761 (Fed. Cir. 1987). It is not clear that Crumbaker mandates compensation at an attorney's usual rate in all circumstances.

In a relatively recent case, the Fifth Circuit held that a bankruptcy judge did not abuse her discretion in awarding compensation at only 50 percent. Although this case interpreted the Bankruptcy Act, it considered cases that arose in other contexts. In re Babcock & Wilcox Co., 526 F.3d 824 (5th Cir. 2008).

Appellate guidance on this topic may be helpful. (Research did not identify any decisions by judges of the Court of Federal Claims on this topic.) It appears that fee-applicants may be entitled to "full" compensation (that is, usual hourly rate times amount of time spent traveling) when the attorney demonstrates that work for the client was performed when the attorney was traveling.

Mr. Moxley's supplemental affidavit, which addressed many of respondent's objections, does not provide any additional justification or explanation for his activities while he was traveling. See exhibit 75. Thus, Mr. Moxley's time during travel to mediation is reduced 50% in accordance with program practice.

The calculation of compensation is a little complicated. The interim fee decision should not have awarded compensation for any hours that Mr. Moxley spent traveling. However, due to the way Mr. Moxley recorded his time, some travel time was not excluded. Thus, there is actually a two-step process. First, the reasonable amount of compensation for travel is determined. Second, the amount of compensation that already was given is subtracted.

The result of these calculations is that Mr. Moxley was overcompensated by $9.75. See table 7 in the appendix.

(2) Fee Application

The other phase of this case is the time spent litigating the fee petition. Because Mr. Masias filed his fee application on March 10, 2008, these activities overlap, in part, with activities in the merit phase. This section of the decision considers only activities related to presenting the fee application. The parties greatly contested the reasonableness of counsel's activities during this time. Both parties pointed fingers at the other, blaming the other side for increasing the litigiousness of the fee dispute.

Respondent objected to the time billed for preparation of the fee application as unnecessary and excessive. Respondent argued that fee applications usually take less than five hours to prepare. Resp't Resp., filed March 24, 2008, at 17.

Mr. Masias countered that this is not a typical fee application. Because of the issues involving the forum rate and the Laffey matrix, this application was more complicated than most. Mr. Masias asserted that given the new legal standard set in Avera, the hours expended in compiling the fee application were necessary, such that the fee application would allow the court to determine the appropriate hourly rate for his services and the controlling doctrine related to setting attorneys' fees. See Pet'r Reply, filed April 30, 2008, at 24.

Generally, a party is entitled to be reimbursed for time spent preparing an application for attorneys' fees and costs. Schuenemeyer v. United States, 776 F.2d 329, 333 (Fed. Cir. 1985) (addressing Equal Access to Justice Act); see also Laffey, 572 F. Supp. at 369 (stating "Defendants must compensate Plaintiffs for their counsels' efforts in litigating the attorneys' fees, but they do not have to pay for unreasonable or excessive endeavor."). Even respondent did not proffer an argument that Mr. Moxley is not entitled to any time for preparing the fee application.

Thus, the same standard will be used to evaluate the number of hours claimed during the fee application stage as during the merit stage – is the number of hours reasonable? In doing so, the approach of substituting the hypothetical client becomes less reflective of what is happening because it is more difficult (although not impossible) to imagine attorneys billing their clients for preparing bills. Nevertheless, some time for preparing a fee application is reasonable.

Mr. Masias seeks compensation for the different briefs relating to attorneys' fees and costs. The following table summarizes the different pleadings:

Activities For Seeking Attorneys' Fees and Costs		
Item	Source	Amount
Preparing Fee Petition	Exhibit 52, invoice 7, at 6-7	$2,684.00
Preparing Fee Petition	Exhibit 69	$10,648.00

Activities For Seeking Attorneys' Fees and Costs		
Item	Source	Amount
Reply - attorneys' fees	Exhibit 76, filed April 30, 2008	$13,596.00
Fees related to preparation of Mot. for Irreducible Minimum, filed June 25, 2008	Exhibit 78	$1,716.00
Resp., filed July 28, 2008	Resp. at p. 4	$511.50
Mot. for Summary Judgment	Exhibit 81: Supp. Invoice, filed Sept. 11, 2008	$4,557.00
Response regarding tuberous sclerosis, etc.	Exhibit 84 Supp. Invoice dated Oct. 10, 2008	$1,598.00
Statement on Forum Rates	Exhibit 88: Supp. Invoice, filed Nov. 17, 2008	$3,952.50
Status Report, filed Dec. 3, 2008	Status report at p. 2 ¶ 5	$139.50
Pet'r Verified Response	Exhibit 90	$3,225.00
TOTAL		$42,627.50

The majority of time spent in seeking fees is reasonable. The main thrust of Mr. Masias's motion for attorneys' fees is part of Mr. Moxley's quest to obtain Laffey matrix rates. Because the Federal Circuit left this question unresolved, Mr. Moxley cannot be said to be unreasonable in seeking an answer. In addition, Mr. Masias's motion for an award of interim attorneys' fees and costs was also reasonable. It was granted.

On the other hand, the decision to file a motion for summary judgment for an award of attorneys' fees and costs was not reasonable. Mr. Masias presented no cases in which a court awarded attorneys' fees through a motion for summary judgment. A motion for summary judgment is a useful device for avoiding a hearing. But, in almost every case, special masters resolve requests for attorneys' fees and costs without a hearing. This practice makes the motion for summary judgment unnecessary. Moreover, the motion for summary judgment largely duplicated both the fee application, filed March 10, 2008, and the motion for an interim award of attorneys' fees. Filing a third pleading essentially asking for the same relief is excessive. Thus, the time spent on filing the motion for summary judgment on the same motion will not be compensated.

In addition, Mr. Moxley's billing statements assumed that the hourly rate of compensation equals the rates in the Laffey matrix. As discussed above, Mr. Masias has not established that Mr. Moxley is entitled to Laffey matrix rates. The Laffey matrix rates are

approximately twice the rates actually awarded. See table 6. Mr. Moxley's hourly rate for the work claimed on attorneys' fees needs to be decreased by approximately 50 percent. Consequently, Mr. Masias is awarded 50 percent of the reasonable amount requested for work performed in seeking attorneys' fees.

Amount Awarded For Seeking Attorneys' Fees	
Amount of Original Request	$42,627.50
Deduction for Motion for Summary Judgment	($4,557.00)
Subtotal	$38,070.50
Reduction by 50 percent	($19,035.25)
TOTAL	$19,035.25

Therefore, Mr. Masias is awarded **$19,035.25** as compensation for Mr. Moxley's work to obtain attorneys' fees and costs. Mr. Masias's case contains several issues that warrant such a large amount of attorneys' fees to obtain attorneys' fees.

3. Calculation of Mr. Moxley's Lodestar Value

The lodestar calculation is the product of multiplying the reasonable hourly rate by the reasonable number of hours. This calculation was largely done in the decision awarding attorneys' fees on an interim basis. See Decision, 2009 WL 899703 (Appendix). Other than the changes for Mr. Moxley's traveling time and for Mr. Moxley's activities in seeking attorneys' fees, additional calculations are not necessary. The lodestar amount to which Mr. Masias is entitled is $19,025.50 ($19,035.25 - $9.75).

C. Reasonable Compensation for Attorney Support

During the course of this litigation, Mr. Moxley employed the support services of Julie Hernandez and Carol Goldbrith. Mr. Masias has requested a total of $6,635.50 for work performed by Ms. Hernandez and $1,124.50[21] for work performed by Ms. Goldbrith. Exhibit 52 at 1; see also exhibit 84.

Mr. Masias has already been awarded $5,303.50 for work done by Ms. Hernandez. For Ms. Goldbrith's work, Ms. Masias was awarded $830.00. Decision Awarding Attorneys' Fees and Costs, 2009 WL 899703 *5.

[21] The request for Ms. Goldbrith includes $1,107.50 in the initial fee application and an additional $17.00 for work related to later filings. See exhibit 52 at 1; see exhibit 84.

The primary issue to be resolved for Ms. Hernandez and Ms. Goldbrith is the appropriate rate of compensation. Mr. Masias requested that they be paid at the forum rate; respondent argued that lower local rate is appropriate. For the reasons explained with regard to Mr. Moxley, Mr. Masias has failed to establish that Ms. Hernandez and Ms. Goldbrith should be compensated at Washington, D.C. rates for work performed in Cheyenne, Wyoming. Thus, increasing the previous award due to an adjustment in hourly rates is not necessary.

The secondary issue regarding Ms. Hernandez and Ms. Golbrith is the reasonable number of hours. The decision awarding interim attorneys' fees and costs granted compensation for all the hours that respondent did not dispute. The present decision resolves the disputed hours.

For Ms. Hernandez's work, respondent objected to 0.3 hours billed by Ms. Hernandez on July 2-3, 2001, because the time spent appears duplicative and excessive for filing a status report. Respondent also argued that several entries totaling 2.1 hours are too vague to evaluate their reasonableness. Resp't Resp. at 18-19.

The hours identified by respondent are vague and redundant. In several of these entries, both Ms. Hernandez and Mr. Moxley appear to have engaged in similar activities on the same day. Consequently, the previous fee award is not increased due to an increase in the number of hours for Ms. Hernandez.

The analysis for Ms. Goldbrith is relatively similar. Mr. Masias has not justified an increase in the hourly rate beyond the hourly rates used in the decision awarding interim attorneys' fees and costs.

A review of the decision on interim fees reveals that it, inadvertently, failed to include 0.8 hours of Ms. Goldbrith's time. To correct this oversight, Mr. Masias is awarded an additional $80.00 ($100 per hour times 0.80 hours).

D. Part Two: Adjustments to the Lodestar

After the lodestar amount is determined, the trial forum may adjust the lodestar upward or downward. Avera, 515 F.3d 1348, citing Blum.

In conjunction with his request for Laffey matrix rates, Mr. Masias conceded that a downward adjustment might be appropriate. According to Mr. Masias, the salary for federal attorneys in Cheyenne, Wyoming is 93.4 percent of the salary for federal attorneys in Washington, D.C. Pet'r Memorandum, filed Mar. 30, 2008, at 13 n.15.

Mr. Masias's concession was premised upon an assumption that Mr. Moxley would be compensated at rates equal to the Laffey matrix. For the reasons discussed above, Mr. Masias has not established that the Laffey matrix is appropriate. Because Mr. Moxley is being compensated at rates from $160 to $220, an adjustment to the lodestar is not required.

E. Summary for Attorneys' Fees

Mr. Masias will be awarded the following amount for attorneys' fees:

Description	Award
Mr. Moxley - traveling	($9.75)
Mr. Moxley - litigating fee request	$19,035.25
Ms. Hernandez	$0.00
Ms. Goldbrith	$80.00
Total Additional Fees	**$19,105.50**

This amount is in addition to the amount ($42, 065.50) that was awarded to Mr. Masias in the interim fee decision.

III. Costs

A. Standard for Adjudication

Mr. Masias is entitled to an award for the reasonable costs incurred by his attorneys. 42 U.S.C. § 300aa–15(e). The reasonable amount of an expert's compensation is determined using the same lodestar method used to determine the reasonable amount of compensation for an attorney. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833 * 1; (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378 *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

"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." Hensley, 461 U.S. at 433-34 (emphasis in original). If a hypothetical yet reasonable client would be willing to pay for an expert's report, then it is appropriate to award compensation for that expert's report. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 184 (2d Cir. 2008) (stating a trial court "must act later to ensure that the attorney does not recoup fees that the market would not otherwise bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively"); Goos v. National Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995) (phrasing the question as "would a private attorney being paid by a client reasonably have engaged in similar time expenditures"); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (recognizing that "in the private sector the economically rational

person engages in some cost benefit analysis."); Presault v. United States, 52 Fed. Cl. 667, 680 (2002). The client must be pictured hypothetically because individual attributes of Mr. Masias (for example, his wealth or poverty) should not determine whether the cost is reasonable. Furthermore, it must be assumed that the client would have to pay for the expert because the client's self-interest would lessen the likelihood that the client would invest money in the expert needlessly.

One aspect of the general rule that costs must be reasonable to be compensable is that costs are not awarded for work that is not necessary. Duplicative work is presumptively unnecessary. Attorneys are not entitled to compensation for performing work that is not necessary. Hensley, 461 U.S. at 434. The same principle restricts experts. Kantor, 2007 WL 1032378 at *4-8.

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault, 52 Fed. Cl. at 670. When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520 *4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970). On the other hand, special masters have also compensated experts when the petitioner failed to submit information about the expert's hourly rate. See, e.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805 *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006). These principles are the basis for evaluating whether the costs requested by Mr. Masias, particularly those costs to which respondent objects, are reasonable.

Before the disputed issues are resolved below, a comment must be made about Mr. Moxley's record keeping. His request for $40,667.37[22] in costs appears to contain $11,242.40 in double billing. It should go without saying that counsel should use care to be as accurate as possible in all filings. This is particularly true when counsel's own money is at stake. Even innocent mistakes – and there is no reason to believe that the mistakes are other than innocent – raise concerns about counsel's accuracy. "[B]ad and excessive billing is inconsistent with superb lawyering." Kenny A., 532 F.3d at 1229. Respondent's counsel, too, is encouraged to be attentive to mistakes in billing.

[22] This total amount includes additional attorneys' litigation costs of $106.33 filed with Exhibit 76 on April 30, 2008. This amount includes $312 for petitioner's expert, Michael Kavauagh, Jr., Ph.D. Exhibit 76 at 4.

Mr. Moxley seeks $40,667.37 in costs. Exhibit 52. The components are:

Summary of Attorneys' Costs	
Description	**Amount**
Petitioner's personal litigation costs	$6,302.15
Robert Moxley's litigation costs	$12,073.32
ReEntry Rehabilitation Services, Inc.	$7,942.40
Dr. Alan Levin	$5,600.00
Dr. Mark Geier	$8,437.50
Dr. Kavanaugh (Exhibit 76 at 4)	$312.00
Total Costs	**$40,667.37**

Exhibit 52. Respondent objected to several costs. These are resolved in the sections that follow.

B. Dr. Mark Geier

In his fee request, Mr. Masias requested $8,437.50 for "medical/legal" services rendered by Dr. Mark Geier. Exhibit 52 at 1; see also exhibit 68, exhibit 74. Dr. Geier sought compensation for 33.75 hours of work at a rate of $250 per hour. Dr. Geier performed these services between June and October 2002.

Respondent objected to the amount requested for Dr. Geier. Resp't Resp. at 19. Respondent argued that the amount requested for Dr. Geier, who did not submit an expert report or testify at hearing, is excessive and noted that Dr. Geier's proposed fee exceeds the fee requested for Mr. Masias's other expert Dr. Levin, who provided an expert report and testimony in support of Mr. Masias's claim. Id. at 19-20. Respondent also raised particular objections to some of Dr. Geier's time.

1. Determination for Dr. Geier

Mr. Masias's request for an award for Dr. Geier is denied in its entirety. The decision to retain Dr. Geier was not reasonable.

There appears to be little dispute that a petitioner should not retain Dr. Geier now. His qualifications and his opinions have been questioned so often that a reasonable petitioner would be better served by seeking the opinion of someone else. Mr. Moxley recognizes this distinction. He states that Dr. Geier incurred expenditures "before it was indicated that Dr. Geier's opinion would carry little weight" in the litigation. Exhibit 55 (affidavit of Robert Moxley) at 3.

Of course, the decision to retain Dr. Geier was actually made in 2002. It would be unfair to penalize Mr. Masias for criticisms of Dr. Geier after 2002.[23]

Nevertheless, even from the perspective of someone in 2002, the decision to retain Dr. Geier was unreasonable. Dr. Geier lacks qualifications to present a reliable and persuasive opinion that the hepatitis B vaccine caused Mr. Masias's arthritis. He is neither an immunologist nor a rheumatologist, which appear to be the most relevant specialties. In 2002, he was not recognized as having special qualifications in epidemiology.[24] Ultimately, Mr. Masias did retain Dr. Levin, who is an immunologist. Exhibit 42, filed June 6, 2005.

Additionally, problems with Dr. Geier were apparent even by 2002. Platt v. Sec'y of Health & Human Servs., No. 93-264V, 2000 WL 1862640 *13 (Fed. Cl. Spec. Mstr. Dec. 1, 2000) (suggesting that Dr. Geier did not testify with candor); Ormechea v. Sec'y of Health & Human Servs., No. 90-1683V, 1992 WL 151816 *7 (Cl. Ct. Spec. Mstr. June 10, 1992)

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[23] A non-exhaustive list of examples of decisions after 2002 criticizing Dr. Geier include: Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 331968 *87 (Fed. Cl. Spec. Mstr. Feb. 12, 2009) (summarizing report of Institute of Medicine, saying that Dr. Geier's work on autism was "uninterpretable" and "noncontributory"), mot for review filed; Jeffries, 2006 WL 3903710 * 14 (noting that Dr. Geier is not an epidemiologist and citing cases); Gilbert v. Sec'y of Health & Human Servs., No. 04-455V, 2005 WL 3320085 * 41 (Fed. Cl. Spec. Mstr. Nov. 10, 2005) (describing challenges to some of Dr. Geier's work); Pafford v. Sec'y of Health & Human Servs., No. 01-165 V, 2004 WL 1717359 *1 n.2 (Fed. Cl. Spec. Mstr. July 16, 1994) (noting that Dr. Geier . . . is not board certified in the areas of rheumatology, pathology, or immunology, which are at issue in this case. . . . Because Dr. Geier testified in matters to which his professional background is unrelated, his testimony is of limited value to the court."), aff'd 64 Fed. Cl. 19 (2005), aff'd 451 F.3d 1352 (Fed. Cir. 2006).

[24] The May 5, 2009 decision questioned the accuracy of Dr. Geier's statement that he is "a board certified epidemiologist." Exhibit 74 ¶ 2. Previous decisions by special masters, such as in Jeffries, and a federal district court judge in Doe v. Ortho-clinical Diagnostics, Inc., 440 F. Supp. 2d 465, 470-72 (M.D.N.C. 2006), stated that Dr. Geier is not board certified in epidemiology. However, as part of Mr. Masias's motion for reconsideration, he presented a certificate showing that the American College of Epidemiology admitted Dr. Geier as a "fellow" in 2007. Pet'r Mot. for Recons., Attachment 14.

Mr. Masias did not present this document while his motion for attorneys' fees and costs was pending, despite respondent's objection to some portion of Dr. Geier's costs. See Resp't Resp., filed Mar. 24, 2008, at 19-20.

The 2007 action by the American College of Epidemiology does not affect the outcome in this case. Mr. Masias consulted Dr. Geier in 2002, years before Dr. Geier was acknowledged as having expertise in epidemiology. Events after 2002 – regardless of whether they enhance or detract from Dr. Geier's qualifications – do not affect the reasonableness of Mr. Masias's decision to retain Dr. Geier.

("Because Dr. Geier has made a profession of testifying in matters to which his professional background (obstetrics, genetics) is unrelated, his testimony is of limited value.")

Special masters may reject items included in requests for attorneys' fees and costs even when respondent has not objected to them specifically. Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 318 (2008). Thus, respondent's failure to object to all of Dr. Geier's time does not preclude a finding that the decision to retain Dr. Geier in 2002 was not reasonable.

The decision not to compensate for Dr. Geier's work is in accord with several other decisions. See Sabella, 86 Fed. Cl. at 218-19 (affirming special master's decision not to compensate Dr. Geier). For these reasons, compensation for Dr. Geier is denied entirely.

2. Additional Comments

As explained above, the original decision to retain Dr. Geier was not reasonable. Nevertheless, even if some portion of Dr. Geier's work were reasonable, Mr. Masias has not met his burden of establishing the reasonableness of much of the time charged by Dr. Geier. In short, respondent's specific objections to Dr. Geier's work are well founded.

a. Original Publications

Dr. Geier sought compensation for 13 hours of work on original publications. Exhibit 68 at 1, 3. Dr. Geier asserted that the original publications, authored by himself and his son, can be related to individual cases. As such, "it is fair the Program bear a tiny proportion" of the research costs as a Program related cost. In the instant case, he stated that this research "demonstrated" that specific vaccines increase the risk of the onset of certain conditions, including arthritis. Exhibit 74. Mr. Masias filed four articles written by Dr. Geier as exhibits. Exhibits 19, 20, 35 & 37.

Mr. Masias also supported Dr. Geier's request for compensation for preparing original publications by arguing that the government has paid for similar research to "further its litigation effort." Pet'r Resp., filed Apr. 30, 2008, at 29. Mr. Masias's counsel filed an affidavit to support this assertion.[25] Exhibit 82. Mr. Moxley averred that during the omnibus proceeding to determine whether vaccines caused tuberous sclerosis, respondent compensated one of his experts for preparing "expert reports" that were presented for publication. Exhibit 82 at 3. Therefore, in Mr. Masias's view, respondent should have no objection to the costs related to reports produced by Dr. Geier.

[25] Mr. Masias's counsel sought to file information obtained from a FOIA request regarding the cost that respondent was paying to an expert. Mr. Moxley was not able to locate the information and filed an affidavit to record his recollection of the FOIA information.

Respondent objected to compensating Dr. Geier for writing these original publications. Respondent maintained that because the research did not specifically relate to Mr. Masias's case, Dr. Geier's work is not compensable. Respondent cited to several cases to support the assertion that the Programs "was never intended" to support private scientific research into vaccine injuries. Resp't Resp., filed Mar. 24, 2008, at 20.

Special masters have denied compensation to Dr. Geier for his "original publications." Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040 *30 (Fed. Cl. Spec. Mstr. Sep. 23, 2008), mot. for review denied in relevant part, 86 Fed. Cl. at 219 (2009); Jeffries v. Sec'y of Health & Human Servs., No. 99-670V, 2006 WL 3903710 * 15 (Fed. Cl. Spec. Mstr. Dec. 15, 2006).

Mr. Masias offered an argument for compensating Dr. Geier for his original publications that was not made in Sabella at least. (The undersigned decided Sabella.) Mr. Masias stated that respondent paid for original research by a doctor, Steven Lamm, who testified as part of the tuberous sclerosis omnibus proceeding. (Mr. Moxley represented petitioners in the tuberous sclerosis proceeding.) Mr. Masias argued that because respondent has paid for original publications, it is fair that petitioners are entitled to the same opportunity. Pet'r Reply, filed April 30, 2008, at 26-29; exhibit 74 (affidavit of Dr. Geier).

Mr. Masias is correct that Dr. Lamm "wrote two papers as a result of his work as an expert" in the tuberous sclerosis cases. Barnes v. Sec'y of Health & Human Servs., No. 92-32V, 1997 WL 620115 *8 (Fed. Cl. Spec. Mstr. Sep. 15, 1997), mot. for review denied sub nom. Hanlon v. Sec'y of Health & Human Servs., 40 Fed. Cl. 625 (1998), aff'd 191 F.3d 1344 (Fed. Cir. 1999). Nevertheless, Mr. Masias's request for compensation for Dr. Geier's work in creating original publications is unreasonable.

It is far from clear that petitioners, like Mr. Masias, are the equivalent to respondent, the Secretary of the Department of Health and Human Services. The Director of the National Vaccine Program is responsible for investigating the safety of vaccines. 42 U.S.C. § 300aa–1 (creating Program), 42 U.S.C. § 300aa–2(a)(3) (responsibilities of the director). When many petitioners present a common theory, such as was involved in the tuberous sclerosis proceeding, one appropriate response from the government is to investigate the theory. If the government's research substantiated petitioner's theory, then the government should account for this research in determining whether to contest entitlement. The Secretary may revise the Vaccine Injury Table. 42 U.S.C. § 300aa–14(c). Thus, the government's interest in determining whether a vaccine caused an adverse reaction extends beyond the one case of any particular individual.

Even if concerns about the quality of Dr. Geier's research and publications could be set aside, another problem remains. Dr. Geier has chosen to distribute the costs of his research work across numerous cases. In doing so, no special master (or counsel for respondent) can easily determine how much work was spent on the entire project. If Dr. Geier should be compensated at all (which is a questionable proposition), he should be compensated in one case.

b. Writing Report

Dr. Geier sought compensation for 17.25 hours on tasks associated with writing a report. These tasks included reviewing Mr. Masias's medical records, reviewing literature, consulting people, and writing the report. Exhibit 68. Mr. Masias filed, on Aug. 15, 2002, Dr. Geier's report as exhibit 18. Respondent has not challenged, specifically, time spent by Dr. Geier to write a report. Resp't Resp., filed Mar. 24, 2008, at 19-20.

Of all the time spent by Dr. Geier, the time spent by him to prepare the report was the most reasonable. However, the decision to retain Dr. Geier at all was not reasonable.

c. VAERS Research

Dr. Geier sought compensation for spending three hours in researching the VAERS database. Exhibit 68 at 3. Dr. Geier differentiated this task from the work on his original publications because, according to Dr. Geier, the research on the VAERS database was specifically for Mr. Masias's case. Exhibit 74 at 1-2.

d. Miscellaneous

Dr. Geier also sought compensation for 0.5 hours of work on a task he initially described as "Renumber declaration of exhibits." Exhibit 68 at 2. After respondent objected to compensating Dr. Geier for a clerical task, Dr. Geier provided more information. He stated that he was actually editing the report. Exhibit 74 at 3-4.

Even by 2002 when Dr. Geier was working on Mr. Masias's case, Dr. Geier was a very experienced expert witness whom many petitioners in the Vaccine Program had retained. By that time, Dr. Geier should have been aware that he was required to record his time contemporaneously and describe the task he was performing.

Dr. Geier's attempt in 2008 to revise the description of his work performed in October 2002 defies credibility. Exhibit 68. The undersigned cannot imagine how Dr. Geier could possess any memory of what he was doing for 30 minutes approximately 6 years earlier. Dr. Geier's purported change in the description of his work undermines his integrity.

If any award for Dr. Geier were appropriate, a deduction would have been made for this task. But, because Dr. Geier is not being awarded any compensation, exploring this issue further is not necessary.

C. ReEntry Rehabilitation Services

Mr. Masias hired Helen Woodard of ReEntry Rehabilitation Services to develop an assessment of damages in this case. Exhibit 55 at 3. Mr. Masias requested $7,942.40 for Mr.

Masias's life care planner, Helen Woodard of ReEntry Rehabilitation Services, Inc. (ReEntry). Exhibit 52 at 1; see also exhibit 66. ReEntry billed some work at $156 per hour and some work at $200 per hour. See generally exhibit 66.

After respondent noted that the billing invoice did not explain the difference in billing rates, Resp't Resp. at 21; Mr. Masias filed an explanatory affidavit from Ms. Woodard. In her affidavit, Ms. Woodward stated that the hourly rate for her services is $200 per hour, which is the market rate in Denver, Colorado. ReEntry billed $156 per hour for any tasks delegated to other life care planners. Exhibit 73 at 2. Ms. Woodard's explanation of the difference in hourly rates is acceptable and the charged fees are reasonable for the services rendered.

While the request for fees for ReEntry Rehabilitation is reasonable, requesting two awards for the same services is not. Mr. Masias included the total amount for ReEntry in his request for Mr. Moxley's litigation costs and as a separate entry. See exhibit 52; see also exhibit 65 at 2. In his itemized list of litigation costs, Mr. Moxley included a payment of $7,942.40 made to ReEntry on October 23, 2007. Exhibit 65 at 2. This equals the amount included on an invoice, dated October 16, 2007, as the total balance due for services rendered by ReEntry. Exhibit 66 at 2. According to these records, there is no remaining balance owed to ReEntry. Mr. Masias is awarded $7,942.40 as a part of the award for Mr. Moxley's litigation costs, but he is not given a separate award for ReEntry's fees.

D. Dr. Levin

In his fee application, Mr. Masias requested an award of $5,600.00 for petitioner's expert Dr. Alan Levin. Exhibit 52 at 1. This, unfortunately, is another example of poor record keeping.

According to Dr. Levin's invoice, his charge for $5,600.00 includes $800.00 for travel and airfare. Exhibit 67 at 1. Mr. Masias remitted an $800.00 payment for Dr. Levin's travel expenses for the entitlement hearing in Denver, Colorado. Exhibit 53 at 7-8 (a copy of a check for $800.00, made payable to "Dr. Al Levine," with the notation "paid by client."); see also Order, filed February 24, 2009. In addition to Mr. Masias's payment, Mr. Moxley remitted payment to Dr. Levin for $2,000.00 in April 2005, which is included in Mr. Moxley's itemized list of attorneys' costs. See exhibit 65 at 1 and 29.

In total, Dr. Levin has received a total of $2,800.00 in payments toward the total $5,600 fee for his expert services. He is owed a balance of $2,800.00 - which is $5,600.00 minus the $2,800.00 in payments made by petitioner and petitioner's counsel. Mr. Masias is awarded $2,800.00 for the balance of Dr. Levin's fee.

Mr. Masias sought to provide additional information on this point. Pet'r Mot. for Recons. at 7. However, Mr. Masias did not submit any additional invoices to support awarding Mr. Masias additional compensation to Dr. Levin. Thus, the May 5, 2009 decision remains unchanged.

E. Additional Costs

1. Miscellaneous Attorneys' Costs

In addition to the specific (larger) items discussed above, Mr. Masias requested an award to reimburse his attorney, Mr. Moxley, for additional litigation costs. This request was for $11,761.32. These costs are primarily fees to obtain medical records and to pay for postage and copies. Respondent did not object to this request.

Except for the double-billing described above, Mr. Moxley's request for costs is reasonable. Thus, Mr. Masias will be awarded $11,761.32 for his attorneys' costs.

2. Mr. Masias's Personal Costs

Mr. Masias sought an award for the costs that he bore personally. He received an award for these costs, which total $6,302.15, in the decision awarding interim attorneys' fees and costs. 2009 WL 899703 *5.

3. Michael Kavanaugh

In his reply to respondents' objections, Mr. Masias included an invoice, for among other things, obtaining an affidavit from Michael Kavanaugh, Jr. Ph.D. Exhibit 76 at 4. Mr. Masias submitted a report from Dr. Kavanaugh as evidence that the Vaccine Program is a national market. Exhibit 58. Respondent did not object to this amount in any subsequent filings.

Dr. Kavanaugh's affidavit is largely misdirected in the sense that Dr. Kavanaugh disagrees with the Federal Circuit's decision in Avera. In this sense, presenting Dr. Kavanaugh's opinion was not reasonable because Avera is binding and Dr. Kavanaugh's opinion about the value of Avera is not relevant.

However, it appears that Mr. Masias intends to pursue some of these issues for review by a higher authority. If so, Mr. Masias must create the factual record in this forum. Thus, obtaining Dr. Kavanaugh's report was reasonable. Mr. Masias is awarded $312 for Dr. Kavanaugh's work.

F. Summary of Costs Awarded

Description	Comment	Amount
Petitioner's personal litigation costs	already paid	$ 0.00
Robert Moxley's litigation costs	Includes payment to ReEntry and, in part, to Dr. Levin	$ 11,761.32
ReEntry Rehabilitation Services, Inc.	Included within Mr. Moxley's costs	$ 0.00
Dr. Alan Levin	Reduced to account for previous payments by Mr. Masias and Mr. Moxley	$ 2,800.00
Dr. Mark Geier		$ 0.00
Dr. Kavanaugh (Exhibit 76 at 4)		$ 312.00
Total		**$ 14,873.32**

Mr. Masias is awarded $14,873.32 for the costs incurred by his attorney. This amount is in addition to the amount ($6,302.15) that he already received.

IV. Petitioner's Motion for Summary Judgment on Attorneys' Fees

While the fee petition was pending and the motion for interim fees was pending, Mr. Masias filed a motion for summary judgment. This motion is DENIED as moot.

V. Total Award Summary

Previously the undersigned issued an interim fee decision that awarded Mr. Masias his personal litigation costs and an amount of attorneys' fees that could not be disputed reasonably. Determining the remaining litigation costs and attorneys' fees, which were in dispute, was deferred until this final decision.

As discussed in the sections above, this decision awards Mr. Masias a total of $19,035.25 in attorneys' fees. This amount is in addition to the amount Mr. Masias previously received in attorneys' fees. Similarly, this decision awards Mr. Masias a total of $14,873.32 in attorneys' costs. This amount is in addition to the previous award. This decision does not award Mr. Masias any additional compensation for his personal costs.

IT IS SO ORDERED.

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

Appendices

Table 1: Special Master's Determinations of Hourly Rates in Wyoming				
Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
Estabrook v. HHS	No. 90-752V, 1991 WL 225096	10/16/1991	$100 per hour to Mr. Moxley	The court found this rate reasonable.
Walker v. HHS	No. 92-814V, 1992 WL 92243	12/17/1997	$100 per hour to Mr. Moxley	The court found this rate reasonable.
Barnes v. HHS	No. 90-1101V, 1999 WL 797468	9/17/1999	$110 to $160 per hour to Mr. Moxley	This represented an increase in an hourly rate that the special master found reasonable.
Gallagher v. HHS	No. 95-191V, 2002 WL 1488759	5/22/2002	$175 per hour	
Hart v. HHS	No. 01-357V, 2004 WL 3049766	12/17/2004	$200 per hour for Richard Gage and Robert Moxley	Amount was reasonable.
Avera v. HHS	No. 04-1385V, 515 F.3d 1343 (Fed.Cir. 2008)	4/15/2008	$200 per hour for Mr. Moxley	Affirmed the original award of $200 from the special master.
Avera v. HHS	No. 04-1385, Order Amending Judgment, Avera v. HHS,	6/24/08	$250 per hour for Mr. Moxley	J. Wheeler found this rate reasonable.

Table 2: Decisions Setting Attorneys' Hourly Rates in Wyoming				
Case Name	**Citation**	**Date of decision**	**Hourly amount & Location**	**Notes**
Smith	129 F.3d 1408	12/3/97	$125 in Casper, Wyoming	The trial court found that $125 per hour was in the top ten percent of rates charged in Wyoming. Context was employment discrimination.
In re Copley	1 F. Supp. 2d 1407	4/30/98	$200 in Cheyenne with multiplier	$200 per hour is higher than normally awarded for Cheyenne attorneys. Pg. 1414 n.3. The fees were set in a class action litigation.
In re Albrecht	245 B.R. 666	3/7/00	$295 (in 1997) was too much	Bankruptcy Appellate Panel affirmed bankruptcy judge's rejection of law firm from Los Angeles.
Burd	97 P.3d 802	9/15/04	$90 per hour was requested for attorney in Casper, Wyoming	Wyoming Supreme Court affirmed Workers' Compensation commissioner's decision to reduce the amount request from $6,030 to $2,500
Morrison	149 P.3d 696	12/28/06	$200 was limit for attorneys outside of Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in action over value of corporation.
Mueller	173 P.3d 361	12/11/07	$150 in Riverton, Wyoming	The parties agreed this rate was reasonable. It was accepted by the courts.
Hartman	No. 2006-6843 (District Court of Sublette County	7/1/08	$400 is implied	Full decision is not available. Information presented in exhibit 89.
City of Gillette	196 P.3d 184	11/14/08	$165 - $180, Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in dispute over construction contract.

Table 3: Summary of Court Decisions				
Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
Estabrook v. HHS	No. 90-752V, 1991 WL 225096	10/16/1991	$100 per hour to Mr. Moxley	The court found this rate reasonable.
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Mueller	173 P.3d 361	12/11/07	$150 in Riverton, Wyoming	The parties agreed this rate was reasonable. It was accepted by the courts.
Avera v. HHS	515 F.3d 1343 (Fed.Cir. 2008)	4/15/2008	$200 per hour for Mr. Moxley	Affirmed the original award

Table 3: Summary of Court Decisions				
Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
	No. 04-1385V			of $200 from the special master.
Avera v. HHS	Order Amending Judgment, Avera v. HHS, No. 04-1385	6/24/08	$250 per hour for Mr. Moxley	J. Wheeler
Hartman	No. 2006-6843 (District Court of Sublette County	7/1/08	$400 is implied	Full decision is not available. Information presented in exhibit 89.
City of Gillette	196 P.3d 184	11/14/08	$165 - $180, Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in dispute over construction contract.

Table 4A: Adjusting Rates to Account for Inflation (Wyoming)				
Year	Wy CPI	Barnes	Hart	Masias
1999	3.1	$160.00		
2000	3.2	$165.12		
2001	3.5	$170.90		
2002	3.7	$177.22		
2003	3.6	$183.60		
2004	4.3	$191.50	$200.00	
2005	5.0	$201.07	$210.00	
2006	4.4	$209.92	$219.24	
2007	6.1	$222.72	$232.61	
2008	2.6	$228.52	$238.66	$350.00

Table 4B: Adjusting Rates to Account for Inflation (National)				
Year	Nat'l CPI	Barnes	Hart	Masias
1999	2.7	$160.00		
2000	3.4	$165.44		
2001	1.6	$168.09		
2002	2.4	$172.12		
2003	1.9	$175.39		
2004	3.3	$181.18	$200.00	
2005	3.4	$187.34	$206.80	
2006	2.5	$192.02	$211.97	
2007	4.1	$199.90	$220.66	
2008	0.1	$200.10	$220.88	$350.00

Sources: The National Consumer Price Index comes from Exhibit 501 (Table IV, second column). The National Consumer Price Index is also available at www.bls.gov/cpi

The Wyoming Consumer Price Index comes from Exhibit 501 (Table IV). In this table, the fourth quarter number is the total rate of increase for the year, not the six months between the second quarter and the fourth quarter. This fact is established by comparing the National CPI, the second column in Table IV, with the national rates from the Bureau of Labor Statistics.

Table 5: Decisions Awarding Attorneys' Fees and Costs in Which Mr. Shoemaker Was Counsel of Record for Petitioner from March 30, 2005 to June 23, 2006				
Case Number	**Case Name**	**Special Master**	**Date Atty Fees**	**Judgment (Fees and Costs)**
1:93-vv-00398-UNJ	Walker	Abell	08/02/05	$57,000.00
1:96-vv-00188-UNJ	Wallace	Abell	10/25/05	$9,361.66
1:99-vv-00032-UNJ	Davis	Sweeney	11/29/05	$22,753.26
1:99-vv-00328-UNJ	Saari	Golkiewicz	01/11/06	$30,823.53
1:99-vv-00423-UNJ	McCammon	Millman	11/03/05	$18,771.00
1:99-vv-00428-UNJ	Cramer	Sweeney	09/01/05	$51,743.33
1:99-vv-00429-UNJ	Larive	Millman	07/21/05	$65,590.66
1:99-vv-00498-UNJ	Rezzonico	Millman	10/13/05	$58,000.00
1:99-vv-00538-UNJ	Noel	Millman	08/09/2005	$43,500.00
1:99-vv-00539-UNJ	Brown	Abell	03/11/2005	Denied
1:99-vv-00564-UNJ	Turpin	Abell	02/10/05	Denied
1:01-vv-00068-UNJ	Smith	Edwards	06/16/06	$5,808.28
1:01-vv-00319-UNJ	Heckler	Abell	04/19/06	$28,965.91
1:02-vv-00094-UNJ	Britton	Edwards	07/11/05	$15,215.48
1:02-vv-00398-UNJ	Kinner	Hastings	06/22/06	$19,615.92
1:02-vv-00471-UNJ	Abtahi	Edwards	06/30/05	$75,000.00
1:02-vv-00724-UNJ	Weaver	Golkiewicz	06/29/06	$15,524.46
1:02-vv-00952-UNJ	Blair	Abell	06/03/05	Denied
1:02-vv-01203-UNJ	Jones	Abell	06/12/06	$7,166.79
1:03-vv-02259-UNJ	Counts	Sweeney	11/22/05	$9,000.00
1:04-vv-00183-UNJ	Akmon	Abell	07/12/05	$12,500.00
1:04-vv-00184-UNJ	Ray	Judge Merow	03/30/06	$23,517.04
TOTAL				$569,857.32

Table 6: Determination of Mr. Moxley's Reasonable Rate			
Time Period	**Hourly Rate Requested**	**Exhibit**	**Hourly Rate Awarded**
9/30/1998 to 3/19/1999	$290	Exhibit 52, Invoice 46, pg 1	$160
6/2/1999 to 5/30/2000	$340	Exhibit 52, Invoice 46, pg 1	$165
6/30/2000 to 5/16/2000	$350	Exhibit 52, Invoice 46, pg 2-3	$170
7/2/2001 to 6/4/2002	$360	Exhibit 52, Invoice 46, pg 3-4	$175
7/18/2002 to 1/4/2004	$370	Exhibit 52, Invoice 46, pg 4-6	$185
1/9/2004 to 5/13/2004	$380	Exhibit 52, Invoice 46, pg 6-8	$195
8/23/2004 to 5/9/2005	$390	Exhibit 52, Invoice 46, pg 9; Exhibit 52, Invoice 120, pg 1	$200
6/16/2005 to 5/19/2006	$405	Exhibit 52, Invoice 120, pg 23; Exhibit 52, Invoice 7, pg 1-2	$205
8/1/2006 to 5/23/2007	$425	Exhibit 52, Invoice 7, pg 2-4	$210
6/4/2007 to 6/17/2008	$440	Exhibit 52, Invoice 7, pg 4-7; Exhibit 76 at 1-3; Exhibit 78 at 1.	$215
7/25/2008 to the date of this decision	$465	Exhibit 81 at 1; Exhibit 84 at 1	$220

Table 7: Determination of Attorneys' Fees for Traveling				
Date	**Source**	**Hours Billed**	**Rate Used in Calculation**	**Reasonable Amount**
Amount to Be Awarded				
12/19/05	Exhibit 52, Invoice 120 at p. 3	1.5	$102.50	$153.75
1/26/06	Exhibit 52, Invoice 7 at p. 1	2.6	$102.50	$266.50
10/9/2007	Exhibit 52, Invoice 7 at p. 6	2.0	$107.50	$215.00
10/10/2007	Exhibit 52, Invoice 7 at p. 6	2.0	$107.50	$215.00
				$850.25
Amount Already Awarded				
10/9/2007	Exhibit 52, Invoice 7 at p. 7	2.0	$215.00	$430.00
10/10/2007	Exhibit 52, Invoice 7 at p. 7	2.0	$215.00	$430.00
				$860.00
			Difference	**($9.75)**

Mr. Moxley's description of his activities on October 9, 2007, includes "travel to Denver Colo[rado]" without an indication of how much travel time he allotted for his trip. Exhibit 52, Invoice 7 at p. 6. In a subsequent entry, on October 10, 2007, Mr. Moxley includes two hours of travel for his return trip. Id. Thus, two hours of the time billed on October 9, 2007, is travel time.