# IN THE UNITED STATES COURT OF FEDERAL CLAIMS

## OFFICE OF SPECIAL MASTERS

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| CHRISTOPHER SABELLA, | * | No. 02-1627V |
| | * | Special Master Christian J. Moran |
| Petitioner, | * | |
| | * | Filed: August 29, 2008 |
| v. | * | Issued for publication: Sept. 23, 2008 |
| | * | |
| SECRETARY OF HEALTH | * | Attorneys' fees; reasonable hourly |
| AND HUMAN SERVICES, | * | rate; Avera; reasonable number of |
| | * | hours; reasonable cost for experts |
| Respondent. | * | |

Clifford Shoemaker, Esq., Shoemaker & Associates, Vienna, VA, for Petitioner;
Michael Milmoe, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

**PUBLISHED DECISION**[*]

Christopher Sabella sought compensation for an injury that he alleged was caused by the hepatitis B vaccine administered to him on November 18, 1999, December 24, 1999, and February 7, 2000. Specifically, Mr. Sabella asserted that the vaccination caused him to suffer an encephalopathy and that, as a sequela of the encephalopathy, he developed (or aggravated pre-existing) learning disabilities. The parties agreed to resolve this dispute before the case was determined on its merit.

Mr. Sabella now seeks reimbursement for his attorneys' fees and costs. However, respondent has objected to a number of items. After considering petitioner's request and

[*] When this decision was originally issued, the parties were allowed 14 days to propose redactions. See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b). Mr. Sabella did so. However, his motion to redact was denied on September 23, 2008. Consequently, the August 29, 2008 decision is being issued without substantive change.

respondent's objections, Mr. Sabella is awarded $62,207.50 in attorneys' fees and $17,742.28 in costs.

## I. Procedural History

Mr. Sabella filed his petition on November 18, 2002. His attorney of record then was Mr. Joel Korin, who worked for a firm known as Kenney & Kearney, P.C. Mr. Sabella's petition was accompanied by 19 exhibits.

Respondent filed his report, pursuant to Vaccine Rule 4, on March 27, 2003. Respondent denied that Mr. Sabella was entitled to compensation and presented a report from a neurologist, Dr. Joel Herskowitz, to support respondent's position.

In late 2003 and continuing into early 2004, Mr. Sabella filed reports from various people who, he asserted, could provide an expert opinion. Respondent submitted reports from other doctors in August and September 2004. Over the next many months, both sides continued to submit more expert reports. The cost for these reports is one item of significant dispute.

On December 16, 2005, Mr. Clifford Shoemaker filed a motion to replace Mr. Korin as Mr. Sabella's counsel of record [docket entry 58]. This motion was granted. However, Mr. Korin continued to participate in the case. Whether the joint representation by Mr. Korin and Mr. Shoemaker was reasonable is a disputed issue.

In 2006, the parties continued to file reports from different doctors and also medical articles on which the doctors relied. Eventually, two days of hearing were held on September 14-15, 2006. The witnesses at this hearing were 3 doctors and a neuropsychologist, all of whom were treating or did treat Mr. Sabella. For some doctors, Mr. Sabella's attorneys were involved in the process of Mr. Sabella becoming the doctor's patient. Mr. Sabella also testified. Mr. Sabella was represented during this hearing by both Mr. Shoemaker and Mr. Korin.

The next expected step was to conduct another hearing at which other experts, who did not treat Mr. Sabella, could testify. Although this hearing was scheduled for December 11, 2006, the hearing was not held. Instead, the parties informed the Court that they had resolved the case. A decision adopting the parties' stipulation was issued on May 21, 2007.

Mr. Sabella filed the pending motion for attorneys' fees on October 10, 2007. Mr. Sabella's request includes time spent by his current counsel of record, Mr. Shoemaker; time spent by his former counsel of record, Mr. Korin; and costs of the case, such as the expense of obtaining reports from the various experts.

At the request of the undersigned, the parties attempted to resolve, or, at least to narrow, their dispute on the attorneys' fees and costs requested. These efforts, however, did not succeed. Consequently, the parties filed briefs in response to the motion for attorneys' fees.

While the parties were briefing various issues, on February 6, 2008, a panel of the United States Court of Appeals for the Federal Circuit issued a decision in Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). The undersigned requested, and eventually received, additional briefs regarding how Avera affected the pending motion for attorneys' fees. With these briefs filed, the record is complete and the motion is ripe for adjudication.

The number of disputed topics is relatively large. The parties dispute (a) the hourly rate for Mr. Sabella's attorneys, (b) the reasonable number of hours spent by Mr. Sabella's attorneys, (c) the reasonableness of the costs sought for Mr. Sabella's experts, and (d) other miscellaneous items of costs. The following sections resolve each issue.

## II. Attorneys' Fees

### A. Introduction

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

Reasonable attorneys' fees are determined using 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 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

In this case, both variables of the lodestar method are disputed. The primary dispute for attorneys' fees concerns whether Mr. Sabella's current attorney of record, Mr. Shoemaker, should be reimbursed at the hourly rates prevailing in Washington, D.C. For the reasons that follow, Mr. Shoemaker is not entitled to these hourly rates. The secondary dispute is whether Mr. Sabella's initial counsel of record, Mr. Korin, is entitled to an increased rate of compensation when Mr. Korin changed from one law firm to another. The answer to this question is no.

The other variable in the lodestar method is the reasonable number of hours. As explained in section C below, respondent's general objection that the participation of so many attorneys caused overstaffing and inefficiency has merit. Thus, the number of hours is reduced considerably.

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]

### B. Reasonable Hourly Rate

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, 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).

Following the Federal Circuit's decision in Avera, Mr. Shoemaker proposed an increase in his requested hourly rates. His requested hourly rates are resolved first. Mr. Korin, however, did not seek an increased hourly rate.

#### 1. Mr. Shoemaker and His Associates

Mr. Shoemaker and his associates are awarded an hourly rate equal to the amount that they requested originally. For Mr. Shoemaker, these hourly rates vary from $250 to $310 per hour. For his associates, they vary from $155 to $215 per hour.

Mr. Shoemaker is not entitled to an hourly rate based upon his view of the prevailing market rate for attorneys of comparable skill in Washington, D.C. Mr. Shoemaker had asserted that based upon differing sources of information, he is entitled to an hourly rate of $440 to $645. Similarly, Mr. Shoemaker requested that his associates (Ms. Gentry) receive $390 to $536 and $255to $380 (Ms. Knickelbein). Pet'r Br. regarding lodestar forum rates, filed March 31, 2008, at 7-8.

Respondent has challenged the adequacy of the evidence to establish the forum rate. Resp't Resp. to Pet'r Br. regarding lodestar forum rates, filed May 27, 2008, at 2. The forum rate is not resolved. For purposes of analysis, it is assumed that the lowest figure for each category represents the "forum rate." Finding the forum rate for Washington, D.C. is not necessary because even using the lowest proposed amount, Mr. Shoemaker is not entitled to forum rates. See footnote 2, below.

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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.

Avera states that "forum rates" should be used to determine an attorney's hourly rate, except when two factors are met. In the present case, these two factors are present.

### a. Where the Work Was Performed

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, at 1348.

No evidence indicates that Mr. Shoemaker or any of his associates performed any work within the District of Columbia. Although many 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 hearing was held in Philadelphia, Pennsylvania.

Mr. Sabella does not argue that Mr. Shoemaker performed any work within the District of Columbia. Instead, Mr. Sabella argues that the "bulk of the work performed in the instant case was performed in the Washington DC metropolitan area." Pet'r Br. on Lodestar Forum Market Rates at 2 (emphasis added). With the qualification noted, Mr. Sabella's assertions about where Mr. Shoemaker performed his activities is accurate. Mr. Shoemaker's firm is located in Vienna, Virginia, which is part of the Washington, D.C. metropolitan area. One way of showing that Vienna, Virginia is part of the Washington, D.C. metropolitan area is to note that one of the subway lines used by many commuters to jobs in Washington, D.C. has a terminus in Vienna, Virginia.

Avera discusses the District of Columbia, not the "Washington, D.C. metropolitan area." Therefore, Mr. Sabella's assertions that work was performed in the broader geographic area are not relevant.

Although the Federal Circuit did not explain why the appropriate area is the District of Columbia, there are reasons for using it. First, there is an ease in administration. The District of Columbia has certain boundaries and it is easy to see whether an attorney was physically located within those boundaries when working. In contrast, the phrase "Washington, D.C. metropolitan area" is nebulous. Determining the extent of the "Washington, D.C. metropolitan area" would add more complexity to determining attorneys' fees.

Second, there probably is a financial difference between working in the District of Columbia and working in the "metropolitan area" of Washington, D.C. Office space is likely more expensive in Washington, D.C. than in Vienna, Virginia. Salaries in Washington, D.C. for employees are likely higher to account for the higher costs of traveling.

A ruling that work performed in a suburb of Washington, D.C. is not the same, for an analysis of the forum rate pursuant to Avera and Davis County, as work performed within the District of Columbia is consistent with at least one other case. In American Canoe Ass'n, Inc. v. U.S. Envtl. Prot. Agency, 138 F.Supp.2d 722, 741-42 (E.D. Va. 2001), a district court refrained from importing information about rates in Washington, D.C. set by the Laffey matrix to set hourly rates for a firm located in Alexandria, Virginia. In American Canoe, the court found that plaintiffs "have failed to carry their burden of demonstrating that Washington, D.C., and Alexandria [Virginia] are the same legal market." Id.

Consequently, the first factor of the two-part exception created in Davis and adopted in Avera is present here. Mr. Shoemaker and his associates performed most, if not all, of their work outside of the District of Columbia.

**b. Difference in Compensation**

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.

Here, the minimum hourly rate proposed by Mr. Shoemaker for attorneys of his experience is $440 per hour.[2] The hourly rate at which Mr. Shoemaker has typically been compensated is $300 per hour. By one calculation, the proposed rate for Washington, D.C. is 46 percent higher (1 minus $440/$300). The undersigned determines that a nearly fifty percent increase is a "very significant difference."

Although a 46% difference is a smaller difference than in Avera and in Davis County, it remains a "very significant difference." This result is consistent with one of the few cases determining whether a difference between proposed rates for the forum and local rates are "very significant." 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 (1 minus $360/$225), close to the disparity found in this case.

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[2] Mr. Shoemaker also proposes as much as $645 per hour. The more money that Mr. Shoemaker requests produces a greater disparity. The greater the difference between the local rate and the Washington, D.C. rate, the less likely Mr. Shoemaker will receive the Washington, D.C. rate.

The determination that a difference of 46 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. Shoemaker's rate from $300 per hour to $440 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."

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.

With regard to the need to attract more attorneys to represent petitioners, no persuasive evidence indicates that attorneys do not participate in this Program due to the allegedly low attorneys' fees awarded. Some attorneys representing petitioners argue that an increase in hourly rates is warranted because otherwise attorneys would not represent petitioners. These statements are arguments, not supported in fact. 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).

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.

In short, the evidence does not support an award of forum rates to Mr. Shoemaker. The Davis exception removes this case from the forum rule established by Avera.

### c. Determination of Mr. Shoemaker's Rates

The preceding two sections explain why Mr. Shoemaker is not entitled to the "forum rate" for an attorney practicing in Washington, D.C. With that option resolved, the question becomes what are the rates to which Mr. Shoemaker is entitled. After Avera was decided by the Federal Circuit, both parties filed briefs. However, these briefs did not discuss the outcome if Mr. Shoemaker were not entitled to forum rates.

The reasonable rates for Mr. Shoemaker and his associates are the rates set by an agreement between Mr. Shoemaker and attorneys from the United States Department of Justice. Mr. Sabella's original motion for attorneys' fees listed this agreement and his time sheets reflect these hourly rates. E.g., Pet'r Mot., Exhibit 3(time sheet) at 25 of 149[3] (summary). To ensure a complete record if appellate review is required, a copy of this agreement was filed as exhibit 101.

Mr. Sabella asserts that the hourly rates reflected in Mr. Shoemaker's agreement "are the result of a compromise reached after a fairly nasty battle between the firm and Respondent's counsel involving at least three special masters and nine cases. As a compromise they are by definition not reflective of the lodestar market rate." Pet'r Reply at 5 (emphasis in original). This argument is flawed. The market rate can be a product of negotiations between a willing buyer of legal services and a willing seller of legal services. See Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348-49 (Fed. Cir. 2004) (defining fair market value); see also In re Synthroid Marketing Litigation, 264 F.3d 712, 718-19 (7th Cir. 2001) (discussing attorneys' fees in the context of a class action), decision after remand, 325 F.3d 974 (7th Cir. 2003); Getaped.com, Inc. v. Cangemi, 188 F.Supp.2d 398, 407 (S.D.N.Y. 2002). If Mr. Shoemaker did not want to agree to the proposed hourly rates, then Mr. Shoemaker could have refrained from the agreement and sought a decision from a special master. Mr. Shoemaker's freedom of choice in this context resembles an attorney who can decide whether to accept a client willing to pay a particular rate or not.

[3] Pages of Exhibit 3 are referenced by the pre-printed page numbers as listed by petitioners.

### 2. Mr. Korin and Ms. Kenney

Mr. Sabella's first counsel of record was Mr. Joel Korin who worked at the law firm of Kenney & Kearney, P.C. until October 15, 2005. Pet'r Mot., tab 4 at 38-39 (Korin Affidavit ¶ 5). While at Kenney & Kearney, Mr. Korin was assisted by another attorney, Jane A. Kenney, who was of counsel at that firm. Pet'r Mot., tab 4 at 40 (Kenney Affidavit ¶ 6).

Time sheets from Kenney & Kearney indicate that Mr. Korin and Ms. Kenney began working on Mr. Sabella's case in June 2002. The petition in Mr. Sabella's case was filed on November 18, 2002.

In March 2003, Mr. Korin attended a seminar in Boston on vaccine litigation. (This seminar is discussed in section II.B.3, below.) At this seminar, Mr. Korin met Mr. Shoemaker. The attorneys began working together because neither Mr. Korin nor Ms. Kenney had previously represented a petitioner in a claim pursuant to the Vaccine Act. Pet'r Mot., tab 4 at 38 (Korin Affidavit ¶ 5). Mr. Shoemaker participated in a status conference held on May 8, 2003. Time records from Mr. Shoemaker show that he continued to work on this case after this date.

In October 15, 2005, the law firm Kenney & Kearney ceased its existence. Mr. Korin began working at another law firm, Ballard Spahr Andrews & Ingersoll, LLP, a national law firm based in Philadelphia. While at Ballard Spahr, Mr. Korin continued to represent Mr. Sabella. Ms. Kenney, however, stopped representing Mr. Sabella when Kenney & Kearney closed.

Shortly after Mr. Korin began working at Ballard Spahr, Mr. Shoemaker filed a motion to substitute as counsel of record for Mr. Korin. This motion was granted. Order, filed Dec. 16, 2005.

When Mr. Shoemaker was counsel of record, Mr. Korin continued to participate in the representation of Mr. Sabella. Both Mr. Shoemaker and Mr. Korin appeared at the hearing on September 14-15, 2006.

Mr. Sabella has requested an award of attorneys' fees for Mr. Korin, Ms. Kenney and associated staff. Mr. Korin states that while at Kenney and Kearney, he charged $200 per hour. Pet'r Mot., tab 4 at 38 (Korin Affidavit ¶ 5). Mr. Korin's billing entries for work at Kenney and Kearney reflect this hourly rate. Pet'r Mot., tab 4, Exhibit B at 56-120 (Kenney & Kearney LLP, Invoice No. 28438). Respondent has not opposed this hourly rate.

After Mr. Korin started working at Ballard Spahr, his hourly rate increased to $295 per hour for the remainder of 2005, to $320 per hour in calendar year 2006, and $345 per hour in calendar year 2007. Mr. Korin's practice at Ballard Spahr appears to be focused on medical malpractice cases. Pet'r Mot., tab 4 at 38 (Korin Affidavit ¶¶ 2, 6). Billing entries from Ballard Spahr reflect these rates. Pet'r Mot., tab 4, Exhibit C at 127-35 ("Master Work in Process Report, dated 4/26/2007). Respondent has objected to the increased rate. Resp't Resp. at 5 n.2.

Information submitted to justify Mr. Korin's increased rate has some value. Mr. Sabella submitted three invoices sent by Ballard Spahr to clients showing that Mr. Korin charged the rates that he said he charged in 2005-07. Pet'r Reply, Exhibit 2 at 1-6. On the other hand, Mr. Sabella did not submit any information about whether Mr. Korin's proposed rate reflects the rate in the relevant community of attorneys. Respondent noted this absence of information. Resp't Supp. Resp. at 6 n.4. Nevertheless, Mr. Sabella did not file additional information, which could have been helpful. Pet'r Supp. Reply at 5.

Respondent is correct that the reasonable hourly rate is based upon the "prevailing market rates in the relevant community." Blum, 465 U.S. at 895. As the person applying for fees, Mr. Sabella (or Mr. Korin) 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.

As discussed in some detail below, issues about the reasonable attorneys' fees pursuant to fee shifting statutes can be evaluated by imaging a hypothetical negotiation between a reasonable client and a reasonable attorney. From this perspective, one can imagine that Mr. Sabella and Mr. Korin agreed in 2002 that Mr. Korin would represent Mr. Sabella at an hourly rate of $200 per hour. (Mr. Sabella did not submit the retainer agreement between any attorney and himself.) It seems likely that this hypothetical agreement did not contain a provision for an increase in hourly rates because Mr. Korin, in fact, did not increase the rate he was billing Mr. Sabella from 2002 to 2005. Pet'r Mot., tab 4, Exhibit B at 56-120 (Kenney & Kearney LLP, Invoice No. 28438).

Although respondent challenges the proposed increase in Mr. Korin's hourly rate, the parties' development of this issue contains gaps. Neither party addressed how Mr. Korin's change in employment from one law firm to another law firm affects, if at all, his relationship with Mr. Sabella. Does Mr. Korin's commitment to Mr. Sabella (whether based in contract or attorney ethics) continue after he changed firms? Mr. Sabella could have produced the agreement(s) between Mr. Korin and himself that should set forth the attorneys' basis for compensation. See Office of Special Masters, Guidelines for Practice Under the National Vaccine Injury Compensation Program § XIV.A.5. (Rev. Ed. 2004).

Without any evidence about Mr. Sabella in particular, the matter will be considered from the perspective of a reasonable client. If Mr. Korin had informed a reasonable client in the Fall of 2005 that he (Mr. Korin) was not going to work at Kenney and Kearney any longer, he was not going to be Mr. Sabella's counsel of record any longer because Mr. Shoemaker was going to become counsel of record, and, finally, that Mr. Korin was going to increase his rate from $200 to $300, then the reasonable client would probably object to this increase.

The invoices showing that Mr. Korin charged some clients at Ballard Spahr at least $300 do not address the circumstances of Mr. Korin's ongoing relationship with Mr. Sabella. Three hundred dollars per hour may be a reasonable rate for an attorney with Mr. Korin's experience and skills for matters that began at Ballard Spahr in 2005 or 2006. But, Mr. Sabella's relationship with Mr. Korin began before that date and Mr. Sabella has not justified using the higher hourly rate.

For these reasons, Mr. Korin's reasonable hourly rate is $200 per hour throughout this litigation.

### C. Reasonable Number Of Hours

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 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 on 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 the total number of hours by at least 25 percent. Respondent argues that the participation of Mr. Korin, Ms. Kenney, and Mr. Shoemaker constitutes overstaffing, created inefficiency, and increased the amount of compensation sought beyond a reasonable limit. Resp't Resp. at 7-8. Mr. Sabella has not challenged the special master's authority to reduce the number of hours. Instead, Mr. Sabella maintains that there is no reason for the reduction because the total number of hours is reasonable. Pet'r Reply at 6. Because the question of overstaffing runs throughout this case, authorities guiding the analysis are reviewed in the following section.

### 1. Use of More than One Attorney

Determining whether Mr. Sabella should be reimbursed for the work performed by more than one attorney is part of awarding a "reasonable" attorneys' fee. See Pennsylvania v. Delaware Valley, 478 U.S. at 562 (1986). Like the fee-shifting statute interpreted by the Supreme Court in Delaware Valley, the Vaccine Act authorizes an award of a "reasonable" attorneys' fee. 42 U.S.C. § 300aa–15(e).

Like other aspects of the process for awarding reasonable attorneys' fees, no hard and fast rules explain when more than one attorney is permitted. Gay Officers Action League v. Commonwealth of Puerto Rico, 247 F.3d 288, 297 (1st Cir. 2001); American Civil Liberties Union of Georgia v. Barnes, 168 F.3d 423, 432 (11th Cir. 1999).

In recognizing that a fee applicant may seek compensation for more than one attorney, the Eleventh Circuit has stated that the fee applicant bears a special burden:

> Thus, a fee applicant is entitled to recover for the hours of multiple attorneys if he satisfies his burden of showing that the time spent

> by those attorneys reflects the distinct contribution of each lawyer to the case and is the customary practice of multiple-lawyer litigation. But the fee applicant has the burden of showing that, and where there is an objection raising the point, it is not a make-believe burden.

Barnes, 168 F.3d at 432. This burden is also reflected in a decision by the First Circuit: "Where tag teams of attorneys are involved, fee applications should be scrutinized with special care." Gay Officers Action League, 247 F.3d at 298. "There is a difference between assistance of co-counsel which is merely comforting or helpful and that which is essential to proper representation." Mares, 801 at 1206 (affirming trial court's elimination of all hours claimed by co-counsel in preparation for trial)

The Court of Appeals for Veterans Claims, a forum whose decisions are reviewed by the United States Court of Appeals for the Federal Circuit, has listed the factors to consider in evaluating requests for attorneys' fees for more than one attorney. According to that court, the following factors can inform the analysis: "(1) the complexity of the case, (2) the need for specialized knowledge, (3) whether the case presents an important issue of first impression, (4) the magnitude of the tasks involved in the litigation, and (5) identification of the specific and distinct tasks assigned to each lawyer." Baldridge v. Nicholson, 19 Vet. App. 227, 237-38 (2005). In general, these factors suggest that Mr. Sabella's use of more than one attorney caused an excessive number of hours.

### a. Complexity

First, evaluating the complexity of this case involves examining the case in two senses. Cases in the Vaccine Program can be compared to other forms of litigation. Additionally, cases within the Vaccine Program can be compared to other cases seeking compensation in the Vaccine Program. Under either analysis, Mr. Sabella's case is not especially complicated.

#### (1) Other Comparable Forms of Litigation

Litigation in the Vaccine Program is simpler than other comparable forms of litigation. "Comparable forms of litigation" include lawsuits alleging product liability against drug manufacturers and lawsuits alleging medical malpractice against administrators of vaccines, two forms of litigation replaced by Congress when it created the Vaccine Program. These torts require a plaintiff to establish not only causation but also some other element establishing culpability, such as design defect or breach of the duty of care.

Certainly, litigating a non-table case in the Vaccine Program, like Mr. Sabella's case, is not simple. Mr. Sabella was required to establish, by a preponderance of evidence, that the hepatitis B vaccine was the cause in fact of his condition.

How the burden to establish causation in non-table cases is characterized (light, heavy, etc.) is not important. What is important is that causation is an element common to non-table cases in the Vaccine Program, and causes of action for which the Vaccine Program is a substitute.

Assuming that "causation" in the traditional tort sense means the same as "causation" in the Vaccine Program, traditional tort litigation remains more complicated because a successful plaintiff is required to establish more elements. Therefore, comparing Mr. Sabella's case to litigation outside of the Vaccine Program does not indicate a special complexity to Mr. Sabella's case.

**(2) Comparable Cases in the Vaccine Program**

Mr. Sabella's case is more complicated than other cases in the Vaccine Program. Mr. Sabella alleged that the hepatitis B vaccine affected his brain, a complex organ. The brain is the subject of many disciplines including psychiatry, neurology, and psychology. Practitioners of these different fields of study had different views (and different nomenclatures) about what was wrong with Mr. Sabella.

Additionally, Mr. Sabella's case is more complicated because of his pre-existing problems. Mr. Sabella (and his experts) were required to evaluate whether his academic performance worsened after receiving the hepatitis B vaccine as a new problem or an aggravation of the pre-existing problem or merely the continuation of an ongoing problem. Comparing Mr. Sabella's condition pre- and post-vaccination is not as easy as the comparison for most petitioners who are (or at least seem to be) normal before receiving a vaccination.

On the other hand, in some respects, Mr. Sabella's case also became more complicated needlessly. In the litigation, Mr. Sabella introduced a theory that he suffered from chronic fatigue syndrome. Exhibit 45 at 2 (Dr. Poser's report). However, there was little evidence that this diagnosis was appropriate. See Pet'r Memorandum, filed Oct. 22, 2006.

In balance, Mr. Sabella's case probably falls toward the complex end of the spectrum of cases in the Vaccine Program. It also falls somewhere in the middle of the range of other forms of litigation.

**b. Specialized Knowledge**

The second factor to consider in evaluating whether more than one attorney is reasonable is whether any specialized knowledge is required. Here, Mr. Shoemaker's experience with the Vaccine Program should be an asset. Mr. Shoemaker is knowledgeable about the history of the Program. More than a relatively inexperienced attorney, Mr. Shoemaker could plan to rebut points raised by respondent.

Recognizing that Mr. Shoemaker's knowledge about the Vaccine Program is an "asset" is not quite the same as stating that specialized knowledge is "required." If specialized knowledge were required absolutely, then new attorneys could not litigate a claim successfully. By issuing Rules for vaccine cases, the Court of Federal Claims has attempted to establish a structure that facilitates the participation of new attorneys. Similarly, by issuing Guidelines, the Office of Special Masters also tries to foster the participation of new attorneys, such as Mr. Korin. The experience of the Office of Special Masters, including the undersigned, is that attorneys who represent petitioners in the program for the first time are able to do so competently. Without a more experienced attorney to guide them, these attorneys who are new to the Vaccine Program achieve results that are comparable to the results that would have been expected from a more experienced practitioner.

In contrast to Mr. Shoemaker, Ms. Kenney seems not to possess any specialized knowledge. Mr. Sabella's case was her first case in the Vaccine Program.

**c. Issue of First Impression**

The third factor is whether the case presents an important issue of first impression. This factor is not present in Mr. Sabella's case. Although Mr. Sabella's case was important to him, the case was not the lead case for a series of cases.

Although Mr. Sabella argues that his case was important because it was one of the first cases involving the hepatitis B vaccine to go to hearing, Pet'r Reply at 1, filed Dec. 18, 2007; this argument is not persuasive. First, decisions of special masters tend to depend heavily on the evidence presented in the case. Without the formation of an omnibus proceeding, Mr. Sabella's case would not affect, much less control, the outcome of any other case.

Second, Mr. Sabella's assertion about the primacy of Mr. Sabella's case appears to be in error. Research indicates that special masters had hearings in several other cases involving the hepatitis B vaccine while Mr. Sabella's case was being developed. E.g., Rezzonico v. Sec'y of Health & Human Servs., No. 99-498V, 2004 WL 3049765 (Fed. Cl. Spec. Mstr. Dec. 17, 2004); Everett v. Sec'y of Health & Human Servs., No. 04-205V, 2004 WL 2958452 (Fed. Cl. Spec. Mstr. Nov. 20, 2004); Doe v. Sec'y of Health & Human Servs., No. 99-670V, 2004 WL 3321302 (Fed. Cl. Spec. Mstr. Oct. 5, 2004); Capizzano v. Sec'y of Health & Human Servs., No. 00-759V, 2004 WL 1399178 (Fed. Cl. Spec. Mstr. June 8, 2004) (decision for five petitioners alleging that the hepatitis B vaccine caused rheumatoid arthritis), aff'd, 63 Fed. Cl. 227 (2004), rev'd and remanded, 440 F.3d 1317 (Fed. Cir. 2006); Bisson v. Sec'y of Health & Human Servs., No. 98-121V, 2003 WL 21730914 (Fed. Cl. Spec. Mstr. June 30, 2003). Consequently, Mr. Sabella's case does not qualify as a case of first impression.

### d. Magnitude of Tasks

Fourth is the magnitude of the tasks involved in the litigation. The tasks involved in Mr. Sabella's case were somewhat larger than typical litigation in the Vaccine Program, although the difference is not very significant as is detailed further below.

### e. Identification of the Specific and Distinct Tasks

The final factor is "identification of the specific and distinct tasks assigned to each lawyer." Mr. Sabella's attorneys fall well short on this factor. Respondent specifically challenged the use of more than one attorney. Resp't Opp'n at 2-8. Mr. Sabella has responded that "each attorney . . . had specific, separate functions." Pet'r Rep. at 3.[4] Yet, Mr. Sabella did not explain how the duties of Mr. Korin, Ms. Kenney and Mr. Shoemaker were segregated to prevent overstaffing or to contribute to advancement. Thus, this case is comparable to Barnes in which the circuit court reversed a district court's award of attorneys' fees because, in part, the fee applicant did not explain how additional attorneys contributed to the advancement of the case. Barnes, 168 F.3d at 433.

Mr. Sabella states "Mr. Korin . . . performed functions more closely associated with direct client contact, i.e. working with treating doctors, obtaining affidavits, and working with petitioners to complete the record – including expert evaluations." Pet'r Reply at 3-4. This description may capture some of (or even most of) what Mr. Korin did, but Mr. Korin also performed other tasks, such as attend status conferences (see entries of May 7, 2003, September 24, 2004, and December 15, 2004) and review reports of respondent's expert (see entry for September 8, 2004).

Moreover, what Mr. Sabella describes as Mr. Korin's functions overlap with tasks performed by Ms. Kenney and Mr. Shoemaker. For example, when Mr. Shoemaker was not counsel of record, he charged time for reviewing updated medical records, reviewing the report of an expert after it was filed, and attending a status conference. Entries for November 9, 2004, through December 15, 2004. Mr. Shoemaker also even charged twice for reviewing a letter sent by Ms. Kenney enclosing a payment to an expert. Entries for October 3, 2005, and October 14, 2005. Mr. Shoemaker's activities are not different in any meaningful way from the tasks that Mr. Korin was performing around the same time.

The lack of delineation of responsibility among counsel runs counter to a case in which a circuit court affirmed a trial court's decision to award compensation to more than one attorney.

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[4] The ellipses indicates that a portion of Mr. Sabella's brief was deleted. The deleted passage states "as the special master noted in the hearing." The undersigned does not recall making this note during the hearing and a review of the transcript has not indicated such a discussion took place on the record. However, this comment could have been made while off-the-record.

Gay Officers Action League, 247 F.3d at 298 (noting "the attorneys' proffer to the district court persuasively described their division of responsibility and their need for teamwork.").

Similarly unpersuasive is Mr. Shoemaker's assertion that his firm prefers to work with local counsel. Mr. Shoemaker did not cite any examples of cases in which he worked with local counsel. See Pet'r Reply, filed Dec. 18, 2007, at 3 n.3. Except for Mr. Sabella's case, Mr. Shoemaker has not represented a petitioner jointly with a local attorney in the experience of the undersigned. Other special masters did not recall this type of arrangement. A search of Westlaw revealed only one possibly relevant case, Hill v. Sec'y of Health & Human Servs., No. 03-619V, 2007 WL 5160382 (Fed. Cl. Spec. Mstr. July 19, 2007). Hill, however, arises in the context of obtaining guardianship for a minor petitioner. Hill does not illustrate a pattern of retaining local counsel to determine whether a petitioner, like Mr. Sabella, is entitled to compensation pursuant to the Vaccine Act. Thus, the accuracy of Mr. Shoemaker's statement is questionable.

In sum, Mr. Sabella has largely failed to establish that his use of more than one attorney was reasonable. For cases involving a single petitioner, virtually all cases in the Vaccine Program are litigated by a model in which one attorney has primary responsibility. (Cases that are the lead cases in omnibus proceedings are sometimes staffed with attorneys from more than one law firm. But, these cases are exceptional.) Often the lead attorney is assisted by an associate and/or paralegals.

One model of an efficient division of responsibilities actually comes from Mr. Shoemaker's firm. Mr. Shoemaker usually appears at status conferences and conducts the trial. His associate, Ms. Knickelbein, is primarily responsible for gathering medical records. A third attorney, Ms. Gentry, handles damages. This division of responsibilities has been accepted for many years because it should minimize the cost in that attorneys with the lowest billing rate perform the more basic functions.

In contrast, the relationship among Mr. Korin, Ms. Kenney, and Mr. Shoemaker has not been delineated. Each attorney appears to be doing a little bit of everything. Without having areas of responsibility, the attorneys collectively spent more time on this case than was reasonable.

Examples of when attorneys duplicated work appear throughout the time sheets. Some of these examples are set forth in the sections below. For ease of analysis, this litigation can be divided into five periods.

### 2. First Period: Beginning until Petition Was Filed

Time sheets from Kenney & Kearney, LLP, the law firm where Mr. Korin and Ms. Kenney worked in 2002, reflect activities of those attorneys and their staff. The time sheets show that from the first entry, which was on June 5, 2002, until the petition was filed, November 18, 2002, the two attorneys spent 109.3 hours on this case. Additionally, staff members spent 75.6

hours. Given that Mr. Korin and Ms. Kenney each charged $200 per hour and that the staff's time was charged at a rate of at least $70 per hour, the asserted value of the attorneys' time for bringing the petition exceeds $27,000. This is an unreasonable amount of money because an excessive number of hours were spent.

Mr. Sabella's case was the first time Mr. Korin or Ms. Kenney represented a petitioner in the Vaccine Program. Thus, they (or their staff at their direction) performed activities, such as basic legal research about this program, that an attorney with more experience in this program would not require. To some extent, the lower requested hourly rates for Mr. Korin and Ms. Kenney ($200 per hour) justify some additional time.

Nevertheless, the relatively lower hourly rate does not entirely justify all the number of hours spent in preparing the petition. The amount requested ($27,000) is on the high end of the total amount of attorneys' fees and costs the undersigned has awarded in cases in which petitioners filed at least one expert report but the case resolved without a hearing. (Eight cases fit this category.) As emphasized, awards in those cases include an award for the attorneys' costs, meaning that there was compensation for an expert. In contrast, here, Mr. Sabella seeks more than $27,000 for merely his attorneys' fees. Although Mr. Korin and Ms. Kenney spent time developing affidavits from Dr. Condolucci and Mr. Knast, who testified as experts, the $27,000 does not include charges from Dr. Condolucci or Mr. Knast.

These other cases are also different that the awards in the other cases compensated the petitioner for the attorneys' work on the entire case and in Mr. Sabella's case, the attorneys only had gathered medical records and drafted the petition. Petitioners' attorneys were compensated for activities such as reviewing respondent's report, analyzing respondent's expert report, and negotiating a settlement. At the preliminary stage of Mr. Sabella's case, the attorneys had not performed any of these activities.

As the authorities cited in section II. C., above indicate, a reduction in the number of hours is not required to be justified on a line-by-line or hour-by-hour basis. However, the following points are identified as places where some inefficiency and/or duplication of efforts increased the number of hours.

First, Mr. Korin and Ms. Kenney duplicated some work. See entries for June 7, 2002 (initial interview with client); September 9, 2002 (traveling and meeting with one of Mr. Sabella's treating doctors); October 24-25, 2002 (discussions with Mr. Knast); October 29, 2002 (meeting between the two attorneys).

Second, the firm spent a very long amount of time developing a medical chronology. Most of this work was done by a paralegal, appropriately. However, the paralegal spent days on this task. See especially entries for July 19, 22-24, August 21, 2002, September 6, 8, 27, 2002, and October 9-10, 2002. Although the staff member often describes particular records as "voluminous," the number of pages of medical records actually filed was approximately 750.

Admittedly, this number of pages could not be summarized at one sitting. However, the amount of time spent on this project was so long that it suggests the paralegal could have been more cursory in his or her summary.

Third, Mr. Korin spent time developing a report of economic damages with Mr. Wolf. This report was not necessary for two reasons. First, in the Vaccine Program, investigations about damages are deferred until after there is some agreement that a petitioner is entitled to some compensation. Office of Special Masters, Guidelines for Practice Under the National Vaccine Injury Compensation Program, (1996) § X, citing the 1989 amendments to the Vaccine Act and the Chief Special Master's General Order of April 22, 1991. The purpose of this instruction is to avoid expenses in calculating damages that are unnecessary. Second, even if Mr. Sabella were required to present some information about damages, Mr. Sabella did not need to retain an economist to determine his lost wages because that calculation is set out by statute. 42 U.S.C. § 300aa–15(a)(3)(B); see also Holihan v. Sec'y of Health & Human Servs., 45 Fed. Cl. 201 (1999). Additional information about Mr. Wolf's report is found in section II.B.6., below.

Fourth, Mr. Korin and Ms. Kenney spent an unusually long time drafting documents, including the petition, an affidavit for Dr. Condolucci, an affidavit for Mr. Knast, an affidavit for Mr. Sabella's mother, and an affidavit for Mr. Sabella. See, e.g., entry for November 4, 2002 (review of second draft of the petition); November 10, 2002 (review of third draft of the petition). The final product of these documents was of high quality. For example, the petition summarizes many medical records and cites to the underlying exhibit. Discounting time spent on drafting a petition, could unintentionally, suggest that attorneys should submit work of poorer quality.

Nevertheless, petitions in this program do not usually require the amount of time for successive revisions as was done in this case. A more limited amount of time is appropriate because much of the petition summarizes or quotes medical records and the task of summarizing medical records was already done by a paralegal.

Fifth, as already noted, Mr. Korin, Ms. Kenney and staff at their direction needed to learn about the Vaccine Program. The reasonableness of this amount of time (at $200 per hour for the attorneys) is difficult to evaluate. But, the attorneys' unfamiliarity with the Program probably contributed to some increase in the number of hours beyond a reasonable limit. Similarly, Mr. Korin is not entitled to compensation for the time required to obtain membership in the bar of the United States Court of Federal Claims. See Velting v. Sec'y of Health & Human Servs., No. 90-1432V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996); Lee v. Sec'y of Health & Human Servs., No. 90-15V, 1991 WL 128136, *1 (Cl. Ct. Spec. Mstr. June 28, 1991). Thus, this time, albeit very small, is not compensable.

On a whole, a reasonable attorneys' fee for filing this petition is $10,000. Notably, this petition contained virtually all the petitioner's medical records and complete reports from two experts.

### 3. Second Period: From Filing of the Petition until Mr. Shoemaker's Participation

The second period begins when the petition was filed on November 18, 2002. It ends when Mr. Shoemaker began participating in the case on April 25, 2003. In this time, Mr. Sabella's counsel of record was Mr. Korin, who was assisted by Ms. Kenney, another attorney in the same firm. During this six-month period, the attorneys charged 78 hours and staff members charged approximately 28 hours. The value for this work is approximately $17,500. Again, this is an excessive amount of time, which, when entered into the lodestar equation, causes an unreasonable amount of money.

In terms of what is reflected on the docket, the most significant advance of the litigation during these six months was that respondent filed his report, pursuant to Vaccine Rule 4, on March 27, 2003. The attorneys' time sheets reveal that they were performing additional work. Primary activities included continuing to learn more about the Vaccine Program, see entries for Nov. 22, 2002, Dec. 5, 11, 16, 2002, Feb. 3, 2003 (reviewing Watson), April 15-16, 2003; investigating a potential medical malpractice case against the doctor who administered the vaccination to Mr. Sabella, see entries for Jan. 27-28, 2003, Feb. 7 and 10, 2003 (research on statute of limitations); and searching for doctors willing to act as an expert, see entries for Jan. 6, 21, 29-31, 2003; Feb. 3, 6, 2003; March 19-28, 2003 (investigating Dr. Geier). Additionally, Mr. Korin attended a seminar on vaccines in Boston on March 6-7, 2003, which he included on his petition for fees.

The general impression is that $17,500 is an unreasonable amount of money. The cause may be either that the attorneys' hourly rate is too high, or that the attorneys spent too much time on activities or a combination of both a high hourly rate and a high number of hours. The practical solution is to eliminate some number of hours so that the amount of attorneys' fees is reasonable. See Rupert ex rel. Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293, 303 (2003) (stating that after the hourly rate is established, "the number of hours billed for a given task can be adjusted.")

Some activities are not compensable. Work in connection with a potential malpractice action against the doctor who administered the vaccine is not compensable because this work is not required to prosecute a petition in this program.

Another non-compensable activity is Mr. Korin's trip to Boston for a seminar. Mr. Korin states that he spent a total of 21.30 hours (at $200 per hour) traveling to and attending this seminar. Pet'r Mot., tab 4, Exhibit B, at 85. This time is denied.

Attendance at seminars in which an attorney learns about a field of law is not compensable. United States ex rel. Averbach v. Pastor Assoc., P.C., 224 F.Supp.2d 342, 353 (D.Mass. 2002) (False Claims Act); In re Agent Orange Product Liability Litigation, 611 F.Supp. 1296, 1322 (D.C.N.Y. 1985) (class action), aff'd in part and rev'd in part, 818 F.2d 226 (2d Cir.

1987). Mr. Sabella cites no cases, and research by the undersigned has not identified any cases that awarded attorneys' fees for the cost of a seminar.

After eliminating these non-compensable activities, the amount of time requested remains unreasonably high. Some portion is attributable to having two attorneys duplicating work unnecessarily. For example, it appears that a telephonic status conference was held on January 6, 2003. Mr. Korin prepared for the status conference, attended the status conference, and wrote a memo about the status conference. Ms. Kenney also attended the status conference, reviewed Mr. Korin's memo, and wrote her own memo. The combined amount of time was 1.3 hours for a status conference that lasted around ten minutes. If only one attorney were working on the case, the expected amount of time would have been less than 1.3 hours as requested in this case. See Mares, 801 F.2d at 1202-03 (stating that a trial court is not required to specify the reasonable limit for an activity when reducing the number of hours awarded). Specifying other specific examples of duplicative work is not necessary because special masters possess the discretion to reduce hours by a percentage.

On the other hand, Mr. Korin and Ms. Kenney pursued obtaining experts at an early stage in the litigation. Most of these attempts were not successful in that the doctors identified in the time records did not file reports. Nevertheless, compensating the attorneys is appropriate for these efforts. A hypothetical and reasonable petitioner would want (and would pay) his or her attorneys to find experts that can assist the case. Thus, although a more experienced attorney would not normally incur significant costs in searching for an expert because experienced attorneys routinely draw from the same pool of experts, the task of looking for an expert is generally compensable. See Planned Parenthood of Cent. New Jersey v. Attorney General State of New Jersey, 297 F.3d 253, 271 (3d Cir. 2002) (affirming award of attorneys' fees to prepare an expert who did not testify due to a scheduling conflict).

In addition to advancing Mr. Sabella's case specifically, Mr. Korin's search for an expert offers the possibility of improving the Vaccine Program generally. Attorneys who are new to the Vaccine Program can improve it by retaining doctors who have not testified in this program as an expert previously. These new experts, in turn, can offer different perspectives that inform the decisions of special masters. To encourage the participation of new attorneys and new experts, these hours are generally compensable.

Taking into account the various factors, an appropriate amount of compensation for activities performed during this second time period is $10,000.

#### 4. Third Period: From Mr. Shoemaker's Participation Until Mr. Shoemaker Became Counsel of Record

The third period begins when Mr. Shoemaker began participating in the case, April 25, 2003. At this time, Mr. Korin was counsel of record and continued as counsel of record

throughout the entire third period. The order granting a substitution of counsel, which was filed on December 16, 2005, ends the third period.

For work performed by his attorneys in this period, Mr. Sabella seeks approximately $50,000. Mr. Korin and Ms. Kenney have charged approximately 140 hours at $200 per hour. Their support staff has charged approximately 60 hours at approximately $70 per hour. In addition, Mr. Shoemaker has charged for approximately 50 hours of work. For purposes of analysis, Mr. Shoemaker's hourly rate is assumed to be $250 per hour, although he also charged $275 per hour. Other people in Mr. Shoemaker's firm charged approximately 22 hours at a simplified rate of $150 per hour. As stated, the total sought for this period of time is approximately $50,000.

The docket shows that during this time, the following activities occurred. Mr. Sabella filed a set of nine more medical records, which essentially completed the development of medical records. Mr. Sabella also filed the report of Dr. Pretorius and the report of Dr. Geier. Respondent filed a second report from a neurologist (Dr. Herskowitz) and a specialist in infectious diseases (Dr. Ward). Mr. Sabella filed an expert report from Dr. Poser and, about three months, later a report from Dr. Rubin. Respondent filed another report from Dr. Herskowitz and Mr. Sabella filed two more supplemental reports from Dr. Rubin. Seven status conferences were held during this period.

Undoubtedly, Mr. Sabella's attorneys advanced his case. The question is whether Mr. Sabella has justified the amount of time that they spent. "It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero." Mares, 801 F.2d at 1210.

Two activities can be removed relatively easily. Time spent obtaining a report from Dr. Geier was unreasonable. As discussed in more detail in section III.B.2., below, a reasonable, paying client probably would not choose to invest in a report from Dr. Geier. Thus, the attorneys should not be compensated for pursuing this request. In addition, time spent obtaining a report from Dr. Pretorius is also unreasonable. See section III.B.5, below. Mr. Sabella has not established that these activities were reasonable. Thus, they are eliminated.

After eliminating these activities, there remains the heart of Mr. Sabella's case – the report of Dr. Poser, a neurologist, and the reports of Dr. Rubin, a neuropsychiatrist. (At this point, Mr. Sabella had already filed the other important evidence, the report of Dr. Condoluci and the report of Mr. Knast.) Against these reports, respondent filed the report of Dr. Herskowitz and Dr. Ward.

The process of filing medical records from approximately ten medical providers, of producing reports from two experts, and of analyzing reports from two contrary experts reasonably takes much less time that the amount of time charged by Mr. Sabella's attorneys.

Mr. Shoemaker's participation in the case raises a question about how his involvement advanced Mr. Sabella's interest. In this context, it is helpful to review the qualifications of Mr. Korin and, to a lesser extent, his colleague Ms. Kenney. If Mr. Korin were not representing Mr. Sabella competently, then adding another attorney would be appropriate. (Although that situation could raise the question of whether Mr. Korin should have remained on the case at all.)

It appears that Mr. Korin, with the assistance of Ms. Kenney, was representing Mr. Sabella reasonably well. Although the undersigned was not assigned this case during this time, a review of the orders issued by the previous special master and other documents do not evidence any particular concerns with Mr. Korin's competence.

A review of Mr. Korin's background supports an expectation that Mr. Korin would represent Mr. Sabella competently. Mr. Korin began practicing law in 1971. His skill as a trial attorney is reflected in his certification by the Supreme Court of New Jersey in 1982 with recertifications being conferred in 1996 and 2003. Pet'r Mot., tab 4, Exhibit A, at 49 (curriculum vitae of Joel B. Korin). Mr. Korin has authored several publications discussing medical malpractice and has also taught at seminars in this field. Id. at 51-54. Mr. Korin's experience with medical malpractice is also evidence by a number of reported decisions. E.g., Reed v. Bojarski, 764 A.2d 433 (N.J. 2001); Carey v. Lovett, 622 A.2d 1279 (N.J. 1993).

Finally, the undersigned did personally observe Mr. Korin's performance, notably during the two-day hearing in September 2006. Mr. Korin's skill in advocacy was consistent with his achievements and experience listed above.[5]

Ms. Kenney, the attorney who was primarily assisting Mr. Korin, began her legal career after graduating from law school in 1983. Since 1997, her practice has focused on representing plaintiffs in actions for personal injuries. Pet'r Mot., tab 4, at 42 (resume of Jane A. Kenney).

How Mr. Shoemaker contributed to the advancement of Mr. Sabella's case is not clear at all. If Mr. Shoemaker did not assist Mr. Korin during this time, would Mr. Sabella's case turned out differently? The answer is probably not.

In terms of significant advancements of Mr. Sabella's case, during this third period, there were only two. Mr. Sabella filed reports from Dr. Poser and reports from Dr. Rubin.

Mr. Shoemaker argues that his participation in the case during this time was reasonable because he spent "only" about 50 hours. Mr. Shoemaker seems to be arguing that because he spent so little time on the case, his participation was reasonable. Pet'r Reply at 4-5.

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[5] These compliments to Mr. Korin do not contradict the decision to award Mr. Korin $200 per hour for his work after 2005. See section II.B.2, above. Mr. Korin's abilities are only one factor in determining his hourly rate. Other factors include the market for legal services and any contractual relationship between Mr. Korin and his client.

This observation actually points in the opposite direction. If Mr. Shoemaker did not do much, why was what he did necessary? Mr. Korin's and Ms. Kenney's records show that they were handling the litigation. Mr. Shoemaker has not established that he influenced the course of litigation.

Is it possible that Mr. Shoemaker's effect was more than is apparent on the face of the time sheets and docket sheets? Perhaps. But, as the person requesting fees, Mr. Shoemaker bears the burden of explaining why his participation was necessary. See Gay Officers Action League, 247 F.3d at 297; A.C.L.U. v. Barnes, 168 F.3d at 432. Respondent particularly challenged the need for more than one attorney. Resp't Resp., filed Nov. 29, 2007, at 2-7. Yet, Mr. Shoemaker chose not to provide any specific examples of how he assisted in a way that Mr. Korin could not. See section II.C.1, above.

When Mr. Shoemaker started participating in this case, he necessarily discussed the case with Mr. Korin and reviewed materials. See entries for April 25, 2003; May 6, 2003. Mr. Korin and Ms. Kenney also transferred materials to Mr. Shoemaker. Entries for April 26 & 28, 2003.

One example of how multiple attorneys unnecessarily increased the amount of time is for the time charged for attending a status conference on May 7, 2003. This status conference was routine. Mr. Korin indicates that it lasted 18 minutes. The order following the status conference set deadlines for Mr. Sabella to file medical records and a report from an expert.

The simplicity of the status conference is not reflected in the amount of work performed by the attorneys. Mr. Korin, Ms. Kenney and Mr. Shoemaker talked before the status conference. All attorneys also attended the status conference. Mr. Korin and Ms. Kenney also wrote memos following the status conference. In total, for work associated with this one status conference, Mr. Sabella's attorneys seek $1,385. This status conference is an example in which one attorney could have easily performed the work much more efficiently than two (or three) attorneys.

The participation of a second law firm necessarily brought with it staff to support Mr. Shoemaker. Many activities performed by Mr. Shoemaker's staff would not have been necessary if Mr. Shoemaker worked at the same law firm as Mr. Korin because Mr. Shoemaker's support staff was duplicating work already performed by support staff at Mr. Korin's firm. See entries for June 9, 2003; July 21, 2003; July 31, 2003; August 4, 2003; August 14, 2003; December 8, 2003; February 19, 2004.

Another example of how the participation of two different law firms caused overstaffing is in regards to Mr. Sabella's visit to Dr. Pretorious. Beginning on June 30, 2003, there was a series of communications about this visit. Mr. Shoemaker talked to his associate, Ms. Knickelbein. Ms. Knickelbein called co-counsel. Mr. Shoemaker wrote e-mails to Ms. Kenney. Ms. Kenney writes e-mails to Mr. Korin. An attorney calls Dr. Pretorious's office. And so on. These communications continue through July 2003. This example demonstrates that Mr. Korin,

Ms. Kenney and Mr. Shoemaker did not divide responsibilities. One attorney (or probably one paralegal) could have accomplished this task without the involvement of anyone else.

Another example of how duplication of effort increased the costs is discussions with experts. On October 8, 2003, Mr. Korin, Ms. Kenney and Mr. Shoemaker participated in a conference call with Dr. Geier. (The process of scheduling this conference call on October 2, 2003, took Ms. Knickelbein roughly 30 minutes.) Then, Mr. Korin wrote at least one memo about the conference that Ms. Kenney read on October 14, 2003. Mr. Sabella's attorneys have not explained why all attorneys were required to talk with Dr. Geier.

This pattern repeated in December 2003, when the topic was neuropsychological testing. Mr. Shoemaker, Ms. Knickelbein, and Ms. Kenney each charged for participating in discussions.

Another example is the review of Dr. Herskowitz's report. Mr. Korin, Ms. Kenney, and Mr. Shoemaker each reviewed it. Entries for September 8, 2004 through October 7, 2004. If one attorney were responsible for this task, the total time would have been less.

The same is true for Dr. Poser's report. Entries from October 22, 2004 through November 14, 2004.

This pattern of multiple reviews by several attorneys was also followed for Dr. Rubin. See entries for February 9, 2005 (Mr. Korin) and February 24, 2005 (Mr. Shoemaker). On one occasion, Mr. Korin and Ms. Kenney both traveled to attend a meeting with Dr. Rubin. Entry for May 20, 2005. The attorneys do not explain why both were required to attend that meeting.

Sometimes, a number of attorneys charged time just to schedule appointments. E.g. entries for February 25, 2004; March 11, 2004; April 19, 2004; June 29, 2004; July 28 - August 2, 2004; March 29, 2005 thru April 4, 2005 (scheduling appointment for Mr. Sabella to visit a doctor). Whether a client would reasonably pay attorneys at least $200 per hour just to set up conference calls is questionable. These tasks are probably more appropriately handled by paralegals or secretarial support. Another example of work charged at an attorney's billing rate but which could have been done by a paralegal is the task of preparing an authorization for medical records. E.g., entry for December 15, 2004. Authorizations for release of medical records typically do not vary greatly and nothing indicates that Mr. Sabella's case required an authorization created especially for it.

During this period of time, Ms. Kenney performed administrative tasks that could have been done by a paralegal. See entries for June 9, 2005 (drafting what appears to be routine correspondence and scheduling a doctor's visit for Mr. Sabella); August 15, 2005 (drafting cover letter to Mr. Shoemaker); August 17, 2005 (dictating documents to accompany the filing of Dr. Rubin's report); September 20, 2005 (reviewing medical records, faxing material, and sending a check).

Duplication of effort between Mr. Korin and Ms. Kenney is seen in the preparation for a status conference held on September 1, 2005. See entries from August 30, 2005 to September 1, 2005.

Throughout this third period, Mr. Sabella's attorneys advanced his case. Yet, as the examples above indicate, the attorneys could have acted more efficiently. They could have accomplished approximately the same result by spending less time. Thus, the number of hours will be reduced to a reasonable number. The attorneys' reasonable hourly rate and a reasonable amount of time produce a result that $15,000 is a reasonable amount of compensation for this period.

### 5. Fourth Period: From When Mr. Shoemaker Became Counsel of Record Until The Entitlement Phase of the Case Ended

#### a. Summary Of Activities

The fourth period starts when Mr. Shoemaker replaced Mr. Korin as Mr. Sabella's counsel of record. The fourth period ends on July 12, 2007, when Mr. Sabella accepted the judgment of the court ending his case, except for the attorneys' fees portion.

For activities charged during the fourth period by his attorneys and their staff, Mr. Sabella seeks approximately $50,000. Mr. Korin has charged approximately 50 hours of time. Staff supporting him has charged an additional 55 hours and generally charged approximately $70.00 per hour. Mr. Shoemaker, counsel of record for this time, charged 100 hours at $300 per hour. Other people in Mr. Shoemaker's office have charged nearly 20 hours.

This transition from Mr. Korin to Mr. Shoemaker occurred shortly after Mr. Korin's firm, Kenney & Kearney, P.C., ceased to exist. See Pet'r Mot., tab 4 at 38 (Korin Affidavit ¶ 5). Whether the dissolution of the firm contributed to the change in Mr. Sabella's counsel is not known. After Mr. Shoemaker became counsel of record, Mr. Korin continued to participate with the case. Ms. Kenney, however, did not.

During this time, Mr. Sabella filed a compact disc containing 40 articles cited by Dr. Poser in his report. Respondent filed a report from Dr. Brenner, a rheumatologist, as well as associated literature. On June 19, 2006, a hearing to receive the testimony of some witnesses was scheduled for September 14-15, 2006. Mr. Sabella indicated that the witnesses to testify were Jerome Knast, Ph.D.; Alan Rubin, M.D., David Condolucci, M.D.; Christopher and Cindy Sabella. Pet'r Status Report, filed August 7, 2006. It was anticipated that testimony would be received in two sessions. At the first session, doctors who treated Mr. Sabella would testify about their conclusions. After allowing some time for the transcript to be reviewed, other doctors, who did not treat Mr. Sabella, would present their opinions at a separate hearing.

On September 1, 2006, Mr. Sabella filed the report of Dr. Yehuda Shoenfeld, an immunologist. He also filed the report of Dr. Carlo Tornatore, a neurologist. Mr. Sabella obtained a report from a second neurologist because Dr. Poser was forced to withdraw from this case due to an unfortunate decline in his health.

Approximately one week before the hearing, Mr. Sabella filed additional materials relating to his witnesses. This material included notes from Mr. Sabella's visits with Dr. Rubin, exhibit 72.

A hearing was held on September 14-15, 2006. Mr. Sabella called five witnesses. In addition, at the court's request, Mr. Sabella arranged to have Thomas Lodge, a school psychologist from Mr. Sabella's high school, testify. Tr. 100-27. Both Mr. Korin and Mr. Shoemaker conducted examinations of the witnesses on the first day. However, on the second day during which only a single witness testified, Mr. Korin conducted the examination. Mr. Shoemaker was not present on the second day. Respondent was represented by a single attorney at the hearing.

Immediately following the hearing, the undersigned discussed preliminary views of the evidence. The undersigned suggested that the parties may want to settle this case.

The second session of testimony was scheduled for December 11, 2006. Order, filed November 15, 2006. However, three business days before the hearing, the parties reached an agreement in principle to resolve this case. Following routine practice, the parties' stipulation eventually was reflected in a decision issued on May 21, 2007.

**b. Determination of Reasonable Amount of Compensation**

The attorneys' billings during the previous period of time raised the question of why Mr. Shoemaker was involved in the case at all. Mr. Korin was competently representing Mr. Sabella. Thus, the need for another attorney to assist was not clear. In determining the reasonable number of hours from May 2003 to December 2005, the duplication in work was a factor.

The time period, spanning from December 2005 to July 2007, raises a similar question. After Mr. Shoemaker became counsel of record, why did Mr. Korin continue to participate in this case? Respondent's brief fairly asks this question. Resp't Resp, filed Nov. 29, 2007, at 6. However, Mr. Sabella has not offered any explanation as to the division of responsibility between law firms. See section II.C.1.e, above.

The questionable need for two attorneys is most apparent at the two-day hearing. The hearing was not especially difficult because five of the six witnesses were friendly. On the first day, Mr. Sabella and his mother testified. They obviously were called to offer facts in support of Mr. Sabella's case. Dr. Rubin and Mr. Knast were also called as witnesses on the first day. They were also friendly witnesses in the sense that they were retained by Mr. Sabella to offer opinions

about him. On the second day, Mr. Sabella called Dr. Condoluci who also had written an opinion in support of Mr. Sabella's claim for compensation.

The only witness who was not obviously supportive of Mr. Sabella's claim was Mr. Lodge, who testified during the first day. The undersigned requested that Mr. Sabella seek the testimony of Mr. Lodge because Mr. Lodge evaluated Mr. Sabella during high school. Tr. 126-27. Mr. Lodge was a neutral witness in the sense that he was not paid by either side. Mr. Lodge was not hostile to Mr. Sabella's claim and met with Mr. Korin the night before his testimony to review materials. Tr. 101.

An attorney with more than 10 years of experience in litigating medicine-based cases can reasonably conduct the examination of five friendly witnesses and one neutral witness over a two-day period. In other cases, the undersigned has observed Mr. Shoemaker examine three witnesses (this group of three is usually: the petitioner, an expert retained by petitioner, and an expert retained by respondent). Mr. Shoemaker has done so competently and without needing the assistance of a second attorney. Mr. Shoemaker's experience in being the sole attorney at a trial is not unusual. Almost all cases in which the claims of a single petitioner are at issue (a category that excludes omnibus proceedings) are tried by a single attorney. Mr. Shoemaker did not establish any persuasive reason why Mr. Sabella's case falls outside of the norm.

Furthermore, respondent's use of only one attorney is an example (albeit not overwhelming) that one attorney was sufficient for the two-day hearing. Although the number of attorneys from respondent does not equate automatically to the right number of attorneys from petitioners, it is some measure of the complexity of the case. Respondent used only one attorney. Respondent's counsel was prepared for all witnesses and asked appropriate questions. Respondent did not increase the complexity of the two-day hearing by assigning more than one attorney.

Besides the preparation for, travel to, and participation in the hearing, attorneys were required to perform other tasks during this period of time. One example of a task that is done by an attorney is attending status conferences. However, other tasks such as filing reports from experts with associated literature and preparing material for trial may be done efficiently by paralegals or other support staff.

The determination of the reasonable amount of compensation for Mr. Sabella's attorneys for this period is based upon several factors. The starting point is a consideration of the attorneys' time sheets, which show the tasks that were performed. However, for the reasons discussed, not all the time that was worked was reasonable. Thus, some adjustments are necessary to make the amount of attorneys' fees "reasonable" as required by the statute.

The reasonable amount of attorneys' fees for activities performed during this time is $23,000.

This figure includes compensation for negotiating a settlement and completing the associated paperwork, which totals approximately $2,400. For these items, Mr. Sabella is entitled to the full amount requested. For these tasks, one of Mr. Shoemaker's associates, Ms. Gentry, took the lead with some minimal oversight and review by Mr. Shoemaker and Mr. Korin. Thus, the problem of duplication of work due to lack of delineation of responsibility did not infect this portion of the case. The time sheets show that Ms. Gentry was responsible. She accomplished these tasks using a reasonable amount of time. Therefore, a reduction for these tasks is not necessary.

### 6. Fifth Period: Fee Application

Mr. Sabella also seeks attorneys' fees for the time his attorneys have spent litigating the amount of attorneys' fees. Respondent has not opposed some compensation for this work, although respondent maintains that Mr. Sabella should not be compensated for filing a reply brief because the reply brief adds little of substance. Resp't Resp. (Second) at 13. For this activity, $4,207.50 is awarded.

For work in preparing the initial application for attorneys' fees, Mr. Sabella seeks approximately $1,000. Mr. Shoemaker has requested only three tenths of an hour. Mr. Korin has not requested any compensation for any work that he did in submitting his time. Almost all of the work was done by one of Mr. Shoemaker's associates.

The process for resolving Mr. Sabella's application for attorneys' fees has been more protracted than normal due to several factors. First, the size of the request prompted a strong (and well-merited) objection from respondent. Some of respondent's objections were in the nature of an observation that Mr. Sabella has not provided any information about a particular topic, such as justification for Mr. Korin's proposed hourly rate, and a request for that information. Resp't Resp., filed Nov. 29, 2007, at 11. Mr. Sabella could have streamlined the process by submitting information with his initial fee application. See Office of Special Masters, Guidelines for Practice Under the National Vaccine Injury Compensation Program § XIV.A. (Rev. Ed. 2004). Second, after the case appeared ready for decision, a panel from the Federal Circuit released the decision in Avera, which could have affected the amount of Mr. Sabella's recovery. Thus, additional briefs on Avera were requested. In all, Mr. Sabella filed four additional briefs after his initial fee application.

For the briefs filed on December 18, 2007, and February 15, 2008, Mr. Shoemaker has increased the amount of attorneys' fees originally requested. The total increase for these 2 briefs is $3,422.50.[6]

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[6] Mr. Sabella's initial application requested $53,203.20 in attorneys' fees for Mr. Shoemaker. Pet'r Mot. Exhibit 1. In Mr. Sabella's second brief after filing his initial application, Mr. Sabella requested $56,625.70. Pet'r Reply (Second), filed Feb. 15, 2008, at 14.

Inconsistently, for the two briefs discussing Avera, Mr. Shoemaker has not directly increased the amount of attorneys' fees requested. Rather, he has reserved the right to amend his application to account for additional time. Because Mr. Shoemaker has not requested additional time, this decision does not award compensation for Mr. Shoemaker's additional efforts regarding Avera.[7]

Respondent's observation that Mr. Sabella's reply briefs "add[] little information" is, in some respects, correct. As discussed throughout this opinion, Mr. Sabella did not meet his burden of establishing the reasonableness of many items. Mr. Sabella's failure, therefore, has led to a reduction in the amount of fees and costs requested to an amount that is reasonable in light of the available information.

On the other hand, Mr. Sabella's reply briefs do add some information. Mr. Sabella's reply briefs also present arguments to support Mr. Sabella's request. Most of these arguments are not persuasive. However, the arguments are not frivolous. Separating the good from the bad in Mr. Sabella's reply briefs to award compensation only for the meritorious portions of Mr. Sabella's reply briefs would be difficult. Therefore, Mr. Sabella is awarded the majority of time requested associated with the reply briefs.

From the amount Mr. Sabella requested for his reply briefs, $215 will be deducted, representing one hour of work by Mr. Shoemaker's associate, who appears to be responsible for writing the reply brief. Mr. Sabella's reply brief filed on December 18, 2007, contains attacks against respondent's counsel, personally. Personal attacks reduce the civility in litigation. (They may also have prompted respondent to object to compensation for the reply brief.) Personal attacks will not be ratified by an award compensating them. Cf. In re Cygnus Telecommunications Technology, LLC, Patent Ligiation, ___ F.3d ___, 2008 WL 3842906 *14 (Fed. Cir. 2007-1328 Aug. 19, 2008) (criticizing appellate brief that contains ad hominem arguments against opposing counsel).

Thus, for preparing the fee application and writing two briefs in support of the fee application, Mr. Sabella's attorneys are awarded $4,207.50 ($1,000.00 + $3,422.50 - $215.00).

### 7. Summary

Mr. Sabella is awarded $62,207.50 in attorneys' fees. This amount is reasonable, albeit considerably less than Mr. Sabella requested.

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[7] Because the undersigned requested a brief about Avera, Mr. Shoemaker possesses a reasonable basis for spending time on the brief. Mr. Shoemaker is not awarded any compensation for the Avera briefs because he has not requested any compensation. If Mr. Shoemaker had amended his application to account for these additional hours – just as he did for the two other briefs, Mr. Shoemaker's request could be adjudicated now.

Despite arguing that the amount requested in attorneys' fees is reasonable, Mr. Sabella provided no examples of cases in which a single petitioner has been awarded a comparable amount of money. Mr. Sabella did not demonstrate that the amount of hours spent or the dollars requested are reasonable by comparing Mr. Sabella's case to other cases from the Vaccine Program. This lack of comparison strongly suggests that Mr. Sabella's request is aberrational and unreasonable. The undersigned's own research reveals that Mr. Sabella's requested amount of attorneys' fees far exceeds previous awards in the Vaccine Program.

The awarded amount of attorneys' fees is within the top amounts the undersigned has awarded in attorneys' fees to a single petitioner. Other cases are roughly comparable because in one case a hearing was held and the parties filed extensive post-trial briefs before agreeing to resolve the case. In another, two separate days of hearing were held during which a total of four experts testified and the parties filed post-trial briefs. Mr. Sabella's case is not significantly more complicated than these other cases.

The invoices and other billing records submitted to support Mr. Sabella's petition for attorneys' fees and costs appear to lack "billing judgment" to which the Supreme Court referred in Hensley, 461 U.S. at 433-34. Billing more than $1,000 in fees for a single 15 minute status conference is excessive. Numerous entries of several attorneys duplicating work is another example. When all these factors are taken into consideration, the resulting reduction in fees was necessary.

## III. Costs

### A. Overview

Mr. Sabella does not state clearly the total amount of costs (as opposed to attorneys' fees) that he seeks. It appears that he seeks costs for the following items:

| Item | Amount |
|---|---|
| Postage | $199.28 |
| Printing | $1,196.50 |
| Photocopies | $128.50 |
| Additional Expenses [primarily travel] | $4,089.85 |
| Consultation - Mark Greenspan | $13,617.87 |
| Consultation - re literature | $0.00 |
| Expert Evaluation - Yehuda Shoenfeld | $7,750.00 |
| Expert Evaluation - Charles Poser [additional | $1,114.50 |

| Item | Amount |
|---|---|
| amount based upon proposed increase in billing rate] | |
| Costs - Kenney and Kearney [includes fees for reports from several experts] | $18,878.37 |
| Costs - Ballard Spahr [includes fees for testimony from several experts] | $14,826.00 |
| TOTAL | $61,800.87 |

The primary source of this information is the synopsis provided in 2008. Pet'r Reply, Attachment 1, filed February 15, 2008. This synopsis is modified in three respects. First, in an earlier brief, Mr. Sabella stated that the entry for "consultation - re literature" was duplicative and would be removed. Pet'r Reply at 12. Therefore, it is reduced to zero. Second, the entry for Dr. Poser is just the amount requested because Dr. Poser has raised his rates after the completion of this case. Id. at 9 & 13. Third, the entry for the costs for Mr. Korin's first firm comes from page 125 of tab 4 to Mr. Sabella's original application.

The total amount requested in costs is approximately three times greater than any previous award of costs made by the undersigned. In briefing, Mr. Sabella has not identified any case in which another special master has awarded a comparable amount of costs to a single petitioner.

Respondent has objected to many items of costs. For ease of analysis, these items can be classified into two groups – objections to costs for reports and testimony from various doctors and other objections. Respondent's objections are discussed in the following sections. Due to the length of the analysis, the analysis is confined to only those objections raised by respondent.

### B. Costs for People Retained To Produce Reports And To Testify

Mr. Sabella requests an award for doctors he retained to produce reports. The list of doctors includes: Dr. Mark Geier, Dr. Shoenfeld, Dr. Poser, Dr. Harold Pretorius, Dr. Allen Rubin, Mr. Jerome Knast, Ph.D., Dr. Condoluci, and one unnamed person. Respondent has interposed one or more objections to each request.

#### 1. Standard for Adjudication

Mr. Sabella 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 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. Sabella (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 into 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 work. 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.

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., Garnder-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 cost of a specific person is reasonable in the following sections.

### 2. Dr. Mark Geier

Mr. Sabella seeks a total of $5,375 for Dr. Geier's work. This amount is the sum of two different entries. See Pet'r Reply at 7 n.10. First, in October 2003, Mr. Korin's register shows that his firm paid Dr. Geier $750 for a "medical consultation." Pet'r Mot., tab 4 at 124. Second, Dr. Geier submitted an invoice to Mr. Shoemaker requesting $4,625 (18.50 hours at an hourly rate of $250.) Pet'r Mot., tab 4, at 34 (invoice from Dr. Mark Geier, Invoice No. 763). Respondent has objected. Mr. Sabella is awarded $1,000 for Dr. Geier's work.

Dr. Geier's training is in genetics. Exhibit 40 (curriculum vitae) at 2. He describes himself as "one of the leading experts in the world analyzing vaccines and their adverse reactions." Exhibit 41 ¶ 1. He prepared a report about Mr. Sabella. Dr. Geier opines that "the Hepatitis B vaccinations that [Mr. Sabella] received caused or significantly contributed to his current and apparently long term neurological sequela from which he currently suffers." Exhibit 41 ¶ 15. Dr. Geier attached 26 articles in support of his opinion. Although Dr. Geier did not testify about his opinion, he was scheduled to testify at a hearing on December 11, 2006. Pet'r Witness List, filed Dec. 4, 2006.

Two activities for which Dr. Geier seeks compensation are denied without the need for too much analysis. Mr. Korin's register shows a payment to Dr. Geier for $750 without any explanation of what tasks were performed. Pet'r Mot., tab 4, at 124 ("Invoice Number 28438, page 69"). In light of Dr. Geier's second invoice, there is no way to evaluate Dr. Geier's work to see if any portion was repetitious or otherwise unnecessary. Consequently, this item is denied.

Respondent has objected to paying Dr. Geier for 2.5 hours of "original publications." According to respondent, Dr. Geier has repeatedly attempted to obtain compensation for his original work through the vaccine program. Resp't Resp. at 9. Mr. Sabella did not deny this assertion. Additionally, Mr. Sabella did not offer any justification for why Dr. Geier should be compensated for "original publications," which do not appear connected to Mr. Sabella's case. See Pet'r Reply at 7-8. These 2.5 hours are denied. See Jeffries v. Sec'y of Health & Human Servs., No. 99-670V, 2006 WL 3903710 *15 (Fed. Cl. Spec. Mstr. Dec. 15, 2006) (denying Dr. Geier's claim for time spent on "original publications.")

The remaining tasks performed by Dr. Geier are (1) reviewing and summarizing medical records for 4.25 hours, (2) searching for literature for 4.0 hours, and (3) writing a report including a summary of the literature for 7.25 hours. Dr. Geier does not give the dates when he performed these tasks, although they must have been performed before February 10, 2004, the date of his invoice. Pet'r Mot., tab 4, at 34 (invoice from Dr. Mark Geier, Invoice No. 763).

Mr. Sabella has not explained why the work performed by Dr. Geier was necessary to advance his case, although respondent challenged the usefulness of Dr. Geier's work. Resp't Resp. at 8. Whether Dr. Geier's report advanced Mr. Sabella's case should be examined from

the perspective of a hypothetical, reasonable, and paying client when the report was obtained. Mr. Sabella did not address this point.

The hypothetical, reasonable and paying client would need to decide whether to retain an expert at a particular time. Events that happen later in the litigation may show, ultimately, that the retention of an expert was not productive, a dead-end. But, those later developments should not affect the evaluation of whether the initial decision to retain an expert was reasonable.

Here, Mr. Sabella filed Dr. Geier's report on February 27, 2004. Thus, it is appropriate to consider the state of Mr. Sabella's case as of early 2004 when Dr. Geier was retained to write a report. On November 18, 2002, Mr. Sabella filed a report from Dr. Condoluci, exhibit 9C, and a report from Jerome Knast, Ph.D, exhibit 17. Respondent believed that Dr. Condoluci's report and Mr. Knast's report did not establish that Mr. Sabella was entitled to compensation. Resp't Rep't, filed pursuant to Vaccine Rule 4 on Mar. 27, 2003, at 7-10. With his report, respondent also presented the report of Joel Herskowitz, a neurologist and psychiatrist. Exhibit A. Therefore, Mr. Sabella was well-justified in obtaining a report from an additional expert. The question becomes what type of expert should be retained.

Mr. Sabella's theory was that the hepatitis B vaccine significantly aggravated his underlying learning disability and/or the vaccine caused a new learning disability. Without defining precisely what problem Mr. Sabella had, it is clear that the problem was in his brain. Tr. 19 (Mr. Sabella's attorney's opening argument, stating "Clearly, there was evidence that there was brain involvement.") Thus, the relevant medical specialist to discuss how the hepatitis B vaccine affected Mr. Sabella, assuming that the vaccine did affect him, was someone knowledgeable about the brain. Obvious choices include a neurologist or a psychiatrist. Mr. Sabella eventually recognized the need for someone skilled in these fields because he eventually obtained reports from two neurologists (Dr. Poser and Dr. Tornatore) and a neuropsychiatrist (Dr. Rubin). See also Mr. Shoemaker's time entry for March 20, 2004 (indicating that case needs to be reviewed by a neurologist).

When Mr. Sabella obtained a report from Dr. Geier, the report was unlikely to advance the case. Because Dr. Geier's training is in genetics, his opinion about the cause of a neurological or pyschiatric problem was unlikely to be more persuasive than the competing opinion of Dr. Herskowitz. Mr. Sabella's attorneys should have been aware of the limited value of Dr. Geier's opinion because decisions of special masters, issued before Dr. Geier was retained in 2004, placed petitioners' attorneys on notice. See Dixon v. Sec'y of Health & Human Servs., No. 01-605V, 2003 WL 23218020 *9 (Fed. Cl. Spec. Mstr. Nov. 25, 2003) (stating "Dr. Geier is not a neurologist. . . . His testimony, however, does not address directly the core issue in this case, i.e., the presence or absence of an encephalopathy."), aff'd, 61 Fed. Cl. 1 (2004); Weiss v. Sec'y of Health & Human Servs., No. 03-190V, 2003 WL 22853059 *2 n.1 (Fed. Cl. Spec. Mstr. Oct. 9, 2003) (stating that Dr. Geier is not a neurologist and that "Petitioners must seriously consider whether they want to proceed with a witness whose opinion on neurological diagnosis is unacceptable."); Bruesewitz v. Sec'y of Health & Human Servs., No. 95-266V, 2002 WL

31965744, *16 (Fed. Cl. Spec. Mstr. Dec. 20, 2002) (stating that Dr. Geier's experience as "a board-certified geneticist and forensic medicine specialist does not qualify him to diagnose neurological diseases.") Notably, Mr. Shoemaker was petitioner's counsel in Bruesewitz.[8] In addition, Mr. Korin and Ms. Kenney also conducted some research on Dr. Geier. See entries for Feb. 6, 2003, March 19, 2003.

In early 2004, if attorneys (1) explained to a reasonable client that the opposing side has retained Dr. Herskowitz, a neurologist and psychiatrist, and (2) proposed retaining Dr. Geier, a geneticist whose opinions about neurological diseases have been criticized, then a reasonable person would not want to pay for Dr. Geier's work. The reasonable response – one that Mr. Sabella's attorneys eventually followed – would be to retain someone whose expertise could address Mr. Sabella's condition. Dr. Geier does not fit this category.

For these reasons, Dr. Geier's report was not necessary. Therefore, he is not entitled to compensation for writing his report.

Besides writing his report, Dr. Geier also performed the separate task of searching for literature. Dr. Geier has requested 4.0 hours for this time. In effect, Dr. Geier was working as a consultant to Mr. Sabella's attorney and/or other doctors retained by Mr. Sabella's attorneys to offer opinions. Several other doctors referred to Dr. Geier's report in their reports and/or testimony. See exhibit 54 (Dr. Rubin), exhibit 62 (Dr. Shoenfeld), tr. 400-01 (Dr. Condoluci).

Dr. Geier requests 4.0 hours for a "literature search." The amount of time appears reasonable, although this determination is far from clear cut. If an attorney conducted on-line legal research, the attorney could present information showing how much time was spent searching and could also present a list of the different searches. Whether similar features are available to doctors who search for literature is not known. Such information, if available, would improve the process of evaluating the reasonableness of the amount of time claimed by doctors when searching for literature.

In this case, there is no direct proof of how much time Dr. Geier spent searching for literature – only Dr. Geier's assertion. Dr. Geier did include 26 articles with his report. Several articles discuss an association between the hepatitis B vaccine and conditions different from Mr. Sabella's problems. See, e.g., exhibit 41, tab 10 (inflammation in kidney), tab 11 (muscle pain in shoulder), tab 12 (rheumatic disorders). The inclusion of these articles whose relevance and persuasive value are not readily apparent does not necessarily mean that Dr. Geier wasted time to find the more useful articles. Dr. Geier's statement that he spent four hours searching for articles is accepted.

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[8] In regard to the retention of Dr. Geier, Mr. Shoemaker's experience with how special masters evaluated Dr. Geier's opinion could have informed Mr. Korin's decision to retain Dr. Geier. However, the circumstantial evidence suggests that Mr. Shoemaker did not alert Mr. Korin to the possible disadvantages in retaining Dr. Geier.

A reasonable rate of compensation for Dr. Geier to search for literature is $200 per hour. Mr. Sabella has provided no information about the reasonable hourly rate for Dr. Geier. However, other special masters have determined Dr. Geier's hourly rate. Doe / 14 v. Sec'y of Health & Human Servs., No. redacted, 2008 WL 98299 *4-5 (Fed. Cl. Spec. Mstr. Mar. 28, 2008) (awarding $250 per hour when Dr. Geier reviewed the VAERS and VSD databases and answered an epidemiological challenge in an important paradigm case); Schrum v. Sec'y of Health & Human Servs., No. 04-210V, 2007 WL 1772056 *3-4 (Fed. Cl. Spec. Mstr. May 31, 2007) (awarding $175 per hour when Dr. Geier performed a general literature search that could been performed by an associate attorney); Densmore v. Sec'y of Health & Human Servs., No. 99-588V, 2006 WL 5668063 *5 (Fed. Cl. Spec. Mstr. Aug. 14, 2006) (same as Schrum).

Additionally, it is appropriate to compensate Dr. Geier for reviewing Mr. Sabella's medical records in a cursory fashion. Before Dr. Geier began to search for literature, he needed to understand the basic outline of Mr. Sabella's case. This information was available in the two reports that Mr. Sabella had already filed (one by Dr. Condoluci and the other by Mr. Knast). Respondent's Report was also available for Dr. Geier to review. The appropriate amount of time is 1.0 hour. Schrum, 2007 WL 1772056 at 4.

In sum, the appropriate total compensation for Dr. Geier is $1,000. This amount is for five hours of work (one hour to learn about Mr. Sabella's case and four hours to search for literature). The reasonable hourly rate is $200.

### 3. Dr. Charles Poser

Mr. Sabella seeks $2,600 for two reports written by Dr. Poser. Pet'r Mot., tab 4 at 36-37 (statement of Dr. Charles M. Poser). See Pet'r Reply at 7 n.10 (eliminating a duplicate billing). Dr. Poser requests $350 per hour for approximately 7.5 hours.

Dr. Poser's initial report offers the opinion that Mr. Sabella "is suffering from a postvaccinal (hepatitis B) myalgic encephalomyelitis / chronic fatigue syndrome." Exhibit 45 (report dated Oct. 25, 2004) at 2. His report includes an attachment, which appears to be a form statement, quoting publications that discuss methods of determining causation.

About one year later, Dr. Poser wrote another report, which was filed as exhibit 56. This report again discusses chronic fatigue syndrome. Unlike the previous report, Dr. Poser cited more than 40 articles about adverse effects of vaccinations. These were later filed as exhibit 60.

Unfortunately, after writing these reports, Dr. Poser suffered serious health problems. Hence, Mr. Sabella could not plan to call him to testify. (Although Mr. Sabella's witness list includes Dr. Poser as a potential rebuttal witness, Mr. Sabella previously indicated that Dr. Poser's health problems would prevent him from testifying.)

Mr. Sabella acted reasonably in retaining Dr. Poser. Before Mr. Sabella obtained a report from Dr. Poser, respondent had filed an expert report from Dr. Herskowitz, who is a neurologist and psychiatrist. Thus, Mr. Sabella acted appropriately in countering Dr. Herskowitz by filing a report of Dr. Poser.

Respondent did not object to the number of hours charged by Dr. Poser, which was 7.6 hours. This amount of time seems reasonable to write two reports, one of which included an extensive list of citations.

Respondent, however, does object to Dr. Poser's proposed hourly rate, which is $350.[9] Mr. Sabella supports Dr. Poser's proposed hourly rate by citing to another case, Kemper v. Sec'y of Health & Human Servs., Fed. Cl. 02-1489, in which, according to Mr. Sabella, Dr. Poser was awarded $350 per hour. In addition, Mr. Sabella argues that in one case, another expert (Dr. Kinsbourne) received $500 per hour and that the services offered by Dr. Poser are the equivalent of Dr. Kinsbourne. Pet'r Reply at 9 & n.12. This argument fails – merely because one doctor earns a certain hourly rate does not mean that another doctor is entitled to the same hourly rate.

Mr. Sabella's citation to Kemper is also not helpful. Although not published to an electronic database, the decision is available through the web site for the Court of Federal Claims. A review of this case shows that Kemper did not discuss Dr. Poser's hourly rate at all. Thus, Kemper does not stand as precedent for awarding Dr. Poser $350 per hour to avoid not including any compensation to Dr. Poser, the appropriate hourly rate will be borrowed from Jeffries v. Sec'y of Health & Human Servs., No. 99-670V, 2006 WL 3903710 (Fed. Cl. Spec. Mstr. Dec. 15, 2006). In Jeffries, Dr. Poser was awarded $200 per hour. This rate is adopted as the reasonable rate for Dr. Poser.

Consequently, the reasonable amount of compensation for Dr. Poser is $1,520. This amount is 7.6 hours at an hourly rate of $200 per hour.

#### 4. Dr. Yehuda Shoenfeld

Mr. Sabella seeks $7,750 for Dr. Shoenfeld's work. This amount reflects 15.5 hours of work at $500 per hour. Pet'r Mot., tab 4 at 35 (October 10, 2007 statement from Yehuda Shoenfeld).

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[9] During the briefing process, Mr. Sabella attempted to raise Dr. Poser's hourly rate to $500 per hour. This attempt is rejected summarily. Mr. Sabella has not shown that he incurred a cost of paying $500 per hour. In fact, an invoice submitted by Dr. Poser show that he charged only $350 per hour. Pet'r Mot., tab 4, at 36 (statement from Dr. Charles M. Poser). Without some evidence that Dr. Poser has charged $500 per hour, Mr. Sabella's attempt to seek more money for Dr. Poser seems based entirely upon an opportune moment to increase the hourly rates. See Adams v. Sec'y of Health & Human Servs., No. 01-267V, 2008 WL 2221852 (Fed. Cl. Spec. Mstr. April 30, 2008) (discussing experts' rates are set at time of retention).

Dr. Shoenfeld's report states that he joins "Dr. Geier's opinion that to a reasonable degree of medical and scientific probability the case of [Mr.] Sabella is one of encephalopathy occurring after Hepatitis B vaccinations. It is my opinion that the Hepatitis B vaccination that [Mr. Sabella] received caused or significantly contributed to his current and apparently long term neurological sequela from which he currently suffers." Exhibit 62 at 4 (filed Sept. 1, 2006). Dr. Shoenfeld referenced eight articles supporting his opinion that a vaccination can cause an encephalopathy. Dr. Shoenfeld's discussion of these articles in his report draws upon his background as an immunologist. See exhibit 63 (Dr. Shoenfeld's curriculum vitae).

Although Mr. Sabella filed Dr. Shoenfeld's report relatively late in the litigation, the overall context of the litigation indicates that Mr. Sabella's retention of Dr. Shoenfeld was reasonable. Before Mr. Sabella retained Dr. Shoenfeld, both parties had filed reports from neurologists. Mr. Sabella had filed reports from Dr. Poser and Dr. Rubin. Respondent had filed reports from Dr. Herskowitz. Respondent had also filed, on August 30, 2004, a report from Dr. Brian Ward, an immunologist and infectious disease specialist, as exhibits B and C. Dr. Ward discussed whether the hepatitis B vaccine can produce neurological sequela. Exhibit B at 5. Respondent had also filed a report from Dr. Alan Brenner. Dr. Brenner asserted that there is little evidence connecting chronic fatigue syndrome to encephalomyelitis. Exhibit G at 3.

Dr. Shoenfeld's opinion was useful and relevant in that he explained how a person responds to an immunization. His background makes him well-positioned to challenge the views asserted by Dr. Ward, an immunologist retained by respondent. Therefore, some compensation for Dr. Shoenfeld is appropriate.[10]

The reasonable amount of compensation for Dr. Shoenfeld is determined by multiplying the reasonable hourly rate by the reasonable number of hours. Once again, there is an absence of information about the reasonable hourly rate for Dr. Shoenfeld. This omission is particularly glaring because Dr. Shoenfeld practices in Tel Aviv, Israel. Exhibit 62 at 1. Respondent particularly argued that no justification for the proposed hourly rate was submitted. Resp't Resp. at 10.

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[10] If Dr. Shoenfeld were retained primarily to opine about chronic fatigue syndrome, then the value of his opinion would lessen for two reasons. First, little in Dr. Shoenfeld's background suggests that he has special experience in diagnosing or treating chronic fatigue syndrome. Second, the evidence that Mr. Sabella suffered from chronic fatigue syndrome was weak. The doctors, who saw Mr. Sabella and who testified, did not diagnose him with chronic fatigue syndrome. See tr. 426 (testimony of Dr. Condoluci explaining that chronic fatigue syndrome is a wastepaper diagnosis).

For these reasons, Mr. Sabella's argument that Dr. Shoenfeld's opinion was useful to address the report of Dr. Brenner, a rheumatologist retained by respondent to opine about chronic fatigue syndrome (see Pet'r Reply at 7 n.9), is not persuasive. However, Dr. Shoenfeld's opinion is relevant for another reason as discussed in the text.

Rather than submit information about Dr. Shoenfeld's hourly rate, Mr. Sabella provided information about another doctor, Dr. Kinsbourne, and argues that Dr. Shoenfeld's hourly rate should equal Dr. Kinsbourne's hourly rate. This is the same argument that Mr. Sabella makes in reference to Dr. Poser. Pet'r Reply at 9. Even if comparing Dr. Kinsbourne to Dr. Poser has any value (and it has very little or no value there), the comparison here between Dr. Kinsbourne and Dr. Shoenfeld is even more attenuated. Two points of contrast jump out. First, Dr. Kinsbourne and Dr. Shoenfeld specialize in different areas of medicine. Second, Dr. Shoenfeld lives in a foreign country. See Resp't Supp. Resp. at 8-9.

Mr. Sabella's failure to provide any meaningful information about the hourly rates for Dr. Shoenfeld could justify a decision not to award any compensation for his work. However, to avoid this result, a comparison will be made to another doctor in Dr. Shoenfeld's field. Dr. Joseph Bellanti is an immunologist who frequently testifies that a vaccine caused a particular condition. Dr. Bellanti practices in Washington, D.C. He has been awarded $350 per hour. Savin v. Sec'y of Health & Human Servs., No. 99-537V, 2008 WL 2066611*4 & n.8 (Fed. Cl. Spec. Mstr. Apr. 22, 2008), motion for review filed (May 22, 2008).

From Dr. Bellanti's rate of $350 per hour, one adjustment will be made. To account for a possible difference in cost of living and cost of practicing medicine in Washington, D.C. and Tel Aviv, Israel, $50.00 will be deducted from Dr. Shoenfeld's hourly rate. This deduction is, admittedly, not based upon any evidence showing the difference between the two places. However, a deduction is appropriate because without some accounting for possible differences Mr. Sabella (and Dr. Shoenfeld) would receive a windfall. See Rupert, 52 Fed. Cl. at 293-94 (vacating special master's finding regarding hourly rate when special master did not explain the basis for transferring an hourly rate for a paralegal in Los Angeles, California to an hourly rate for a paralegal in Boston, Massachusetts), decision after remand, 55 Fed. Cl. 293 (2003). To the extent that a deduction penalizes Mr. Sabella, the penalty is appropriate because Mr. Sabella has failed to introduce any evidence specifically about Dr. Shoenfeld. In short, $300 per hour is better than zero dollars per hour.

Dr. Shoenfeld states that he worked on this case for 15.5 hours, which includes reviewing medical records, writing his report, and conferring with an attorney. With one exception, this amount of time is reasonable. Dr. Shoenfeld has charged three hours for traveling to meet with an attorney in July 2006. (Where Dr. Shoenfeld's trip originated is not clear. However, presumably Dr. Shoenfeld did not start in Tel Aviv, Israel, because a trip between those two cities cannot be completed in three hours.) Travel time for Dr. Shoenfeld to meet with an attorney is not reasonable. First, there is no evidence to show why a face-to-face meeting to prepare a report was required at all. Second, if traveling were required, then it is more efficient for the attorney, whose hourly rates are lower than Dr. Shoenfeld's requested hourly rates, to travel. After subtracting time for Dr. Shoenfeld's travel, the reasonable amount of time is 12.5 hours.

In sum, the reasonable amount of compensation for Dr. Shoenfeld is $3,750 (12.5 hours at $300 per hour).

### 5. Dr. Harold Pretorius

Mr. Sabella requests a total of $1,200 for work performed by Dr. Harold Pretorius. Pet'r Mot., tab 4, at 123-24 (entries for July 30, 2003, and Aug. 7, 2003). No compensation is awarded.

Dr. Pretorius performed a scan of Mr. Sabella's brain using single-proton emission computed tomography ("SPECT") on August 5, 2003. He produced a report showing "nonspecific neuro-degeneration." Exhibit 35 at 1.

Mr. Sabella has not justified the reasonableness of this cost. If the SPECT scan were justified as part of the treatment for Mr. Sabella's condition, then Mr. Sabella should have submitted the invoice to his insurance company and requested reimbursement. See 42 U.S.C. § 300aa-15(g). If the SPECT scan was part of the litigation, Mr. Sabella has not shown how it advanced his case.

The usefulness of Dr. Pretorius's report is not apparent within its four corners. Although Dr. Pretorius states that certain findings are "consistent with immune cerebritis," this statement is too vague to be useful. Degeneration in a brain can happen for many reasons, including because of an inflammation in the brain. ("Cerebritis" means an inflammation in the brain. Dorland's Illustrated Medical Dictionary (30th ed. 2003) at 336 (defining "cerebr-") and at 960 (defining "-itis").) No evidence indicates that inflammation in the brain caused by an immune reaction appears different from inflammation caused by other factors.

Two people with specialized training in neurology, who were retained by Mr. Sabella, also could not draw any meaningful conclusions from Dr. Pretorious's report. Dr. Rubin stated that he was not familiar with SPECT scans. Exhibit 52 at 7. Dr. Poser also stated that he could not comment on the results. Exhibit 45 at 2.

Finally, even if a SPECT scan was theoretically useful, the timing of the scan is a problem. The scan was performed in August 2003. Mr. Sabella received the last dose of the hepatitis B vaccine in February 2000. Approximately three and a half years had elapsed. The elapse of time makes attributing any problems detected on the SPECT scan to the vaccine difficult. See exhibit F (report of Dr. Herskowitz) at 2 (noting this problem).

For all these reasons, Mr. Sabella has not established, by a preponderance of the evidence, that the work of Dr. Pretorius was reasonable. Therefore, no compensation is awarded.[11]

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[11] Mr. Sabella also did not submit any invoice from Dr. Pretorius showing how much time Dr. Pretorius spent. Mr. Sabella also did not submit any basis for determining Dr.

### 6. Robert P. Wolf, Ed.D, M.B.A.

Mr. Sabella has requested $1,250 for work performed by Mr. Wolf. Pet'r Mot., tab 4, at 122 (entry for Oct. 31, 2002). Mr. Wolf prepared an economic analysis to determine "the present value loss of earning capacity" for Mr. Sabella. Exhibit 21.[12]

This report was not necessary because a statute eliminates the need for individualized evaluations for people comparable to Mr. Sabella. When a person loses his (or her) earning capacity due to an injury caused by a vaccine that was administered before age 18, then the person is entitled to compensation at a rate established by the Secretary. 42 U.S.C. § 300aa–15(a)(3)(B); see also Holihan v. Sec'y of Health & Human Servs., 45 Fed. Cl. 201 (1999). Thus, obtaining this report was not reasonable and compensation is not awarded.

### 7. Jerome F. Knast, Ph. D.

Mr. Sabella requests approximately $5,000 for the work performed by Mr. Knast. Respondent opposes this request because Mr. Knast treated Mr. Sabella and, therefore, Mr. Knast should be compensated as a fact witness only. Secondarily, respondent contends that if Mr. Knast is compensated as an expert, his fee should be reduced. The reasonable amount of compensation for Mr. Knast is $1,920.00.

Although respondent argues that Mr. Knast appeared solely as a fact witness, respondent's argument lacks support. Mr. Knast saw Mr. Sabella because Mr. Sabella's attorney and Mr. Sabella's mother were planning to initiate litigation. Exhibit 17B (comprehensive neuropsychological evaluation, dated Sept. 29, 2001) at 2. Due to the anticipated litigation, Mr. Knast declined to treat Mr. Sabella. Tr. 64, 129. Mr. Knast's examination of Mr. Sabella was incidental to Mr. Knast writing a report. Mr. Knast saw Mr. Sabella again just before the hearing. Tr. 130. Thus, Mr. Knast presented the report of an expert. Exhibit 17B. A professional's examination of a petitioner on one or two occasions does not transform the professional from an expert witness who was retained in the context of litigation into a fact witness. McSwain v Bowen, 814 F.2d 617, 619 (11th Cir. 1987).

Mr. Knast's testimony during the hearing was consistent with his written report. He explained why he believed that Mr. Sabella worsened after he received the hepatitis B vaccine. Tr. 32, 61-62, 72, 84. However, Mr. Knast refrained from stating that the hepatitis B vaccine caused the worsening. Tr. 79-80. This restraint was appropriate because Mr. Knast, by his own admission, lacks the training to determine whether the hepatitis B vaccine causes harm to the brain.

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Pretorius's reasonable hourly rate.

[12] Neither party identified Mr. Wolf as the person who prepared exhibit 21.

Mr. Knast's testimony was important and useful. Before receiving the hepatitis B vaccinations, Mr. Sabella had a learning disorder. Mr. Sabella continued to have a learning disorder after the hepatitis B vaccinations. A critical question was whether Mr. Sabella worsened. This question would not have been answered easily without the guidance of a specialist in learning disorders such as Mr. Knast. Thus, for all these reasons, Mr. Knast is entitled to compensation as an expert witness, not as a fact witness.

The challenge, unfortunately, is that Mr. Sabella has not submitted any information to explain the basis of Mr. Knast's fee. Expenses listed in Mr. Korin's ledgers show that Mr. Korin paid Mr. Knast approximately $5,000. Mr. Sabella did not provide invoices from Mr. Knast. Respondent particularly has noted this omission. Resp't Resp. at 12 n.6. Even after being placed upon notice of the omission, Mr. Sabella's subsequent briefs did not provide any additional information.

The reasonable hourly rate for Mr. Knast is $160 per hour. This figure appears to represent the amount that Mr. Knast charges. See entry for August 21, 2006. It is also reasonable because it is less than the amount that is awarded for Dr. Poser, a neurologist. People lacking a medical degree are generally entitled to lower hourly compensation than those with such degrees.

Although the notes on Mr. Korin's ledger provide some information about the tasks performed by Mr. Knast, there is no information about the amount of time a particular activity took. It appears that Mr. Knast spoke to Mr. Korin on October 29, 2002, reserved time in his schedule to meet with an attorney to prepare for his testimony and to testify, met with Mr. Sabella, and reviewed medical records. A separate entry for the preparation of Mr. Knast's report was not found. A reasonable, if conservative, number of hours for these activities is 12. This entry may be on the lower end of reasonable, but Mr. Sabella could have avoided a reduction by providing invoices from Mr. Knast that explain the number of hours for each task.

Consequently, Mr. Sabella is awarded $1,920 for Mr. Knast's work. This figure represents $160 per hour for 12 hours.

### 8. Dr. Allen Rubin

The analysis of Dr. Rubin's work closely matches the analysis of Mr. Knast's work. Mr. Sabella is requesting compensation for Dr. Rubin without providing any basis to determine either Dr. Rubin's reasonable hourly rate or the reasonable number of hours.

Mr. Sabella seeks approximately $4,125 for work performed by Dr. Rubin. Again, Mr. Sabella's documentation for this request consists of entries on Mr. Korin's ledger. Mr. Sabella did not provide any invoices showing the number of hours or hourly rate for Dr. Rubin. (Respondent did not raise this point specifically. Resp't Resp. at 12.) Respondent objects to paying Dr. Rubin for his time as an expert witness.

Allen Rubin completed residencies in psychiatry and neurology and is board certified in both fields. Exhibit 49 (curriculum vitae); tr. 149-50. When he finished his training, less than 50 people had done a residency in psychiatry and a residency in neurology. Tr. 150.

Mr. Sabella was referred to Dr. Rubin by an attorney, by Mr. Knast, and by one of Mr. Sabella's doctors. Exhibit 48 (report of Dr. Rubin, dated Feb. 3, 2005). At the beginning of the doctor-patient relationship, Dr. Rubin was told that litigation was ongoing. Dr. Rubin's "focus would be primarily on understanding clinical issues and recommending treatment." Exhibit 48 at 1.

Dr. Rubin saw Mr. Sabella in September and October 2004. In February 2005, he wrote a report summarizing his understanding of Mr. Sabella's history and results of certain questionnaires completed by Mr. Sabella. This report also stated that Mr. Sabella "suffered a well documented vaccine-related immune encephalitis." Exhibit 48 at 4; see also tr. 154-56, 173-74 (explaining this phrase).

Mr. Sabella saw Dr. Rubin five times between February 2005 and July 2005. During these visits, Dr. Rubin sometimes adjusted Mr. Sabella's medications. In August 2005, Dr. Rubin wrote a report addressed to Mr. Sabella's attorney. This report stated that Dr. Rubin believed that Mr. Sabella, among other diagnoses, suffered from "[p]ost-vaccinal encephalopathy." Exhibit 52 at 7. In response to a request from Mr. Sabella's attorney, exhibit 72 at 10; Dr. Rubin clarified that the reports of Dr. Geier and Dr. Poser "informed and reinforced" his opinion. Exhibit 54.

Dr. Rubin also saw Mr. Sabella in August 2006, approximately three weeks before the hearing. At that point, Dr. Rubin believed that Mr. Sabella could return to see him only as needed. Tr. 161.

Based upon the information presented, Dr. Rubin is entitled to be paid as an expert witness for the work for which Mr. Sabella seeks compensation. Mr. Sabella has not requested an award for the time in September and October 2004, when Dr. Rubin was treating him. Instead, the first activity for which Mr. Sabella seeks compensation for Dr. Rubin's work is after Dr. Rubin wrote a report. See entry for May 18, 2005.

Mr. Korin's ledger shows that Dr. Rubin was paid for writing three reports. The docket confirms that Dr. Rubin did, in fact, write three reports. Dr. Rubin also met with an attorney to prepare for his testimony. Dr. Rubin also testified for approximately two hours. Additionally, he traveled to appear at court.

It certainly would be better to have invoices from Dr. Rubin. Nevertheless, there is some basis for awarding compensation for Dr. Rubin's activities. For example, Dr. Rubin has charged time for writing reports and the reports are in the record. Exhibits 48, 52, and 56. Also, Dr. Rubin appeared before the undersigned.

The amount requested ($4,125.00) is awarded in full.

### 9. Dr. David Condoluci

Dr. Condoluci completes the list of three people whom respondent contends should be paid as a fact witness only. Mr. Sabella seeks compensation for Dr. Condoluci's work as an expert witness and requests $1,800 for his work. Pet'r Mot., tab 4, at 122-24, 137-40 (entries for October 30, 2002, and September 19, 2006) For the reasons explained below, Mr. Sabella is awarded $1,200.

David Condoluci is a doctor of osteopathic medicine. He is board certified by the College of Osteopathic Internists and Osteopathic Infectious Disease Specialists. Exhibit 9, tab A (curriculum vitae), tr. 353.

Dr. Condoluci treated Mr. Sabella for one year – April 2000 to April 2001. Exhibit 9, tab D; tr. 360. Mr. Sabella's family doctor referred Mr. Sabella to Dr. Condoluci. During his treatment, Dr. Condoluci formed an opinion that Mr. Sabella's problems were caused by an adverse reaction to the hepatitis B vaccine. Tr. 365. After April 2001, Dr. Condoluci did not treat Mr. Sabella. Tr. 399, 407.

Approximately 18 months after Dr. Condoluci stopped treating Mr. Sabella, Dr. Condoluci wrote a letter addressed "To Whom It May Concern." In this letter, Dr. Condoluci stated Mr. Sabella "had an encephalopathy caused, in fact, by the Hepatitis B vaccine." Exhibit 9, exhibit C (letter dated Oct. 29, 2002). Dr. Condoluci based his opinion, in part, upon information contained in the Physician's Desk Reference. Tr. 367-68; see also tr. 398-99. Dr. Condoluci also considered the reports of Dr. Geier and Dr. Poser. Tr. 400-01.

Dr. Condoluci testified on September 15, 2006. Some of his testimony was a review of his office notes. See, e.g., tr. 366 (reading recommendations), 377-80. Other portions of his testimony explained why he did certain things, such as ordering tests, when he treated Mr. Sabella. See, e.g., tr. 372. Dr. Condoluci also explained why he concluded that the hepatitis B vaccination caused Mr. Sabella's encephalopathy. Tr. 398-99.

Mr. Sabella, through Mr. Korin, retained Dr. Condoluci in September 2002, approximately 15 months after Dr. Condoluci stopped treating Mr. Sabella. Although Dr. Condoluci's year-long treatment of Mr. Sabella provides a basis for Dr. Condoluci's opinion, Mr. Sabella retained him separately to present an expert opinion. Thus, Dr. Condoluci may be compensated as an expert.

However, the problem again is that Mr. Sabella did not provide any invoices or other material from Dr. Condoluci. The two items for which Mr. Sabella requests compensation as pertaining to Dr. Condoluci are a fee for writing a report and a fee for testifying. Dr. Condoluci testified for slightly more than two hours, although he also had to travel to the court. In absence

of better information from Dr. Condoluci, the undersigned finds that $1,200 is a reasonable amount of compensation.

### 10. Unnamed Individual(s)

Mr. Sabella seeks compensation for work by an expert who was not identified. (It is possible that the two items refer to two different people, but for simplicity sake, it is assumed that there is only one person.) Entries for April 20, 2006 ($1,500) and May 24, 2006 ($1,600). Without any information about the person, it is impossible to determine whether the requested fee is reasonable. Therefore, these items are denied entirely.

The failure to supply information about this unnamed person is peculiar. Respondent's initial opposition raised the issue. Resp't Resp. at 13. Mr. Sabella's reply did not submit more information. Pet'r Rep. at 12-13.

The following chart summarizes, for people who prepared reports, the amount requested and also the amount awarded. Most of these deductions are due to Mr. Sabella's failure to present information necessary to establish the reasonableness of the cost.

### 11. Summary of Costs for People Testifying

| Professional | Amount Sought | Amount Awarded |
|---|---:|---:|
| Dr. Geier | $5,375.00 | $1,000.00 |
| Dr. Poser | $3,714.50 | $1,520.00 |
| Dr. Shoenfeld | $7,750.00 | $3,750.00 |
| Dr. Pretorius | $1,200.00 | $0.00 |
| Mr. Wolf | $1,250.00 | $0.00 |
| Mr. Knast | $5,080.00 | $1,920.00 |
| Dr. Rubin | $4,125.00 | $4,125.00 |
| Dr. Condoluci | $1,800.00 | $1,200.00 |
| Unnamed Individuals | $3,100.00 | $0.00 |
| TOTAL | $33,394.50 | $7,245.00 |
| Difference | | $26,149.50 |

### C. Other Costs

As mentioned in the overview, respondent has objected to other items of cost, not just the costs claimed for the treating doctors. This list includes (1) compensation for Mark Greenspan, a consultant retained by Mr. Shoemaker, (2) travel expenses, (3) printing costs, and (4) costs for a paralegal to travel. The following sections resolve these disputes.

Although respondent objects to these four items, respondent has not objected to some other items such as postage and photocopying from Mr. Shoemaker's firm as well as some costs from Kenney & Kearney and Ballard Spahr. These miscellaneous unobjected items total $5,916.37. A review of these items shows that these costs appear reasonable. Therefore, the total amount of $5,916.37 is awarded.

#### 1. Mark Greenspan

Mr. Sabella requests approximately $13,000 for work performed and costs incurred by Mark Greenspan.[13] Respondent has objected to this cost entirely. A reasonable cost for Dr. Greenspan's services is $2,950.00.

Dr. Greenspan's letterhead describes himself as both a lawyer "JD" and a doctor "MD." This statement is consistent with decisions of special masters addressing Dr. Greenspan. McNett v. Sec'y of Health & Human Servs., No. 99-684V, 2007 WL 5183149 *2 n.3 (Fed. Cl. Spec. Mstr. Nov. 28, 2007). His credentials in two fields seem to underlie his request for an hourly rate of $250 per hour.

Respondent argues that Mr. Sabella's attorneys were not required to retain Dr. Greenspan because the attorneys are "highly experienced lawyers." Resp't Resp. at 10. Thus, respondent is arguing implicitly that an award of costs for Dr. Greenspan would be unreasonable because it is duplicative. See Pet'r Reply at 10 (stating "[t]he work performed by Dr. Greenspan was not duplicative, nor was it unnecessary.")

The first question is whether the activities performed by Dr. Greenspan were necessary. They are not necessary when someone else, especially a lower-priced person is capably performing the same tasks. The second question is assuming that Dr. Greenspan is appropriately performing the task, what is the rate at which he should be compensated.

Some of Dr. Greenspan's activities did not have to be performed by him at all. Between October 24, 2005 and November 1, 2005, Dr. Greenspan spent 12.75 hours creating and reviewing a chronology of medical records. This work was already done by people at Mr.

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[13] Mr. Greenspan's invoices appear at Pet'r Mot., tab 4 at 32-33 (dated March 28, 2007) and Exhibit 5 to Pet'r Reply, filed Dec. 18, 2007.

Korin's law firm. Dr. Greenspan did not have to do this work again. Thus, these hours are not compensable.

Dr. Greenspan spent 9.75 hours gathering articles cited in Dr. Poser's bibliography. It is more efficient for Dr. Greenspan to look for records cited by Dr. Poser, only if Dr. Greenspan charges an hourly rate less than Dr. Poser. It is assumed that because Dr. Poser cited certain articles, Dr. Poser has access to those articles – either in Dr. Poser's own files or on Dr. Poser's computer screen. (If Dr. Poser did not have access to the articles, then how could Dr. Poser cite to them?) Furthermore, the process of finding and printing articles already cited by another person requires little advanced education. This work could appropriately be done by a paralegal. Some tasks within this project, such as picking up a book and copying an article on October 25, 2005, are even more clearly the work of a secretary. Therefore, for all tasks related to producing articles for Dr. Poser's bibliography, the appropriate hourly rate is $100 per hour.

Between August 9 and August 13, 2006, Dr. Greenspan assisted the attorneys in preparing for a meeting among the attorneys, Mr. Sabella, his mother, and at least one expert witness. (Although Dr. Greenspan's invoice calls this meeting a "pre-trial conference," it was not a conference held with the Court.) These tasks benefit from Dr. Greenspan's combined background of being both an attorney and a doctor. For example, preparing a cross-examination of Dr. Herskowitz uses both medical knowledge and legal skill. Therefore, Dr. Greenspan will be compensated at $200 per hour.

However, Dr. Greenspan also attended the meeting, which required him to travel to Philadelphia, Pennsylvania. There appears to be no reason for Dr. Greenspan to participate in this meeting. Dr. Greenspan provided information to the attorneys in the days leading up to the meeting. Then, the responsibility for meeting with Mr. Sabella, his mother, and the expert witnesses fell to the attorneys who were trying the case. (It is worth noting that Mr. Shoemaker claims a relatively high hourly rate because of his experience in cases in the Vaccine Program and familiarity with medical issues. The premium paid to Mr. Shoemaker because of his familiarity with medical issues would be defeated if the Program compensated both Mr. Shoemaker and another attorney / doctor.) Attorneys do not typically request compensation for a consultant to assist the attorney in preparing a witness to testify. Mr. Shoemaker appears unique in this regard. Certainly, even if there were some advantage to having Dr. Greenspan participate in part of the meeting (and none has been shown), then the reasonableness of Dr. Greenspan's travel remains dubious. Therefore, Dr. Greenspan is not awarded any compensation for activities on August 15, 2006. Because it is not reasonable for Dr. Greenspan to travel to attend the meeting, he is not entitled to the costs associated with his travel.

On August 14, 2006, Dr. Greenspan spent 3.25 hours finding articles on chronic fatigue syndrome. The process of finding articles requires more education and knowledge than just printing articles already identified by a doctor. Thus, Dr. Greenspan is entitled to compensation at a rate higher than a paralegal. When Dr. Greenspan has researched an issue, he has been awarded the rate equivalent to a rate for a junior attorney. Lamar ex rel. Lamar v. Sec'y of

Health & Human Servs., No. 99-584V, 2008 WL 3845157 *14 (Fed. Cl. Spec. Mstr . July 30, 2008) ("Just as an attorney should not bill at an attorney's rate for tasks that a paralegal should perform, nor should he bill for paralegal time when the tasks involved are of a secretarial nature, a doctor-lawyer should not bill at a medical consultant's rate for tasks that a nurse consultant or paralegal should perform."). This approach is reasonably compensates Dr. Greenspan for the type of work he performed. Therefore, Dr. Greenspan will be awarded $175 per hour for this work.

After the meeting, Dr. Greenspan also prepared a letter for the attorneys regarding positive rechallenge. This time is allowed. A reasonable hourly rate is $200 because Dr. Greenspan probably used his medical training to write the report.

The following chart presents Dr. Greenspan's time and the hours that he claimed. For all activities, Dr. Greenspan appears to charge at an hourly rate of $250 per hour. It also shows the reasonable number of hours and reasonable hourly rate.

| Date | Description | Hours Claimed | Hours Allowed | Rate Allowed | Fee |
|---|---|---|---|---|---|
| 10/5/05 | Review of Expert Report of Dr. Geier | 0.75 | 0.75 | 175.00 | 131.25 |
| 10/8/05 | Review of multiple articles in Poser bibliography | 1.00 | 1.00 | 100.00 | 100.00 |
| 10/10/05 | Further internet research for PubMed articles cited by Dr. Poser | 0.25 | 0.25 | 100.00 | 25.00 |
| | Further work on assembling bibliography to support Dr. Poser's supplemental report | 4.00 | 0.25 | 100.00 | 25.00 |
| 10/11/05 | Further download, print and collate articles from web on Dr. Poser's bibliography | 0.75 | 0.25 | 100.00 | 25.00 |
| 10/12/05 | Download, print and collate further articles from web on Dr. Poser's bibliography | 0.75 | 0.75 | 100.00 | 75.00 |
| | Email to Cliff Shoemaker attempting to send articles from Dr. Poser bibliography. Email with EVMS ILLIad account about outstanding requests | 0.25 | 0.25 | 100.00 | 25.00 |
| | Print out of following pleadings: | 1.00 | 1.00 | 100.00 | 100.00 |

| Date | Description | Hours Claimed | Hours Allowed | Rate Allowed | Fee |
|---|---|---|---|---|---|
| | Petition, Table of Contents, Respondent's Report, Two Reports of Dr. Herskowitz, Report of Dr. Rubin. Review of petition for overview of facts | | | | |
| 10/14/05 | Download articles from ILLiad system for Dr. Poser's bibliography. | 0.50 | 0.50 | 100.00 | 50.00 |
| 10/18/05 | Collating articles for Dr. Poser's bibliography | 0.25 | 0.25 | 100.00 | 25.00 |
| 10/19/05 | Searching for one Journal article on PubMed. Will ask librarian to find it. | 1.00 | 0.25 | 100.00 | 25.00 |
| 10/24/05 | Activities for Poser bibliography: pick up book and copy article | 1.00 | 1.00 | 100.00 | 100.00 |
| | Review of Medical Records from Doctors Marzilli and Kravitz. Begin construction of chronological record. | 1.50 | 0.00 | | 0.00 |
| 10/25/05 | Review of records from Doctors Marzilli, Kravitz, Reinhold-Erney, Blank, Condoluci, Hauptman, Andriulli; records from grade and middle school, child study records, Baptist High School records | 3.00 | 0.00 | | 0.00 |
| 10/26/05 | Review of records from Home Solutions, VAERS file, Moss/ Magee rehab; West Jersey Health System, Social Security Admin., Records from Doctors Spitz, Marzillis, Knast, Jermyn, Tedeschi, MRI imaging, etc. | 3.50 | 0.00 | | 0.00 |
| 10/27/05 | Completion of work gathering articles for Poser bibliography, copying files to CD for Shoemaker firm | 1.00 | 0.50 | 100.00 | 50.00 |
| | Review of chronologic medical records assembled from all exhibits from 1984 through 1999 (second | 1.25 | 0.00 | | 0.00 |

| Date | Description | Hours Claimed | Hours Allowed | Rate Allowed | Fee |
|---|---|---|---|---|---|
| | hepatitis B vaccination) | | | | |
| 10/31/05 | Review of assembled chronological record for 2000 | 2.50 | 0.00 | | 0.00 |
| 11/1/05 | Completion of assembled chronological record | 1.00 | 0.00 | | 0.00 |
| 11/2/05 | Completion of review of pleadings and expert's reports. Preparation of opinion letter. Email to Shoemaker firm with opinion letter. | 2.25 | 0.00 | | 0.00 |
| 11/4/05 | Review of Herskowitz report and CV. Email to Renee Gentry | 1.75 | 1.75 | 200.00 | 350.00 |
| 8/9/06 | Multiple emails with Cliff Shoemaker about hearing on 9/14-15. Review CD with exhibits for preparatory review. | 0.25 | 0.25 | 200.00 | 50.00 |
| | Assembly of documents for pre-trial conference [with attorneys, not court] | 0.50 | 0.25 | 100.00 | 25.00 |
| 8/12/06 | Review of materials for pre-trial conference on Aug. 15 | 2.50 | 2.50 | 200.00 | 500.00 |
| 8/13/06 | Review all pleadings and expert reports, compare Hershkowitz's report to clinical record for accuracy. Set up literature search with articles necessary for cross-examination | 4.25 | 2.50 | 200.00 | 500.00 |
| 8/14/05 | Research and printing articles for bibliography | 2.25 | 2.25 | 175.00 | 393.75 |
| | Preparing bibliography list for CFS articles | 1.00 | 1.00 | 175.00 | 175.00 |
| 8/15/06 | Meeting w/ Client, Cliff Shoemaker, Mrs. Sabella, Joel Korin, Dr. Rubin. Provide bibliography and articles to expert. | 6.00 | 0.00 | 0.00 | 0.00 |

| Date | Description | Hours Claimed | Hours Allowed | Rate Allowed | Fee |
|---|---|---|---|---|---|
| | Travel to and from Philadelphia, including airport waiting time and "the flight from Hell coming home" | 9.00 | 0.00 | 0.00 | 0.00 |
| 8/16/06 | Draft / revise summary of medical records for Dr. Rubin. Email with positive re-challenge letter to Mr. Shoemaker and Mr. Korin for approval. | 1.75 | 1.00 | 200.00 | 200.00 |
| | TOTAL | 56.75 | 18.50 | | 2,950.00 |

**2. Unsubstantiated / Travel Expenses**

As part of Mr. Sabella's costs, he seeks reimbursement for approximately $4,000 in uncategorized in costs. Mot., Tab 4, at Exhibit 1. Although not initially apparent, some of these costs were for travel. Pet'r Mot., Tab 4 at 30.[14]

With two exceptions, these costs are rejected. One reasonable item is the charge for a stay on August 18, 2006, at the Doubletree hotel in Mt. Laurel, New Jersey, for $182.00. Information from counsel's time sheets indicates that counsel was meeting with Mr. Sabella, and some of his treating doctors to prepare for the hearing. Similarly, the other reasonable item is the charge for staying at a Holiday Inn on September 16, 2006. This is the date that the hearing ended. This expense, which probably reflects more than one night, is allowed for the entire amount requested, $252.41.

The documentation to explain the other items is simply inadequate. For example, there is a charge for a stay in a Sofitel Hotel on August 30, 2006. But, there is no explanation as to where the Sofitel Hotel is located. On July 21, 2006, there is an entry for an expense ($217.65) at amazon.com, but absolutely no explanation for why the expense was incurred.

Similarly, entries from July 21-23, 2006, suggest that "counsel" was staying at the Sofitel Hotel in Baltimore, Maryland to meet with Dr. Shoenfeld. Why counsel was required to meet with Dr. Shoenfeld in person is not explained. Counsel stayed at Sofitel Hotel and ate an Equinox Restaurant. While counsel may incur reasonable expenses while traveling and does not

[14] Mr. Sabella states that page 30 represents a printout from the Quicken account of counsel. Pet'r Reply at 10. Whether "counsel" in this context is Mr. Shoemaker or Mr. Korin is not clear. Furthermore, the printout at page 30 is not complete because information is contained in the "memo" field that has not been reproduced on the printout.

have to stay or to eat at the least expenses places, expenses at the Sofitel Hotel and Equinox Restaurant are more expensive than reasonable.

Respondent (reasonably) raised the issue of whether these costs are reasonable. Resp't Supp. Opp. at 10. Mr. Sabella provide little additional information. Instead, the tone of Mr. Sabella's response suggested that respondent was wrong to raise the issue. Pet'r Supp. Reply at 10-11. Rather than accuse respondent of not acting in good faith, Mr. Sabella would have been better served by addressing the substance of respondent's objection, the lack of documentation and lack of explanation for why the cost was incurred.

Consequently, due to the deficiencies in Mr. Sabella's request, of the $4,088.25 claimed in expenses, $434.41 is awarded. This amount is for the expenses for the Mt. Laurel Doubletree hotel and the Holiday Inn.

### 3. Printing Costs

Mr. Sabella seeks $1,196.50 for the cost of printing almost 12,000 pages. Despite respondent's objection, this amount is awarded in full.

In Mr. Sabella's supplemental response, he explained that at least some of these pages were printed because he was providing paper copies of exhibits filed in electronic form to experts. In this sense, printing substitutes for photocopying. Pet'r Supp. Reply at 11-12. While Mr. Sabella does not explain how many of the 12,000 pages were for experts to review, his explanation does provide a reasonable basis for at least some of the costs.

Mr. Sabella's attorney represents that the firm tracks what copies or prints are made for each case. Id. It would be difficult to imagine how the law firm could provide additional information, unless the firm were required to document the purpose of each piece of paper. That level of detail would be excessive. The cost for the time for a paralegal (or even an attorney) to record the photocopying or printing could easily exceed the cost of the underlying photocopying. Thus, this cost is awarded in full.

### 4. Paralegal Travel

Mr. Sabella requests reimbursement for the time spent by and costs incurred by Elizabeth K. Margolis, a paralegal employed by Mr. Korin's firm. Mr. Sabella seeks $1,400 in time, Pet'r Mot., tab 4 at 98; and $3,585.78 in costs, id. at 124. Mr. Sabella explained that he needed to see Dr. Pretorius, whose office is in Cincinnati, Ohio, and that his mother could not accompany him on the trip. Pet'r Reply at 14.

This time and associated costs are rejected entirely. Paralegals are trained to assist attorneys with legal matters. Accompanying a patient on an overnight trip to see a doctor is not using paralegal skills. Additionally, Mr. Sabella has not explained why he was required to see

Dr. Pretorius in the first place. Nothing justifies an assumption that Dr. Pretorius was the closest doctor who could treat Mr. Sabella.

### 5. Summary Regarding Other Costs

| Item | Amount Requested | Amount Awarded |
|---|---|---|
| Mark Greenspan Consultant | $13,617.87 | $2,950.00 |
| Other (Primarily Travel) Expenses | $4,089.85 | $434.41 |
| Printing Costs | $1,196.50 | $1,196.50 |
| Paralegal Travel | $3,585.78 | $0.00 |
| Miscellaneous Items (no objection) | $5,916.37 | $5,916.37 |
| TOTAL | $28,406.37 | $10,497.28 |
| Difference | | $17,909.09 |

### D. Conclusion Regarding Costs

Overall, Mr. Sabella seeks $61,800.87 ($33,394.50 + $28,406.37) in costs. He has established that $17,742.28 were reasonably incurred. Thus, he is awarded $17,742.28.

## IV. Conclusion

In many respects, the fee petition was not presented well. Because a large amount of money was requested, a comprehensive amount of evidence should have supported it. However, there are gaps in the evidence. Mr. Sabella presented almost no evidence about the reasonable hourly rates for different people whom he or his attorneys retained. Mr. Sabella did not provide invoices for some of the doctors. Respondent specifically challenged the reasonable hourly rate for the attorneys, and respondent requested information about some doctor's hourly rates. Even after these items were placed in dispute, Mr. Sabella did not provide the requested information.

This lack of information created a challenge to adjudicate the fee petition. On one hand, special masters possess the discretion to reject requested awards when the documentation is not adequate to evaluate the request. A categorical rejection may be appropriate in cases, such as this one, in which petitioners were placed on notice about the missing information and still did not provide it. On the other hand, eliminating some requested items in the entirety may not be appropriate when some reasonable, if conservative, determination can be made. For the most part, this ruling adopts the latter practice. If there is some basis for determining that (a) the requested task was reasonable in the first place, (b) a reasonable amount of time for the requested

task, and a reasonable hourly rate for the requested activity, then compensation was awarded. However, petitioners are placed on notice that future fee petitions may not be adjudicated so leniently.

In sum, Mr. Sabella is awarded $62,207.50 in attorneys' fees and $17,742.28 in costs.

IT IS SO ORDERED.

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