**OFFICE OF SPECIAL MASTERS**
**No. 06-559V**
**Filed: July 27, 2009**
**TO BE PUBLISHED**

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| GABRIEL GENE RODRIGUEZ AS ADMINISTRATOR OF THE ESTATE OF GIAVANNA MARIA RODRIGUEZ FOR THE BENEFIT OF GABRIEL GENE RODRIGUEZ AND JENNIFER ANN RODRIGUEZ<br><br>Petitioners,<br><br>v.<br><br>SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br><br>Respondent. | Attorney Fees; *Laffey* Matrix; Forum Rate; Geographic Rate; Due Process; Petitioner's Burden; Reasonable Hourly Rate |

*John E. McHugh, Esq.,* New York, NY, for Petitioners.

*Robin Broderick, Esq.,* (entitlement)*; Alexis Babcock, Esq.,* (fees and costs)*,* U.S. Department of Justice, Washington, DC, for Respondent.

## DECISION AWARDING FEES AND COSTS[1]

**VOWELL**, Special Master:

### I. Procedural History.

[1] Because I have designated this decision to be published, petitioner has 14 days to request redaction of any material "that includes medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire order will be publicly available. 42 U.S.C. § 300aa-12(d)(4)(B).

On July 31, 2006, petitioners, Gabriel and Jennifer Rodriguez[2], timely filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq*.[3] [the "Vaccine Act" or "Program"], based on the death of their daughter, Giavanna Rodriguez ["Giavanna"]. After conducting an entitlement hearing in Philadelphia, PA, on May 18, 2007, and considering the parties' post-hearing filings, I ordered respondent to show cause why I should not find that Giavanna had suffered a "Table" injury[4] and that her estate was thus entitled to compensation. The parties subsequently negotiated a settlement and on November 29, 2007, I issued a decision based on the joint stipulation and awarded compensation in the agreed amount.[5]

On February 25, 2008, petitioner filed his Application for Fees and Expenses ["Fees App."], requesting fees in the amount of $65,925.00,[6] costs in the amount of $4,817.48, unpaid expert costs in the amount of $4,200.00, and petitioner's own costs of $2,252.16.[7] Respondent filed an opposition to the fees and expenses application ["Res. Opp."] on March 20, 2008, arguing that the claimed rate of $450.00 per hour was unreasonable and challenging some of the hours claimed.

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[2] Pursuant to my order of September 14, 2007, Gabriel Rodriguez secured appointment as the administrator of his daughter's estate. *See* 42 U.S.C. §§ 300aa–11(a)(9) and 11(b)(1)(A). The case was subsequently recaptioned to reflect a claim on behalf of the estate. *See* Order, dated October 5, 2007. I will therefore refer to Gabriel Rodriguez as "petitioner" throughout the remainder of this opinion.

[3] Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

[4] A "Table" injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified. A presumption of vaccine causation attaches to such injuries.

[5] Petitioner's Application for Fees and Expenses mistakenly characterizes my show cause order as a "ruling" and, equally mistakenly, states that the settlement was in lieu of a government appeal of that ruling. *Id.* at p. 1.

[6] According to respondent's calculation, based on the hours and rates claimed, the attorney fees total should have been $64,125.00, not the $65,925.00 claimed. *See* Respondent's Sur-Response to Petitioners' Amended Reply Memorandum ["Res. Sur-Resp."] at n.1. The discrepancy is based on an error in the hours claimed. The hours claimed actually total 146.5, not the 142.5 stated in the body of the application. Petitioner's "bottom line" figure of $65,925.00 correctly reflected the requested hourly rate times the actual number of hours claimed.

[7] The application included a declaration of Mr. Rodriguez, requesting $2,252.16 in expenses. The declaration referred to an "accompanying sheet" itemizing the expenses, but that sheet was not filed with the application. Petitioner's declaration also referenced an unspecified amount paid to his expert, Dr. Shane. Petitioner's Fees Application (Exhibit I) indicated that Dr. Shane was paid $1,675.00 by petitioner and $1,500.00 by petitioner's counsel, and that a bill for an additional $4,200.00 for Dr. Shane's services remained outstanding.

On March 31, 2008, petitioner filed a reply to respondent's objections ["Pet. Reply"]. Petitioner argued that the claimed attorney fee rate of $450.00 per hour was amply supported by the original application. Just three days later, on April 3, 2008, petitioner filed an "Amended Reply Memorandum" ["Amend. Reply"], which increased the hourly rate from the $450.00 per hour originally requested to $598.00 per hour for work performed in May, 2006, $614.00 per hour for work performed from June, 2006–May, 2007, and $645.00 per hour thereafter. The amended demand raised the amount claimed to $84,322.00 for work previously performed, and added 16 hours of work on the amended reply, at $645.00 per hour, for a total of $94,642.00 in fees. Petitioner also sought an additional $90.00 in costs for the purchase of the National Law Journal's 2007 fees survey. Petitioner claimed a concession by respondent that his attorney was entitled to the forum rate, as reflected in the "updated" *Laffey* Matrix.[8]

Respondent's Sur-Response, filed on April 18, 2008, denied any concessions regarding petitioner's rates and urged me to determine a reasonable award, based on my experience. Petitioner filed a brief Sur-Reply Memorandum ["Pet. Sur-Reply"] on April 28, 2008.[9]

After analyzing the evidence and arguments presented, I ordered the parties to file additional evidence focused on negotiated hourly rates for attorneys of Mr. McHugh's skill, experience, and reputation; fees paid to attorneys in the Washington, DC area;[10] and argument to assist in determining the relevant legal community for

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[8] The *Laffey* Matrix is based on the hourly rates allowed by the U.S. District Court for the District of Columbia in *Laffey v. Northwest Airlines, Inc.,* 572 F. Supp. 354, *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Dir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The matrix is prepared by the U.S. Attorney's Office for the District of Columbia, and includes a chart of hourly rates for attorneys, based on the number of years in practice. Yearly updates to the original hourly rates allowed by the district court are based on annual increases in the Consumer Price Index. The *Laffey* Matrix may be viewed at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html (last visited June 24, 2009). Versions of the *Laffey* Matrix were also filed by the parties. Pet. Amend. Reply, Ex. P; Res. Sur-Resp., Ex I. The "updated" *Laffey* Matrix (which will be referred to as the "adjusted *Laffey* Matrix" in the remainder of this opinion) contains higher hourly rates which are based on price index calculations specific to legal services. The applicability of this particular price index to the type of legal services the *Laffey* Matrix covers was contested by respondent. Horn Affidavit, ¶¶ 6-7, Res. Ex. I. The adjusted matrix rates were applied by the District Court for the District of Columbia in *Salazar v. DC*, 123 F. Supp. 2d 8, 13 (D. D.C. 2000), but it is by no means clear that the adjusted matrix is generally applied in that court system.

[9] No additional attorney fees were sought for the Sur-Reply Memorandum, as indicated by the final paragraph of the document (which was not paginated).

[10] Both petitioner and respondent argued that my order requesting information on rates paid to attorneys in the Washington, DC area (as opposed to the District of Columbia proper) would produce irrelevant information with regard to the forum rate. In making a request for information on fees from a geographic area broader than the District of Columbia, I was guided by my experience in Vaccine Act cases. Based on that experience, I was aware of the fact that few Washington, DC attorneys represent Vaccine Act petitioners. My review of attorney fees decisions located only one recent court document

purposes of determining the forum rate for attorney fees.[11] Order, dated July 17, 2008. Petitioner filed two identical responses to my order, one on September 12, 2008, and one on September 17, 2008 ["Pet. Resp. to July 17, 2008 Order"], both of which included affidavits from Mr. Clifford Shoemaker, an attorney in Vienna, VA, whose primary practice involves Vaccine Act litigation. Petitioner also expressly reserved the right to file a supplemental fee application, presumably for the additional expense involved in responding to my order.[12] Respondent filed a response on September 12, 2008 ["Res. Resp. to July 17, 2008 Order"] which included five exhibits.

Because petitioner failed to file his supplemental application in the months that followed the responses to my order, on April 21, 2009, I ordered petitioner to file any supplemental application by no later than April 30, 2009. After requesting and receiving an extension of time, the supplemental application ["Suppl. App."] was filed on May 7, 2009, and respondent's opposition ["Res. Suppl. Opp."] was filed on May 21, 2009. Petitioner's supplemental reply was filed on June 8, 2009 ["Suppl. App. Reply"]. Respondent's Response to Petitioner's Reply to Respondent's Opposition to Petitioner's Supplemental Application for Attorney Fees ["Res. Suppl. Sur-Reply"] was filed on June 29, 2009. The fees and costs application is thus now complete and ripe for decision.

## II. Applicable Law.

This court applies the lodestar method to any request for attorney's fees and costs. *See Blanchard v. Bergerson*, 489 U.S. 87, 94 (1989) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate" (*quoting Blum*, 465 U.S. at 888). *See also Avera v. Sec'y*, *HHS*, 515 F.3d. 1343, 1347-48 (Fed. Cir. 2008) ["*Avera II*"] and *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The standards set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 429-37 (1983) for calculating attorney fees "are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433, n.7.

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referencing an hourly rate for an attorney in a Washington, DC law firm. *See* Order to Show Cause, filed in *Flannery v. Sec'y, HHS*, No. 99-963V, 2004 U.S. Claims LEXIS 280 (Fed. Cl. Spec. Mstr. Oct. 12, 2004). A search conducted for me by the Clerk of Court's office disclosed that, with the exception of Professor Meyers, whose law school clinic fees are discussed below, the only additional Washington, DC attorneys representing Vaccine Act petitioners are doing so in the Omnibus Autism Proceeding, and no fee requests from those Washington, DC attorneys are pending. Thus, I requested information concerning fees in the broader geographic area in order to provide more information that might assist me in determining the forum rate.

[11] The "relevant legal community" encompasses those lawyers performing similar services within the community. *See Blum v. Stenson*, 465 U.S. 886, 896, n.11 (1984).

[12] *See* Pet. Resp. to July 17, 2008 Order at 9.

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896, n.11. The "prevailing market rate" is determined using the "forum rule." *Avera II*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). Prior to the Federal Circuit's decision in *Avera*, the Court of Federal Claims applied the "geographic rule" to determine the appropriate rate of compensation. The geographic rule is based on the community in which the attorney performs the services, rather than the prevailing market rate in the forum community. *See Avera v. Sec'y, HHS*, 75 Fed. Cl. 400, 405-406 (2007) ["*Avera I*"].

In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley,* 461 U.S. at 434.

Special masters may use their experience in Vaccine Act cases to determine whether the hourly rate and the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (special master is given broad discretion in calculating fees and costs awards).

Petitioner has the burden to demonstrate that the hourly rate requested is reasonable. *See Blum*, 465 U.S. at 896 ("the burden is on the fee applicant 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 reasonable comparable skill, experience and reputation.").

As petitioner was awarded compensation in this case, he is entitled to an award of reasonable attorney fees and costs. § 300aa-15(e)(1)(A).

## III. Issues Presented.

Five issues are presented in this fees dispute: (1) the hourly rate to be paid to petitioner's lead counsel; (2) the reasonableness of some of the hours for which compensation is sought; (3) the hourly rate of compensation for travel time; (4) some of the costs claimed; and (5) compensation for outside counsel's efforts in preparing the supplemental fees and costs memorandum ordered by the court.

### A. Mr. McHugh's Hourly Rate.

The primary issue in this fees and costs dispute is the question of what hourly rate to apply for work performed outside the forum (Washington, DC). It is uncontested that the bulk of the work on behalf of petitioner was performed in New York City, NY,

and that the entitlement hearing was held in Philadelphia, PA.[13]

Petitioner originally requested a rate of $450.00 per hour for Mr. McHugh, based on a discount applied to the rates billed by senior partners in New York City law firms. He later argued that the adjusted *Laffey* Matrix rates for experienced attorneys practicing in Washington, DC, should apply. For the reasons indicated below, I conclude that the forum rate rule applies, but that petitioner has failed to demonstrate that the forum rate is set by either version of the *Laffey* Matrix or by the rates charged by senior partners in DC area law firms for other types of litigation. Petitioner has therefore failed to produce sufficient evidence to establish the forum rate pertaining to Vaccine Act cases. However, respondent has aided the court by providing information concerning the forum rate, by filing information concerning the rate negotiated for a Vaccine Act attorney practicing in Washington, DC, as well as by providing information regarding negotiated rates for two firms that handle a substantial number of Vaccine Act cases.[14]

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[13] The issue of compensation for the work performed in California by Mr. Gaynor is addressed separately in Part III.E, below.

[14] In *Ray v. Sec'y, HHS*, No. 04-184V, 2006 U.S. Claims LEXIS 97, *17-18 (Fed. Cl. Spec. Mstr. Mar. 30, 2006), Chief Special Master Golkiewicz questioned whether a negotiated fee truly represents a market rate because, in the process of negotiations, a petitioner's counsel may accept an hourly rate lower than the market rate in order to avoid protracted fee litigation and the concomitant loss of the time value of money. Of course, in negotiations, respondent may agree to pay an hourly rate higher than the market rate, in order to avoid additional costs charged to Program funds and the attorney and support staff time associated with protracted fee litigation.

In comparing rates negotiated by these two firms with those rates authorized by a special master or judge immediately prior to the successful rate negotiations, it appears that the petitioners' counsel who have negotiated fee schedules have achieved significant fee increases over those hourly rates previously awarded. With regard to the Boston firm, the negotiated fees set forth in *Carr v. Sec'y, HHS*, No. 00-778V, 2006 U.S. Claims LEXIS 105 (Fed. Cl. Spec. Mstr. Mar. 29, 2006) were $300.00 per hour for the firm's senior attorney for work performed in 2006, with the $250.00 per hour rate awarded to the same attorney by Judge Miller in *Rupert v. Sec'y, HHS*, 55 Fed. Cl. 293 (2003). The advantage of the negotiated rates to the Virginia firm were even greater. The senior attorney was awarded the negotiated rate of $300.00 per hour for work performed in 2006 in *Duncan v. Sec'y, HHS*, No. 99-455V, 2008 U.S. Claims LEXIS 176 (Fed. Cl. Spec. Mstr. May 30, 2008). This negotiated rate is substantially higher than the rate of $245.00 per hour that he was awarded in *Ray*.

The negotiated rates may not be all that the market could bear, but because they represent an agreement, they constitute some evidence of what a willing buyer would pay a willing seller for the precise services at issue in Vaccine Act fees litigation. *See Arbor Hill Concerned Citizens Neighborhood Association, et al., v. Count of Albany*, 522 F.3d 182, 184 n.2 (2d Cir. 2008) ("in calculating the reasonable hourly rate for particular legal services, a district court should consider all relevant circumstances in concluding what a reasonable client would expect to pay."). *See also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565-66 (1986) (fee shifting statutes are not intended as economic relief for attorneys or "to replicate exactly the fee an attorney could earn through a private fee arrangement with his client.").

1. Initial Fee Request.

Petitioner's initial argument was that his attorney, Mr. McHugh, should receive $450.00 per hour, based on his attorney's billing rate. Fees App. at 2. He argued that this rate was well below the prevailing rates for senior litigators in New York City, where Mr. McHugh is located (*id.* at 4), that his attorney had 40 years of general litigation experience (*id*. at 5), and that his attorney has been handling Vaccine Act cases since 2000 (Fees App. Exhibit ["Ex."] A, Resume of John McHugh).[15] In support of this rate, petitioner cited to the Federal Circuit decision, *Avera II*.

Respondent contended that *Avera II* did not support petitioner's requested hourly rate, that the hourly rate should be based on the rates charged in the year in which the services were performed, and that Mr. McHugh's billing rate should reflect the lower hourly rate ($350.00) that he had received in another Vaccine Act case, *Kantor v. Sec'y, HHS*, No. 01-679V, 2007 U.S. Claims LEXIS 100 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).[16]

In his Reply Memorandum, petitioner reiterated his arguments that the market rate should apply, citing to numerous decisions of New York courts on fee awards, but providing few references to this court's precedents. Based on the Fees App. and the exhibits attached thereto, it is obvious that the $450.00 per hour rate initially requested is less than that awarded by New York courts for experienced litigators, and less than that billed by partners in Wall Street firms (in the same general geographic area of New York City as Mr. McHugh's office). However, that does not answer the question of what constitutes Mr. McHugh's rate for *similar* litigation, nor does it assist in determining the forum rate in Vaccine Act cases.

Both parties argued that the *Avera II* decision supported their positions. In *Avera II*, the Federal Circuit held that the forum rule applies to attorneys' hourly rates in

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[15] The Fees App. indicated that Mr. McHugh's billing rate is lower than that of experienced litigators and senior partners in New York City firms because Mr. McHugh is a solo practitioner and, thus, performs tasks himself that might be performed by an associate attorney or paralegal in a larger firm. *Id.* at 6. His lower billing rate reflects that some of the work he performs would, in a larger firm, be done by those whose services would be billed at a lower hourly rate than that of a partner or senior litigator.

[16] In *Kantor*, Mr. McHugh billed for $350.00 per hour. 2007 U.S. Claims LEXIS 100 at *27. His declaration in the instant case explained that the hourly rate billed in *Kantor* represented his billing rate from 1998. He later raised his billing rate to $400.00 per hour, effective November, 2006, and to $450.00 per hour as of January, 2007. Amend. Reply, McHugh declaration, ¶ 2. This represents a substantial increase in an hourly rate over a period of just two months. The same paragraph of Mr. McHugh's declaration asserted that the billing rate is what he charges his clients in the transportation industry. From Mr. McHugh's resume, it appears that transportation law constitutes the bulk of his experience and practice. Whether his transportation law practice is comparable to Vaccine Act litigation remains an open question, as is his relative expertise in the two fields. It is Mr. McHugh's burden to establish that the two fields of practice are sufficiently similar to permit him to command the same fee in both.

Vaccine Act litigation. The forum rule dictates that the reasonable hourly rate be based on the rates paid to similarly qualified attorneys where the court sits, which in Vaccine Act litigation is Washington, DC. *Avera II*, 515 F.3d at 1348; *see also Sabella v. Sec'y, HHS*, 86 Fed. Cl. 201, 205 (2009). However in *Avera II*, the Federal Circuit also held that an exception to the forum rule applied, and that the petitioners' attorney was entitled to a lower hourly rate–his "billing rate"–because the bulk of the work in that case was performed outside Washington, DC, and in an area where the prevailing attorneys' rates were substantially lower. *Avera II*, 515 F.3d 1343.

Petitioner's initial arguments that the market rate in New York City should apply evinced a misunderstanding of *Avera II,* because he focused his arguments only on the market rate. Applying the market rate in New York City would be applying the geographic rule that the Federal Circuit rejected. What *Avera II* requires is that an attorney be paid the forum rate, unless an exception to the forum rule applies.

2. The Amended Fee Request.

Three days after filing the Pet. Reply, petitioner filed an amended fee request, arguing that respondent had conceded that the market rate for the District of Columbia should apply and that the adjusted *Laffey* Matrix represented that market rate. Petitioner also filed the declaration of petitioner's mother, describing her difficulties in finding an attorney willing to take this case.[17] Mr. McHugh's declaration asserted that his billing rate in *Kantor* was "ridiculously low" (Amend. Reply, McHugh Declaration, ¶ 10), that his firm "appears to have become the last resort for victims of vaccines who cannot find representation elsewhere" (*id*., ¶ 11), that the decisions of the courts handling Vaccine Act cases and respondent's frequent challenges to attorneys' fees and expert fees have resulted in attorneys being unwilling to accept such cases, and that, as a result, persons with vaccine injuries are being unconstitutionally denied due process of law. Further, petitioner contended that respondent's refusal to concede that

[17] This declaration and that of Mr. McHugh are not filed as exhibits or tabs to the petition. The declaration of Mary Rodriguez is not paginated, although the paragraphs are numbered. Mr. McHugh's declaration is paginated separately from that of the Amend. Reply, but is attached directly to it. The additional declarations filed with the Amend. Reply are, like those attached to the Fees App., labeled as lettered exhibits. In accordance with the Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program ["Guidelines for Practice"], respondent's exhibits in the entitlement phase of this case were lettered. Petitioner's re-use of these letters as exhibit identifiers has the potential for confusion. Petitioner's apparent inability to properly enumerate his exhibits has persisted from the entitlement phase of this litigation. It has occasioned considerable extra work by this court. *See* Order, dated July 11, 2007, and Order to Show Cause, dated September 14, 2007, n.9. An inability to follow clear guidelines regarding pagination and identification of exhibits in various court filings (particularly those that followed the July 11, 2007 Order, in which counsel were chastised for re-use of exhibit designators) does not enhance Mr. McHugh's arguments that he is entitled to an hourly rate that is substantially higher than that ever before awarded to a Vaccine Act practitioner. *See also Doe 21 v. Sec'y, HHS*, 84 Fed. Cl. 19, 49-50, n.57 (2008) (in remanding, directing the special master to consider specific problems in Mr. McHugh's performance as counsel when awarding fees and costs).

Giavanna suffered a Table injury entitled his counsel to full compensation. Petitioner argued that Mr. McHugh's political connections and years of experience equated him to senior partners in major Washington, DC, firms, and, therefore, he is entitled to the adjusted *Laffey* Matrix rates (filed as Amend. Reply, Ex. P).

Most of the remaining exhibits filed with the Amend. Reply are copies of declarations filed in the *Avera II* case. An exception is Exhibit J, the declaration of another Vaccine Act attorney, Mr. Clifford Shoemaker, which was previously filed in the *Kantor* case in support of Mr. McHugh's fees request in *Kantor*.

Respondent's Sur-Reply, citing *Saxton*, 3 F.3d at 1520-22, encouraged me to use my broad discretion and prior experience to determine reasonable attorney's fees and costs in this case, without suggesting what hourly rate I should apply. Respondent reiterated the argument that petitioner did not establish that his attorney was entitled to fees of $450.00 per hour, much less the newly claimed rates based on either the *Laffey* Matrix or the adjusted *Laffey* Matrix. Respondent vigorously challenged petitioner's assertion that respondent's discussion of *Avera II* constituted a "judicial admission" that forum rates (interpreted by petitioner as the *Laffey* Matrix rates) should apply.

This Sur-Resp. also included a declaration by Mr. Daniel F. Horn, a Deputy Chief in the Civil Division of the U.S. Attorney's Office for the District of Columbia. Mr. Horn explained that his duties included updating the *Laffey* Matrix. He provided information concerning the origin of the *Laffey* Matrix, its uses, and the updating process. The affidavit noted that the matrix has not been adopted for use by other Department of Justice Offices outside the District of Columbia's U.S. Attorney's Office, or, within that office, for other types of cases. The affidavit further explained that the adjusted *Laffey* Matrix was not a creation of the U.S. Attorney's Office and detailed some issues regarding its methodology, in addition to noting that the DC U.S. Attorney's Office was not a party to the litigation in which the adjusted matrix was applied. Respondent Exhibit I (attached to Res. Sur-Resp.).

3. Additional Matters Submitted in Response to the July 17, 2008 Order.

The July 17, 2008 Order directed the parties to provide information and argument concerning what constituted the "forum rate" for Vaccine Act cases. While disagreeing with my initial determination that neither the *Laffey* Matrix nor the adjusted *Laffey* Matrix set the forum rate for attorney fees, petitioner contended that I should consider the *Laffey* Matrix as "highly probative evidence of the forum rate in the District of Columbia." Pet. Resp. to July 17, 2008 Order at 4 (emphasis original). Petitioner then argued that the reasons I concluded the *Laffey* Matrix was inapplicable were incorrect or inaccurate. While conceding that *Avera II* established the forum rule, petitioner argued that the applicable market rate is that of "the forum, the District of Columbia, and the relevant comparison is to prevailing market rates for attorneys engaged in complex litigation in the forum." Pet. Resp. to July 17, 2008 Order at 9. In

essence, the argument presented was that the *Laffey* Matrix constitutes the forum rate.

Respondent contended that the *Laffey* Matrix did not represent the appropriate forum rate, that petitioner had failed to produce sufficient evidence of what constituted the forum rate, and that rates negotiated with non-forum practitioners would not assist the court in determining the forum rate. Res. Resp. to July 17, 2008 Order at 2.

Respondent also produced evidence of a rate negotiated with an attorney engaged in Vaccine Act litigation who practices within the District of Columbia, Professor Peter Meyers.[18] Pursuant to an agreement with the Department of Justice, Professor Meyers will be paid $240.00 per hour for work performed in 2007, with annual rate adjustments pegged to the cost of living index in subsequent years. *See* Tab D, Res. Resp. to July 17, 2008 Order. Respondent also referred the court to decisions of other special masters setting forth the negotiated rates between the Department of Justice and a small Boston, MA law firm specializing in Vaccine Act cases and a Vienna, VA firm also specializing in Vaccine Act cases, while noting that these firms were not located within the forum, the District of Columbia.

4. Supplemental Fees Application.

Petitioner's Suppl. App. for fees appropriately focused on justifying the hourly rate requested on behalf of Mr. Gaynor, not Mr. McHugh. However, the Suppl. App. Reply returned to the applicability of the *Laffey* Matrix in determining the forum rate for attorney fees, reiterating petitioner's previous arguments in that regard. Suppl. App. Reply at 2.

Respondent's Suppl. Sur-Reply included additional argument that the *Laffey* Matrix was not applicable to a determination of fees in a Vaccine Act case. It also included evidence supporting that argument, in the form of a declaration by Mr. Daniel Rezneck ["Rezneck Declaration"]. The law firm that represented the successful *Laffey* litigants retained Mr. Rezneck's law firm to pursue its application for fees and costs, and Mr. Rezneck was assigned to the *Laffey* fees litigation.

Mr. Rezneck explained both the nature of the underlying litigation and the evidence in support of the fees schedule developed in that litigation. Quoting from the

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[18] I note that, in spite of the affidavit of Mr. Clifford Shoemaker (Tab 1, Pet. Resp. to July 17, 2008 Order) regarding what he alleged was economic coercion in the development of the agreement between his firm, Shoemaker and Associates, and the Department of Justice regarding the hourly rates for his firm's attorneys, Mr. Shoemaker subsequently engaged in negotiations with the Department of Justice on behalf of Professor Meyers and his law school clinic regarding the fees to be paid to Professor Meyers and his law students. *See* Tab D, Res. Resp. to July 17, 2008 Order (letter from Mr. Shoemaker to Ms. Catherine Reeves, a Department of Justice attorney, confirming the negotiated fees). The letter and other evidence pertaining to the rate negotiated for Professor Meyers are relevant to, but not dispositive of, the issue of what constitutes the "forum rate."

opinion of Chief Judge Robinson awarding the attorney fees in *Laffey*, Mr. Rezneck noted that the litigation took 13 years. Rezneck Declaration, ¶ 5. He also noted that the judge specified the relevant legal market as that involving "complex employment discrimination litigation." *Id.* at ¶ 6 (quoting *Laffey*, 572 F. Supp. at 374).

The law firm represented the *Laffey* litigants had, historically, charged very low rates, for numerous reasons set forth in Mr. Rezneck's declaration, some of which had to do with the public service nature of the firm and its clientele. Rezneck Declaration, ¶¶ 9-11. In support of the higher rates requested, Mr. Rezneck did not seek to establish the average billing rates for competent counsel within the District of Columbia, but rather those charged by the best lawyers within the District in their most complex cases. Rezneck Declaration, ¶¶ 12-16. He concluded his affidavit by noting that *Laffey* "was never designed to set attorney rates in normal federal litigation by competent attorneys." Rezneck Declaration, ¶ 17.

5. Additional Information Regarding the Forum Rate.

The *Flannery* Order to Show Cause, 2004 U.S. Claims LEXIS at *9-12, provides some additional evidence regarding the forum rate for Vaccine Act cases, at least for work performed in 2004 and earlier by a highly experienced tort attorney.[19] In her order, Special Master Millman discussed the exceptional qualifications of the attorney, who requested a rate of $300.00 per hour, and she required respondent to show cause why the rate requested should not be granted.

B. Hours Billed.

Respondent interposed objections to the number of hours billed in this case (146.5 in the initial application[20] and 16 additional hours for the amended application,[21]

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[19] The evidence demonstrated that the attorney in question was a senior partner in a Washington, DC law firm, had practiced law for over 35 years, specialized in medical malpractice and products liability cases involving drugs, and was board certified by the National Board of Trial Advocates. The attorney's many activities and honors in the field of trial advocacy included being the former president of the Association of Trial Lawyers of America, a member of the American Board of Trial Advocates, a member of the American Law Institute, and a Master of the American Inns of Court. This attorney's qualifications appear to be superior to those of Mr. McHugh in every respect, except, perhaps, Vaccine Act experience. However, his years of medical malpractice and drug liability litigation involve litigation of even greater complexity than that found in Vaccine Act cases. Special Master Millman's show cause order reflected a high impression of the quality of the work he performed in *Flannery*, and referred to the attorney's reputation as "stellar."

[20] *See* n. 6 for an explanation of the discrepancy between this figure and the hours appearing at Fees App., Ex. I.

[21] The objections concerning the hourly rate and 12.7 hours expended in the response to my July 17, 2008 Order are addressed separately, *infra*.

and 22.4 for the responses to my July 17, 2008 Order). Respondent noted that the special master who decided *Kantor* had expressed concerns about the "disproportionate blocks of time in Mr. McHugh's tally" in that case. Res. Opp. at 12, quoting *Kantor*, 2007 U.S. Claims LEXIS 100 at *32. Respondent specifically objected to petitioner's practice of billing in 1/4 hour increments, the ten hours billed for reviewing and annotating the hearing transcript, the 35 hours billed for drafting the post-hearing brief, and the 15 hours billed for working on a reply memorandum.[22]

Inexplicably, in his Pet. Reply, petitioner stated: "The respondent has not however, cited to any entry that is claimed to be excessive." He further stated: "As the respondent has failed to point to any particular entry they [sic] deem excessive, it is impossible to respond further." *Id.* at 15. These comments were made in the portion of the Pet. Reply headed "Quarter Hour Time Sheets." Whether these comments pertain only to respondent's objections to the quarter hour billing method is unclear, but petitioner did not otherwise respond to respondent's objections to specific blocks of time billed.

In the Sur-Response, respondent also objected to the $10,320.00 billed for petitioner's Amend. Reply. Res. Sur-Resp. at 11, n.13. Based on the language used in the objection ("time spent purportedly preparing it..."), I treated this objection as one involving both the hours claimed and the hourly rate billed.

C. Travel Time.

In an entry dated May 17, 2007, Mr. McHugh billed eight hours for trial preparation, travel, and witness preparation, all at the full hourly rate claimed.[23] The lumping of these dissimilar activities could have made it impossible to determine how many hours were spent in travel on May 17, 2007. However, an entry on May 18, 2007, reflecting Mr. McHugh's return travel time of two hours allows me to calculate a total of

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[22] Respondent objected to the amount of time billed for the reply as excessive, but also objected on the basis that the work was performed before the respondent's reply brief was filed. The second part of this objection reflected a misunderstanding of the post-hearing briefing practice I ordered, which included optional post-hearing briefs filed simultaneously, followed by equally optional reply briefs. The attorney currently representing respondent in this case was not the attorney who handled the hearing or the briefing. My decision regarding the reasonable number of hours for post-hearing briefing in this case was not influenced by respondent's misunderstanding.

[23] This entry reflects block billing for several different tasks. Lumping dissimilar activities is not a proper billing practice and conflicts with the Guidelines for Practice. The Guidelines for Practice instruct petitioners' counsel to maintain contemporaneous time records that indicate the date and character of the service performed, the number (or fractions) of hours expended, and the identity of the person performing them. These guidelines encourage separate, rather than "lumped," entries in order to better assess the reasonableness of a fee request. *See* Guidelines for Practice, Section XIV.A.3. *See also Green v. Sec'y, HHS*, 19 Cl. Ct. 57, 67 (1989).

four hours of travel time for the hearing. An entry on the attorney cost page indicated that the method of travel was rental car. Fees App. Ex. I, 4th (unnumbered) page.

Respondent objected to reimbursing Mr. McHugh's travel time at the full hourly rate claimed, noting that travel time has historically been reimbursed at one-half the hourly rate claimed. Res. Opp. at 12-13. Petitioner responded by noting that a court in New York had ruled in favor of paying the full rate for "*de minimus*" travel time and that all travel was performed during working hours, noting that the return travel was performed between 5-7 PM. Pet. Reply at 14-15. Petitioner did not cite to any Vaccine Act cases involving travel cost billing.

D. Issues Regarding Costs Claimed.

Four issues concerning the costs claimed bear mention. The first involves the lack of documentation concerning petitioner's own costs. The second involves Dr. Shane's fees. The third involves an unexplained entry dated June 14, 2007, for $862.93, referred to simply as "Ck#2386." The fourth is petitioner's claim for $90.00 to purchase the National Law Journal's fees report.

1. Petitioner's Own Costs.

Petitioner's own declaration concerning his costs appears as the last two pages of Pet. App., rather than as a separate exhibit. It is not identified as the submission made in accordance with Vaccine General Order 9, but its content generally comports with that Order.[24]

Mr. Rodriguez asserted that he had expenses of $2,252.16, which included some of the fees paid to Dr. Shane, expenses incurred in gathering records, and travel expenses related to the hearing. He referred to "an accompanying sheet" listing such expenses, but no such sheet was filed.

Instead, the last (unnumbered) page of the Fees App., Ex. I, contains a table entitled "Rodriguez Expenses," which totals $2,252.16. It appears that petitioner's counsel converted the "accompanying sheet" into this table. The better practice would have been to include the sheet with petitioner's statement of his own expenses, clearly identifying the submission as the General Order 9 statement, with the signatures of both petitioner and counsel. Additionally, the invoices or bills pertaining to the costs should have been furnished, avoiding the necessity to search through all of the

[24] For the edification of petitioner's counsel, General Order 9 provides: "the court **shall** require in **all** future applications for fees and costs a statement signed by **petitioners and counsel** which clearly delineates which costs were borne by counsel and which costs were borne by petitioners..." (emphasis original). General Order 9 is available on the court's website at http://www.uscfc.uscourts.gov/sites/default/files/General9.pdf (last visited June 25, 2009).

documents filed for a precise listing of petitioner's incurred expenses and support therefor. The rationale behind General Order 9's requirement for a petitioner's own statement of costs incurred was to ensure that petitioners' out-of-pocket expenses were not overlooked by their attorneys. Because the two entries in this case have the same totals, I am satisfied that the table accurately captures the costs petitioner personally incurred.

2. Doctor Shane's Fees.

Doctor Shane's fees appear in three different places in this application: (1) a total of $1,675.00 paid directly to Dr. Shane by petitioner himself (in the amounts of $1,500.00 on March 14, 2007, and $175.00 on March 30, 2007); (2) a separate entry dated May 22, 2007, for $4,200.00, which appears on the same page of the Fees App., Ex. I as petitioner's own expenses; and (3) two entries for costs that appear on the second from the last sheet of Ex. I for $1,050.00 on October 26, 2006, for "photos and time" and on January 18, 2007, for $450.00 for "report." No invoices or bills from Dr. Shane accompany any of these entries[25] and, with the exception of the last two items, there is no indication of what services were performed. Finally, there is nothing to indicate the hourly fee Dr. Shane charged.

3. Unknown Cost Incurred on June 14, 2007.

There is nothing in the fees application or the docket of this case that explains the June 14, 2007 charge for $862.93. An application for fees and costs should provide sufficient detail regarding what is being claimed to allow a special master to determine, from the application and the case file, whether those amounts are reasonable. Petitioner bears the burden to document the fees and costs claimed. *Bell v. Sec'y, HHS,* 18 Cl. Ct. 751, 760 (1989).

4. The National Law Journal Charge.

In his amended application for fees and costs, petitioner requested reimbursement for a subscription to the National Law Journal's survey of attorney fees. Amend. Reply at 21. Respondent objected that such costs were not properly reimbursable. Res. Sur-Resp. at 11, n.13.

E. Supplemental Fees Application.

Petitioner seeks $5,787.50 in attorney fees for his response to my July 17, 2008

[25] It is possible that petitioner submitted Dr. Shane's bill with his own statement of costs, which is missing from this application. With regard to the remainder of Dr. Shane's fees, there is no excuse for the failure to include an itemized bill. This is not Mr. McHugh's first fee request, nor is it Dr. Shane's first appearance as an expert.

order and an additional $4,607.50 in fees for preparing the Suppl. Fees App. and answering respondent's objections thereto, for a total request for $10,395.00 in attorney fees for supplemental work on the original fees requests.

The supplemental fees application does not involve Mr. McHugh's fees; it concerns those of Mr. Gilbert Gaynor, with whom Mr. McHugh contracted to respond to my July 17, 2008 order and to prepare the supplemental response to the request for Mr. Gaynor's fees. Mr. Gaynor averred that his billing rate for "private paying clients on all new matters as of the start of 2009 is $475. My hourly rate in 2008 was $450." Declaration of Gilbert Gaynor, ¶ 3 (unnumbered exhibit incorporated into petitioner's Suppl. Fees. App.) ["First Gaynor Declaration"].[26] Petitioner seeks reimbursement at Mr. Gaynor's stated billing rate.

The Suppl. Fees App. and the accompanying declarations of Mr. Gaynor, Ms. Drooz, and Mr. Adlai do not specify the precise nature of the legal work for which Mr. Gaynor commands these hourly rates, other than identifying it as "complex litigation within the Central District of California" (Declaration of Tarik Adlai (filed without an exhibit number) at ¶ 5) and "complex litigation in federal courts in the Central District of California" (Declaration of Deborah Drooz (also filed without an exhibit number) at ¶ 2). Petitioner filed no references to any cases in which a court authorized payment for Mr. Gaynor's legal work at these rates.

Respondent objected to the hourly rates of Mr. Gaynor,[27] but not to the hours expended, contending that the rate of compensation should be $252.00 per hour. Res. Suppl. Opp. at 8. Respondent based this hourly rate on Mr. Gaynor's lack of Vaccine Act experience and a 2008 survey of small firm rates in the western region of the U.S. Respondent also objected to the increase in rates from 2008 to 2009, as the $25.00 increase exceeded the rate of inflation. Respondent noted a discrepancy between Mr. Gaynor's claims regarding his Martindale-Hubbell AV rating and the on-line Martindale-Hubbell listing.[28]

Respondent also challenged the usefulness of the declarations of Ms. Drooz and Mr. Adlai in support of Mr. Gaynor's rates because their lack of familiarity with the requirements of Vaccine Act litigation undercut their assessment of the reasonableness

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[26] This declaration of Mr. Gaynor should not be confused with Mr. Gaynor's second declaration (also not assigned an exhibit number) ["Second Gaynor Declaration"], attached to the Suppl. App. Reply.

[27] Respondent's objection that the fees requested for Mr. Gaynor are not compensable in the absence of a retainer by petitioner is not well taken. Respondent cites no law in support of this proposition, nor is there evidence suggesting that petitioner did not consent to Mr. Gaynor's participation in the case.

[28] As the Suppl. App. Reply notes, the information in Martindale-Hubbell's on-line listing was incorrect. Second Gaynor Declaration at ¶ 3.

of Mr. Gaynor's rates for work performed in this case. In support of the lower hourly rate proposed for Mr. Gaynor, respondent cited a recent decision, *Broekelschen v. Sec'y, HHS,* No. 07-137V, 2008 U.S. Claims LEXIS 399 (Fed. Cl. Spec. Mstr. Dec. 17, 2008), awarding $340.00 per hour to an experienced Vaccine Act attorney practicing in the Central District of California, whom the special master characterized as "among the best attorneys representing petitioners in this Program." *Broekelschen*, 2008 U.S. Claims LEXIS 399 at *11. Respondent argued that Mr. Gaynor, with little Vaccine Act experience, did not warrant a rate higher than the attorney representing the petitioner in *Broekelschen*.

In their Suppl. App. Reply, both Mr. McHugh and Mr. Gaynor engaged in intemperate and ill-considered attacks on respondent's filing in opposition to the supplemental fee application, calling it "entirely devoid of merit." *Id.* at 1.[29] They assert that respondent wasted public funds by challenging the hourly rate Mr. Gaynor demanded in the Suppl. Fees App.[30] The declarations of Mr. McHugh and Mr. Gaynor, attached thereto, complain that respondent engaged in unprofessional conduct by commenting on the lack of support in Martindale-Hubbell for Mr. Gaynor's assertion of his "AV" rating. Mr. McHugh bitterly complained that respondent's expert filed a deceptive opinion (declaration of Mr. McHugh), and Mr. Gaynor claimed respondent filed a "meritless" brief. Suppl. Fees. App. Reply, Gaynor Supp. Dec. at ¶ 7. These declarations are not paginated, not assigned exhibit numbers, and are attached directly following the nine page reply memorandum.

Petitioner conveniently overlooks the fact that it was Mr. Gaynor who raised the subject of his Martindale-Hubbell AV rating without ever checking the on-line website reflecting his professional credentials with Martindale-Hubbell. Gaynor Supp. Dec. at ¶ 3. It was Mr. Gaynor's responsibility to ensure that his professional credentials were correctly reflected and respondent cannot be faulted for reporting what she found.

Mr. McHugh's personal attack on respondent's expert witness is likewise unfounded,[31] and unfortunately, reflects back to his own expert's entirely unwarranted

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[29] Although numbered as page 1, this page is actually the second page of the Suppl. Fees App. Reply.

[30] The costs of litigation are certainly an appropriate consideration for respondent in deciding whether to challenge a fees request. However, the cost of litigation is not the only factor. Respondent may well determine that a challenge to Mr. Gaynor's rate of compensation now will result in ultimate savings if a special master determines that lower hourly rates are warranted for Mr. Gaynor's services. In any event, the decision to challenge a fee request is solely within the purview of respondent, and Mr. McHugh's and Mr. Gaynor's observations are simply not well-taken.

[31] Although the petition alleged both a Table injury and an actual causation claim, if petitioner's expert addressed the Table injury claim in his initial report, he did so in such an oblique manner that his contention escaped my very careful review. Respondent's expert's report focused solely on the actual

personal attack on this same expert's credentials during the litigation of the entitlement phase of this litigation. *See* Order, dated February 6, 2007 (expressing the court's concern about Dr. Shane's personal attacks on respondent's expert).

## IV. Discussion.

A. Determining a Reasonable Hourly Rate.

The parties agreed that *Avera II* mandates the use of the forum rule to determine the hourly rate of compensation to which petitioner's attorneys are entitled. Unfortunately, they do not agree on what the appropriate rate of compensation is. As Judge Rader predicted in his concurring opinion in *Avera II*, jettisoning the "hometown rule" approach requires this court to "undertake a complex *Davis*[32] exception analysis rather than simply determining the local applicable rates for a reasonable fee award." 513 F.3d at 1353. Petitioner first argued that his attorney's New York City "market rate" of $450.00 per hour applied.[33] Although he ostensibly relied upon *Avera II,* his submission was void of any evidence or argument concerning the forum rate.

Thereafter, petitioner abandoned his initial fees argument, contending instead that the local rate in the District of Columbia applied and that the *Laffey* Matrix constituted that local rate. Based on *Avera II*, it is clear that the analysis must begin with a determination of the forum rate. Once the forum rate is determined, then, if the bulk of the work was performed outside the forum, the analysis may shift to the market rate. Only if the "bulk of the work" exception to the forum rate applies is it then necessary to determine the rate of compensation in the legal marketplace where that work was performed, in order to determine if the *Davis* exception to the forum rule applies. *Avera II* applied the *Davis* exception "windfall rule" when the local rate was substantially lower than the forum rate. *Avera II* did not address what rate to apply when the local rate is substantially higher than the forum rate, although this issue was discussed in *Davis,* 169 F.3d at 758 (when out-of-town counsel possess special expertise or local counsel are unwilling, higher out-of-town rates may apply). In most

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causation claim made by petitioner's expert in his initial report in this case. Mr. McHugh's comments about respondent's expert ignores the decided difference between the medical term "encephalopathy" and the Table definition of the type of encephalopathy required to demonstrate a Table injury. *See also* discussion of Mr. McHugh's "scorched earth" defense rationale for awarding him the entire amount of fees requested, *infra*, at Section IV.A.4.c.

[32] Referring to *Davis County Solid Waste Management and Energy Recovery Special Service District v. EPA*, 169 F.3d 755 (D.C. Cir. 1999).

[33] Based on my experience and recent research, I find that the initially requested fee of $450.00 per hour is substantially higher than the hourly rates awarded to attorneys of similar years of litigation experience with far more years of experience in Vaccine Act litigation, including attorneys who practice in high cost areas.

cases, a higher rate has been awarded only when one of these two additional factors are demonstrated: that the non-local attorney possesses "special expertise" or that the party seeking fees and costs was unable to find other representation. *See*, *e.g.*, *Gavette v. Office of Personnel Mgmt*., 788 F.2d 753, 54 (Fed. Cir. 1986) (unavailability of qualified local attorneys); *Nat'l Wildlife Federation v. Hanson*, 859 F.2d 313, 317-18 (4th Cir. 1988) (unavailability of local counsel); *In re "Agent Orange: Prod. Liab. Litig*., 818 F.2d 226, 232 (2d Cir. 1987) (rates higher than the local rate authorized only when "special expertise" of non-local counsel essential, local counsel unwilling, or other special circumstances exist); *Donnell v. United States*, 642 F.2d 240, 251-52 (D.C. Cir. 1982); *Eli Lily & Co. v. Zenith Goldline Pharmaceuticals*, 264 F. Supp. 2d 753, 763-64 (SD Ind. 2003) (higher rates justified when a party has tried and failed to obtain local counsel or equally competent counsel unavailable locally).

1. The *Laffey* Matrix (Adjusted or Not) is Not The "Forum Rate."

Petitioner's amended fees application treated the applicability of the *Laffey* Matrix as a foregone conclusion. It is not.[34] In *Avera II*, the Federal Circuit left open the question of the applicability of the *Laffey* Matrix in Vaccine Act cases. Applying the *Laffey* Matrix to Vaccine Act cases has a certain allure because a bright line rule would go a long way toward reducing unnecessary litigation over attorneys' hourly rates in Vaccine Act cases. It would eliminate the necessity for a petitioner to establish the local hourly rate. Were the court to adopt such an approach, the question of what hourly rate is "reasonable" could be established very easily, simply by reference to the *Laffey* Matrix or a similar scheme based on Vaccine Act compensation rates.

However, the *Laffey* Matrix is not a statutory reimbursement scheme; it is a court-created mechanism to streamline the issue of reimbursement of attorney fees in fee-shifting cases tried in the U.S. District Court for the District of Columbia. There are significant differences between the litigation in which the *Laffey* Matrix is applied and Vaccine Act litigation. *See*, *e.g*, *Laffey*, 572 F. Supp. at 359 (calling the *Laffey* case itself "an extraordinary undertaking" involving 13 years of litigation).

As Judge Rader noted in *Avera II*, procedures under the Vaccine Act differ from those in other fee-shifting statutes, with the Vaccine Act providing for a "less adversarial, streamlined process." 513 F.3d at 1353. The Vaccine Act is a no-fault statute; unlike traditional personal injury or products liability litigation, there is no requirement to establish fault, informed consent, defects in design or manufacture, or a failure to warn, thus streamlining and simplifying the litigation. In *Blum*, the Supreme

[34] Even in the court system in which it was created, judges are not required to apply the *Laffey* Matrix to fees. *See Blackman v. District of Columbia*, 59 F. Supp. 2d 37, 43-44 (D.D.C. 1999); *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995); *Agapito v. District of Columbia*, 525 F. Supp. 2d 150, 155 (D. D.C. 2007) (applying an hourly rate much lower than that of the *Laffey* Matrix) and *Muldrow v. Re-Direct, Inc*., 397 F. Supp. 2d 1 (D. D.C. 2005).

Court indicated that the nature of the services provided is a factor in determining the reasonable rate of compensation. 465 U.S. at 895, n.11.

In the fee-shifting cases in which the *Laffey* Matrix is applied, a party must prevail in the litigation in order to receive fees, a factor that suggests not only that the underlying claim was meritorious, but also that the case was competently tried. Under the Vaccine Act, nearly all litigants receive attorney fees and costs because the Act provides that fees may be awarded to unsuccessful litigants. Furthermore, our court has been extremely generous in finding that unsuccessful petitions were brought in good faith and upon a reasonable basis, in order to award fees and costs to these litigants and their attorneys. *See Hamrick v. Sec'y, HHS*, 99-683V, 2007 U.S. Claims LEXIS 415 (Fed. Cl. Spec. Mstr. Jan. 9, 2008). Thus, the risk of attorneys receiving no compensation at all is significantly reduced, a factor that undoubtedly influences whether an attorney will take a Vaccine Act case in which the likelihood of prevailing is not high.

In *English v. Sec'y, HHS*, No. 01-061V, 2006 U.S. Claims LEXIS 356 (Fed. Cl. Spec. Mstr. Oct. 26, 2006), the Chief Special Master considered arguments similar to those advanced here regarding the applicability of the *Laffey* Matrix to a determination of reasonable attorney fees. He rejected them. In *Kantor*, Mr. McHugh advanced the same *Laffey* Matrix arguments with regard to his fees. Special Master Abell rejected them.[35] For similar reasons, I do so as well. The *Laffey* Matrix does not represent the prevailing market rate as defined by the Supreme Court in *Blum*: that rate paid in the community for "similar services by lawyers of reasonably comparable skill, experience, and reputation."[36] 465 U.S. at 895, n.11. The *Laffey* Matrix applies to complex litigation in which one must prevail in order to receive fees at all;[37] discovery disputes abound;

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[35] Apparently, no petition for review of the special master's fees and costs decision in *Kantor* was filed.

[36] If I accepted petitioner's argument that the adjusted *Laffey* Matrix constituted the forum rate for purposes of calculating attorney fees, Mr. McHugh would fall into the *Davis* exception adopted in *Avera II*. The adjusted *Laffey* Matrix would, according to petitioner, set a rate of compensation for work performed from June, 2007, through May, 2008, for an attorney in practice for more than 20 years at $645.00 per hour. The original fee application indicated that Mr. McHugh's "billing rate" for that period was $350-450.00 per hour, or approximately $200-300.00 less per hour than what he contended was the "forum rate." This is a significantly lower hourly rate and comparable to the difference that constituted a windfall in *Avera II*. All of the work in this case was performed outside the District of Columbia. Therefore, consistent with the decision in *Avera II*, Mr. McHugh would only be entitled to, at best, the lower "billing rate."

[37] Petitioner relies on *City of Burlington v. Dague*, 505 U.S. 557, 564 (1992) and *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. at 720 as support for his position that the *Laffey* Matrix should apply to litigation in which there is no requirement that a party prevail in order to receive fees from the opposition. Petitioner's reliance is misplaced. In *City of Burlington*, the Supreme Court held that a court could not enhance a lodestar calculation based on the contingent fee contract between the substantially

the rules of evidence apply; and, if litigated rather than settled, may be tried to a jury, rather than before a special master who hears only vaccine injury cases. None of these factors apply in Vaccine Act litigation.

To parse the relevant language from *Blum*, and assuming, *arguendo*, that petitioner has demonstrated that the *Laffey* Matrix rates are "those prevailing in the community"[38] (the District of Columbia), he has failed to show that the services provided in civil cases tried in the U.S. District Court for the District of Columbia are similar to Vaccine Act litigation, or that his skill and reputation are similar to those counsel who command the *Laffey* Matrix rates he requests.

The *Laffey* Matrix was judicially created for application in a completely different forum, that of the U.S. District Court for the District of Columbia. Although several decisions of the Court of Federal Claims have briefly discussed the *Laffey* Matrix in fees disputes, the court has never found that matrix applicable in fee-shifting cases in or outside of the context of the Vaccine Act. *See Avera I*, 75 Fed. Cl, 400, and *Filtration Development Co., LLC v. United States*, 63 Fed. Cl. 612 (2005). Although petitioners have requested *Laffey* Matrix rates in a number of fees petitions before a special master of the Court of Federal Claims, no decision on a petition for review has held the *Laffe*y Matrix applicable to Vaccine Act cases. *Avera II* is apparently the only decision of the Federal Circuit that discusses the *Laffey* Matrix, and it left the question of its applicability open. The fact that the judges of the local U.S. District Court[39] have concluded that the *Laffey* Matrix fee schedule represents a reasonable level of compensation, given the complexity of the litigation and expected level of performance in their courtrooms, does not mandate similar conclusions about Vaccine Act litigation under our relatively informal and streamlined procedures.

Finally, I note that, based on the adjusted *Laffey* Matrix rate requested, $645.00 per hour is nearly twice the amount ($350.00 per hour) that Mr. McHugh has most recently been awarded in Vaccine Act litigation. *Kantor*, 2007 U.S. Claims LEXIS 100, *30. The requested rate is also significantly higher than any fee ever paid to any attorney representing a Vaccine Act petitioner that I was able to discover. If a reasonable fee is that fee necessary to attract and retain competent counsel, then the fees that have been awarded in Vaccine Act cases in recent years have adequately

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prevailing party and his attorney; a similar result obtained in *Delaware Valley*. As both cases involved impermissibly enhancing a lodestar rate to compensate for the risk of loss, they have little relevance to a determination that the lodestar rate in litigation under fee-shifting statutes is different from litigation in which nearly every petitioner's attorney receives compensation.

[38] 465 U.S. at 895, n.11.

[39] The use of the *Laffey* Matrix in the U.S. District Court for the District of Columbia, was approved by the U.S. Court of Appeals for the District of Columbia. *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*).

accomplished that purpose.[40]

Nevertheless, noting the time and effort consumed in the fees litigation in this case, I echo the sentiment expressed by the Chief Special Master in *Ray*, 2006 U.S. Claims LEXIS 97, n.6, regarding the utility of establishing a "*Laffey*-like" matrix for the forum rate of attorney fees within the Vaccine Program, based on reasonable rates for varying levels of experience.[41] Such a matrix would not entirely eliminate disputes over what constituted a reasonable hourly rate, but it would reduce the considerable time spent by counsel and the court alike in resolving fees disputes.

2. Evidence in This Case Upon Which to Determine the Forum Rate.

The information filed by petitioner was insufficient, post-*Avera II,* to determine the forum rate. However, respondent's Resp. to July 17, 2008 Order at 3-5 and Tab D did provide some information upon which to determine that rate, in the form of evidence concerning the agreed-upon rate of compensation for one Vaccine Act attorney who provides the bulk of his services within the District of Columbia.[42] Additionally, other information provided by respondent, coupled with the cost of living index submitted by petitioner, permitted some reasoning by analogy to assist me in determining the forum rate to which petitioner's attorney is entitled. The *Flannery* order provided an indication of what rate an experienced Washington, DC tort litigation attorney requested for a Vaccine Act case and the view of the special master in that case that the rate was

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[40] In his due process arguments, petitioner alleges the contrary. This issue is addressed in greater detail in Part 4d, below.

[41] I made the identical suggestion in my July 17, 2008 Order. In response, respondent asserted in a conclusory statement that "such a matrix would be contrary to the forum rate required by *Avera*" without explaining that assertion. Res. Resp. to July 17, 2008 Order at 7, n.5. Respondent's suggestion, in the same footnote, that a Vaccine Act Matrix for attorney fees could result in a windfall for attorneys who practice in low cost areas is well-taken. However, the fact that fees in some cases would continue to be based on the *Davis* lower-cost exception does not detract from the utility that a fees matrix would provide. Unfortunately, unless the Federal Circuit squarely addresses whether the *Laffey* Matrix presents the *prima facie* forum rate in Vaccine Act litigation, the issue of its applicability will continue to bedevil our attorney fees cases. *See, e.g.*, *Paul v. Sec'y, HHS*, No. 05-886V, 2007 U.S. Claims LEXIS 408 (Fed. Cl. Spec. Mstr. Dec. 13, 2007), *Kantor*, 2007 U.S. Claims LEXIS 100; *Ray*, 2006 U.S. Claims LEXIS 97, *English*, 2006 U.S. Claims LEXIS 356, and *Ceballos v. Sec'y, HHS*, No. 99-97V, 2004 U.S. Claims LEXIS 77 (Fed. Cl. Spec. Mstr. Mar. 25, 2004). Many firms handling a substantial number of Vaccine Act cases have requested *Laffey* Matrix rates in at least one case over the past three to four years, although most firms have not persisted in those requests after denial by the special master. This may reflect a groundswell of opinion–at least from petitioners' attorneys–that *Laffey* Matrix rates are appropriate, but in view of the exhibits filed in this case, with case headings from other cases requesting *Laffey* Matrix rates, it more likely represents an orchestrated effort by the Vaccine Act petitioners' bar to press this issue until it is resolved by the Federal Circuit.

[42] *See Sabella*, 86 Fed. Cl. at 2005, n.2 (the forum for Vaccine Act cases is the District of Columbia).

reasonable.

The information pertaining to Professor Meyers was less valuable than that from the *Flannery* order because there are distinctions between Professor Meyers and most other attorneys who handle Vaccine Act cases. Professor Meyers represents Vaccine Act petitioners through a law school clinical practice program. Thus, he lacks the "overhead" expenses common to most other attorneys who engage in litigation practice. As respondent suggested, the $240.00 per hour 2008 billing rate for this clinic practice may not truly represents the amount that an attorney engaged in the private practice of law would charge a willing buyer of his services within the District of Columbia for work of complexity similar to that of the Vaccine Act.[43]

The *Flannery* order, issued in 2004, does not specify when the work was performed by the Washington, DC attorney representing the petitioner. Fortunately, the published decision in the same case *(see Flannery v. Sec'y, HHS*, No. 99-963V, 2005 U.S. Claims LEXIS 74 (Fed. Cl. Spec. Mstr. Mar. 14, 2003)) indicated when the work was performed. The hearing was initially scheduled in the fall of 2001, rescheduled for the spring of 2002, and postponed again, based on petitioner's death. Before the hearing, rescheduled for March 25, 2003, the special master raised the issue of lack of subject matter jurisdiction. Briefs were filed by the parties in March, 2003. It thus appears that the bulk of the work in the *Flannery* case was performed between 2001-2003, for which petitioner's attorney sought an hourly rate of $300.00. Applying adjustments for the cost of living increases from the 2001-2003 time frame to the periods in which the services in the instant case were performed, a 2009 "forum rate" for a similarly qualified attorney[44] would not exceed $360.00 per hour.

The burden is on petitioner to establish the "forum rate." Although petitioner's Amend. Reply, Ex. O, contains evidence regarding a nationwide sampling of law firm billing rates, including Washington, DC area firms, it does not provide sufficient detail

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[43] However, $240.00 per hour is more than the hourly rate received by many petitioners' counsel within the Vaccine Program. For example, in *Averal*, the petitioner's attorney, who is highly experienced in Vaccine Act litigation, was awarded $200.00 per hour for his work on the entitlement phase of that case. *Avera I*, 75 Fed. Cl. 400. In general, attorneys who have roughly similar years of practice and experience in Vaccine Act litigation have been awarded hourly rates of between $250-350.00 per hour for work performed in the last two years, although attorneys who practice in lower cost areas of the nation have been awarded lower rates. *See, e.g.*, *Paul*, 2007 U.S. Claims LEXIS 408 (awarding $275.00 per hour for 2007); *Savin v. Sec'y, HHS*, 85 Fed. Cl. 318 (2008) (upholding decision of special master awarding $310.00 per hour for 2007); and *Sabella*, 86 Fed. Cl. 207 (upholding award of fees between $250-310.00 per hour).

[44] Based on the information contained in the *Flannery* order and my knowledge of Mr. McHugh, the only area in which Mr. McHugh's qualifications exceed those of the petitioner's attorney in *Flannery* is in the number of Vaccine Act cases handled. Comparing the professional qualifications of the two attorneys leads me to conclude that the attorney in *Flannery* had greater skill and a better professional reputation than Mr. McHugh, although their years of professional experience appear similar.

concerning the nature of these law firms' practice areas to offer much guidance on the forum rate in Vaccine Act cases. There is no evidence that any of these firms engage in similar litigation, nor is it established that the senior partners in these firms practice law of the same degree of complexity or with the same degree of skill as Mr. McHugh. By Mr. McHugh's own admission, his solo practice means that he does some tasks that would be performed by associates or paralegals in a larger firm, and not by a senior litigator or partner.

In accordance with petitioner's request, I have considered the *Laffey* Matrix and the adjusted *Laffey* Matrix as some evidence of fees ordered by other courts within the District of Columbia. Like the Chief Special Master in *Ray*, I conclude that petitioner has failed to demonstrate that either matrix represents fees for work sufficiently comparable to Vaccine Act litigation so as to constitute sufficient evidence of a reasonable hourly rate in this case. *See Ray*, 2006 U.S. Claims LEXIS 97 at *17-20.

With regard to the fees charged and received by other attorneys handling Vaccine Act cases, I have not had the opportunity, post-*Avera II*, to consider the issue of the "forum rate" for any attorneys, other than those in which respondent and petitioner have negotiated an hourly rate. Because *Avera II* changed the focus from the geographic rule previously used in the lodestar calculation to the forum rate, decisions issued prior to *Avera II* awarding specific hourly rates must be viewed with some caution, as they may be based on evidence of the geographic rate for the attorneys involved.

The rates negotiated between Vaccine Act petitioners' counsel not practicing in a law school clinic setting and the Department of Justice are informative concerning a "forum rate," although they are certainly not dispositive. The rates negotiated for two small firms[45] representing many vaccine claimants provide some measure of what the market rate may be. A reasonable fee is what a willing buyer would pay a willing seller. *See Arbor Hill*, 522 F.3d at 184 n.2 ("in calculating the reasonable hourly rate for particular legal services, a district court should consider all relevant circumstances in

[45] Petitioner devoted considerable, albeit misplaced, argument to the unfairness of what he viewed as respondent's efforts to penalize him for being a solo practitioner. *See, e.g.*, Pet. Reply at 4-5 and Amend. Reply at 18. Petitioner missed the point of respondent's argument (and perhaps overlooked his own concession that his practice is qualitatively different from that of a senior partner in a large litigation practice). Respondent merely noted that the nature of Mr. McHugh's practice was different from that of a senior litigation partner in a large law firm. Res. Opp. at 9-11. In a solo practice, the lone attorney performs all tasks. In a large litigation practice, paralegals and junior attorneys perform many of the tasks in litigation, at rates considerably lower than those of the senior partner. It is petitioner's burden to demonstrate that the billing rate for a solo practitioner would be the same as that of a senior partner in a large law firm, a burden he failed to carry.

concluding what a reasonable client would expect to pay."). These fee negotiations[46] represent some evidence of what may be considered a "forum" market rate for experienced Vaccine Act practitioners. *Sabella v. Sec'y, HHS,* 2008 U.S. Claims LEXIS 385, at *17-18 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd*, 86 Fed. Cl. at 207-08 (a negotiated rate may be the market rate). Because these rates are similar, if not identical, for the senior litigator in each of these small firms, even though the two firms are not located in the same geographic area (one in Boston, MA, a high cost locale, and one in Vienna, VA, a suburban area within commuting distance of Washington, DC, with a more moderate cost of many services, to include office space), they clearly do not represent a geographic or "hometown" rate. I note that many, although not all, of the latter firm's cases are tried within the District of Columbia, and some of the Boston firm's cases are also tried here.

Additionally, in the initial Fees App. at Ex. J, petitioner included a cost of living index which reflects that Boston, MA, and Washington, DC, have a very similar cost of living. Thus, a fee negotiated by a Boston law firm specializing in Vaccine Act litigation

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[46] Although petitioner's most recent submission included an affidavit from one of these attorneys, Mr. Shoemaker, indicating that his negotiated fee did not represent a true negotiation, I did not find Mr. Shoemaker's affidavit persuasive. The affidavit indicated that, at the time of the negotiations, all of his fees applications were "stayed pending the outcome in *Ray*." (emphasis original, referring to *Ray,* 2006 U.S. Claims LEXIS 97). He explained that these stays meant that his "fees were effectively frozen for the better part of a year." Pet. Resp. to July 17, 2008 Order, Tab 1. I was able to find any evidence of only one stay issued in this attorney's fees and costs cases during the appropriate time frame, although some special masters may have granted informal stays and my search was limited to those cases in which payment for his fees and costs was awarded in 2006. The case in which a stay was issued was *Smith v. Sec'y, HHS*, No. 01-068V, and the stay was for a period of just two months. In one other case identified in the affidavit, *Stott v. Sec'y, HHS*, No. 02-192V, the special master suspended a deadline for one of respondent's filings, but just eight days later, petitioner filed an amended application for fees and costs, so any suspension did not materially delay the payment of fees. Information from the Clerk of Court's office indicated that this attorney received slightly fewer fees and costs awards during 2006 than he did in 2005. However, the Chief Special Master's decision on fees in *Ray* was issued on March 30, 2006, and Judge Merow's decision on the petition for review was issued on June 23, 2006. Thus, it is unlikely that the time during which the *Ray* appeal was being processed had much effect on fees in other cases.

Given that the total fees and costs awarded to Mr. Shoemaker in both 2005 and 2006 were substantial (approximately $650,000.00 in 2005 and $500,000.00 in 2006), the claims of economic coercion appear exaggerated. I also note that the issue in *Ray* was the applicability of the *Laffey* Matrix to Mr. Shoemaker's own attorney fees, thus, he is hardly a disinterested party in the instant litigation over the matrix's applicability to Vaccine Act fees cases. *See Kenney A. ex re. Winn v. Perdue*, 532 F.3d 1209, 1231-32 (11th Cir. 2008), *cert. granted*, 129 U.S. 1907 (Apr. 6, 2009) (lawyers who sign affidavits in support of fees applications may have a financial interest in the litigation as precedent for their own fee requests) and *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 724-26 (1990). As Mr. Shoemaker remains free to reject his own negotiated settlement and permit a special masters to set his hourly rates based on evidence he submits, I do not consider his self-serving affidavit persuasive on issues pertaining to the forum rate. Because the Chief Special Master awarded him $245.00 in *Ray*, 2006 U.S. Claims LEXIS 97 at *32, and the settlement negotiations resulted in a fee of $275.00 per hour for work performed in 2005, the allegedly coerced negotiated settlement was clearly in Mr. Shoemaker's economic interest. The $275.00 per hour figure is an extrapolation from the $250.00 per hour rate for 2004 and the $300.00 per hour rate for 2006 found in *Duncan*, 2008 U.S. Claims LEXIS 176 at **8, 11.

on behalf of their senior attorney would have some relationship to a presumptively reasonable rate, as defined in *Arbor Hill*.[47]

Although Mr. McHugh has somewhat less experience in Vaccine Act litigation than the lead counsel at each of these two firms, each of those counsel and Mr. McHugh have been practicing law for similar (and lengthy) periods of time. Thus, applying the *Blum* requirement that fees should be based on those that are paid to "lawyers of reasonably comparable skill, experience, and reputation" (465 U.S. at 896, n.11), I have considered these negotiated rates to have some relevance to my determination of the forum rate for an attorney of Mr. McHugh's skill and experience.

Based on all the evidence available to me, and considering my own experience with attorney fees in the Vaccine Program, I conclude that the "forum rate" for an attorney with more than 20 years of experience, and one with considerable specialized expertise in Vaccine Act cases or litigation of similar or greater complexity, is in the range of $275-360.00 per hour, with work performed in earlier years at the lower end of this range and work performed more recently at the higher end of this range. This rate is reflective of the rate requested in *Flannery*. Although the *Flannery* order does not indicate the amount ultimately awarded, the special master's comments in the order indicate that she considered the request rate appropriate. I am mindful that this range is higher than the fee negotiated on behalf of Professor Meyers, but the lack of overhead expenses in his case was an important factor in the fee agreement negotiated. Res. Resp to July 17, 2008 Order at 4-5. Where Mr. McHugh's many years of legal experience and several years of Vaccine Act experience place him within this range is addressed in Section V, below.

3. The Rate of Compensation in the Location Where the Bulk of the Work Was Performed.

The cases discussing a higher cost exception to the forum rule do not, unlike those involving the lower cost exception, appear to turn on whether there is a

[47] I am aware that the Chief Special Master opined in *Carr*, 2006 U.S. Claims LEXIS 105 at *4, n.2 that the fees negotiated for this firm could not be "used or interpreted as evidence of attorneys outside of the Boston community." I am first considering this negotiated fee structure as some evidence of what a willing buyer of legal services would pay to a willing seller in the Boston marketplace. Because the cost of living in Boston is similar to the cost of living in Washington, DC, the negotiated rate of compensation in Boston may be comparable to the market rate in the Washington, DC forum. I am also cognizant that the fees for similar legal services might differ between the two markets, in spite of similarities in the cost of living. However, in the absence of evidence of forum rates, other than those negotiated on behalf of Professor Meyers, and the $300.00 rate requested in *Flannery*, it is the best data available because these negotiated rates took into consideration "critical evidence for the lodestar analysis, and synthesized from that some base rates that form an appropriate rate applicable to an attorney practicing a similar type of law, with similar levels of experience, and within a fee-shifting structure." *Carr*, 2006 U.S. Claims LEXIS 105 at **10-11.

"significant difference" between the two rates. *Avera II* did not discuss a higher cost exception at all, and the decision upon which the Federal Circuit relied, *Davis*, only discussed a higher cost exception in dicta: "The exception to the *Donnell* rule allowing home market rates for attorneys from a more expensive jurisdiction when lawyers in Washington are not available or competent to handle the case remains in place." *Davis*, 169 F.2d at 760, citing to *Donnell,* 682 F.2d 240.

Thus, it appears unnecessary to decide whether the "billing rates" claimed by Mr. McHugh and Mr. Gaynor constitute a "significant" difference from the forum rate. Assuming, *arguendo*, that a significant difference is required, I conclude that their billing rates are significantly higher than the forum rate.

a. Mr. McHugh's Rate.[48]

Applying Mr. McHugh's "billing rate" of $450.00 per hour as the putative market rate where the services in this case were performed, and comparing it to the local rates I have found applicable to attorneys with substantial years of practice and experience in litigation of the complexity found in Vaccine Act cases, I conclude that the geographic rate is significantly higher than the forum rate.

The $450.00 per hour rate differs substantially from the $275.00 rate at the bottom end of the range for the forum rate I have determined to be applicable in Vaccine Act litigation, in that Mr. McHugh's billing rate is more than 60% higher. The difference is less substantial when compared to the upper end of the local rate, but still constitutes $90.00 per hour more, a difference of 25%. I thus conclude that the originally requested rate of $450.00 per hour is a significantly greater rate of compensation than the forum rate.

b. Mr. Gaynor's Rate.

Mr. Gaynor has claimed billing rates of between $450-475.00 per hour for work performed, according to the Suppl. App. at 1, "in responding to this Court's Order of July 17, 2008 directing further briefing on certain issues." These rates also represent a significant difference from the forum rate.

More significantly, the work actually performed in this case by Mr. Gaynor is not work commensurate with complex federal or state litigation. The response required by my July 17, 2008 Order was not complex, and the affidavit accompanying that response was not prepared by Mr. Gaynor. The Suppl. App. itself was a relatively simple fees

[48] Because Mr. McHugh appears to have eschewed reliance on his originally requested rate of $450.00 per hour, it may be unnecessary to determine whether a higher cost *Davis* exception applies. Therefore, once I determine the forum rate, I could simply apply that rate to the hours that I determine to be reasonable.

request. The nature of the services provided is an appropriate matter for consideration in awarding attorney fees, petitioner's arguments to the contrary (Suppl. App. Reply at 3-4) not withstanding. *Blum*, 465 U.S. at 895, n.11.

4. Has Petitioner Established a "Higher Cost" Exception to the Forum Rule?

*Avera II* is silent regarding any higher cost exception to application of the forum rates. The Federal Circuit placed significant reliance on the DC Circuit's decision in *Davis* and analyzed the exception to the forum rule in terms of the "windfall" to petitioners. In *Davis*, an attorney, practicing in a location where the hourly rates were lower, was compensated at the lower hometown rate, rather than receiving the higher rates obtaining in the forum. In dicta, the *Davis* court suggested that an attorney practicing in a location where hourly rates were higher would be limited to those rates obtaining in the forum. *Davis*, 169 F.3d at 759-60. Other federal courts considering a "higher cost" exception to the forum rule have approved higher rates only when it was demonstrated that the out of town counsel possessed special expertise or that local counsel[49] were unwilling to take such cases. Res. Opp. cites many of these cases at pp. 6-7, n.3.

a. Special Expertise.

This record is devoid of any information that establishes that Mr. McHugh, much less Mr. Gaynor, possesses any special expertise in Vaccine Act cases. Mr. McHugh has occasionally represented petitioners filing Program cases over the last decade. His assertion that his office is "the last resort" for Vaccine Act petitioners is simply not supported by the evidence. The cases in which Mr. McHugh has appeared as counsel of record are not remarkable, nor do those records reflect any extraordinary degree of skill exhibited by Mr. McHugh. Mr. Gaynor has never appeared as counsel of record in a Vaccine Act case, although I accept his assertions that he has assisted Mr. McHugh on five cases, including this one.

b. Availability of Other Counsel.

The record is likewise sparse concerning the unavailability of other counsel to take this case. In his due process objections, petitioner contends that "the limitations placed on legal fees in this program have driven attorneys from the program, have

[49] In view of the nationwide jurisdiction conferred on the Court of Federal Claims and the special masters who hear Vaccine Act cases, the term "local counsel" is something of a misnomer. Counsel in Vaccine Act cases come from New York City, Honolulu, and many places in between. While there are some Washington, DC area attorneys currently representing Vaccine Act litigants in the Omnibus Autism Proceeding (which comprises the vast majority of the Vaccine Act cases currently filed), none of the cases on my non-autism docket involve Washington, DC attorneys representing petitioners. Although there are well over 200 attorneys currently representing Vaccine Act litigants, the vaccine bar is specialized and dominated by a small number of firms who handle a large number of cases.

denied numerous injured persons access to the Courts [sic] and have denied those persons due process of law." Amend. Reply at 21. In support, petitioner refiled several declarations, previously filed in *Avera II*, concerning the reasons some attorneys no longer take Vaccine Act cases, and the declaration of Mary Rodriguez detailing difficulties she had in finding an attorney to take her son's case.

The evidence that Mrs. Rodriguez had difficulty in locating an attorney willing to take her son's case fails to establish that no attorney practicing in the Vaccine Program, at the rates customarily paid by this Program, would take the case. There are many reasons a law firm may decline a case, and the facts of this one likely contributed to the reluctance of the firms contacted to do so. Child death cases attributable to SIDS have generally not been considered Table injuries and off-Table claims involving apparent SIDS deaths are not routinely compensated.[50]

The fact that some attorneys or firms have ceased to handle Vaccine Act cases does not, standing alone, constitute sufficient evidence that the hourly rates paid to attorneys in Vaccine Act cases are inadequate. Cases under the Vaccine Act continue to be filed, both by attorneys and by *pro se* litigants. The number of *pro se* litigants remains small. Some litigants who initially file *pro se* petitions subsequently secure counsel. Some litigants who are represented by counsel have a parting of the ways with their attorneys and subsequently proceed *pro se.*

Petitioner's anecdotal evidence of attorneys leaving the Vaccine Program may correctly reflect that specific counsel have elected to practice elsewhere. However, reasoning from the specific to the general often results in a fallacious argument. Petitioner has provided no evidence of a general exodus of attorneys from the Vaccine Program. Data available from the Clerk of Court is to the contrary. Of the attorneys who had three or more vaccine cases filed in 1997 or 1998, all but one of those attorneys also filed cases in 2007 or 2008. In addition, eight more attorneys joined the list of those filing three or more cases in 2007 or 2008. *See also Sabella*, 2008 U.S. Claims LEXIS 385 at **15-16) (analysis of similar data for slightly different time frames).

Thus, the evidence fails to demonstrate the conditions precedent for a "higher cost" exception to the forum market rate.

c. "Scorched Earth" Defense.

In his declaration attached to the Amend. Reply, Mr. McHugh stated that

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[50] Giavanna's death presented an uncommon scenario, involving resuscitation and a subsequent coma that constituted the Table encephalopathy, followed by her death. In *Hellebrand v. Sec'y, HHS*, 999 F.2d 1565 (Fed. Cir. 1993), the Federal Circuit found that a SIDS death within 72 hours of a DPT vaccination, without evidence of a preceding encephalopathy, failed to establish a Table injury. *Id*. at 1568; *see also Hodges v. Sec'y, HHS*, 9 F.3d 958 (Fed. Cir. 1993).

respondent's "scorched earth" defense of this case entitled him to the "full cost's" [sic] incurred. Although I stated in the published Order to Show Cause that respondent's failure to concede that Giavanna suffered a Table injury was inexplicable, respondent did not present a "scorched earth" defense. Rather, both parties were so focused on litigating the "actual cause" of Giavanna's death, and arguing about what the autopsy slides revealed, that they failed to focus on the incontrovertible fact that she had a "Table" encephalopathy, as defined by the Qualifications and Aids to Interpretation portion of the Vaccine Table. *See* 42 C.F.R § 100.3(b)(2).

Petitioner's expert's personal attack on respondent's expert's age and his speculations about her current responsibilities (*see* Pet. Ex. 10 and Order, dated February 6, 2007) undoubtedly set the stage for reshaping this case into a battle between what an eminently qualified pediatric neuropathologist (respondent's expert) saw on autopsy slides and what a much less qualified pathologist (petitioner's expert) indicated that those slides revealed.[51] In the ultimate analysis, unless the slides demonstrated the existence of a specific cause for this child's death, rather than an idiopathic or unknown cause such as SIDS,[52] they were not relevant. The slides did not reveal a specific cause for Giavanna's untimely death.

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[51] Although I did not find it necessary in the show cause order to delve into the expert testimony in detail, I did state my factual conclusions regarding the relative qualifications and credibility of the two experts:

> I have not summarized the expert medical testimony, as it primarily concerns the actual causation claim. In view of my tentative finding that this case meets the criteria for a Table encephalopathy, it is unnecessary to address the evidence pertaining to the actual causation claim. However, I note that the two experts frequently disagreed about what the tissue slides taken at Giavanna's autopsy actually showed. In general, I found Dr. Rorke-Adams to be a more qualified, reliable, and credible witness than Dr. Shane, particularly with respect to the autopsy slides and what they represented.

Order, dated September 14, 2007, at 8. I also stated:

> Doctor Rorke-Adams' testimony was clear, lucid, and compelling on the issue of vaccine causation of Giavanna's death. Were I to reach the issue of actual causation, my conclusions regarding petitioners' entitlement to compensation might well be different. Her opinion undercut that of Dr. Shane on how a vaccine could cause Giavanna's condition and ultimately her death. However, more importantly, it demonstrated that the pathologic findings upon which he based his opinion were either not present or he misinterpreted them.

*Id.*, at 13. I note that another special master, who heard the testimony of the same experts in a similar case without the factual prerequisites of a Table injury, concluded that Dr. Rorke-Adams was more persuasive than Dr. Shane. *Nordwall v. Sec'y, HHS*, No. 05-123V, 2008 U.S. Claims LEXIS 86 (Fed. Cl. Spec. Mstr. Feb. 19, 2008), *aff'd*, 83 Fed. Cl. 477 (2008).

[52] "SIDS" is sudden infant death syndrome. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY ["DORLAND'S"] at 1695 (30th ed. 2003).

d. "Due Process" Concerns.

Petitioner asserted that two Supreme Court cases support his position that a "program which limits attorneys fees to what the program will pay denies due process where the fees paid cause plaintiffs to be unable to find counsel." Neither of the cited cases, *Triplett*, 494 U.S. 715 and *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617 (1989), supports petitioner's claim that the Vaccine Act, as administered, violates a petitioner's due process right to obtain representation. Initially, I note that petitioner's assertion is similar in structure, but different in meaning, from a statement by the Court in *Triplett*, 494 U.S. at 720-21 ("A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle") (*citing Caplin & Drysdale, Chartered*, 491 U.S. at 623-24, n.3). This statement was made in regard to a challenge to the attorney's standing to litigate the issue of attorney's fees. It did not constitute the holding of that case, which upheld the constitutionality of a statute that limited attorney fees to what the Department of Labor considered reasonable. In *Triplett*, the Supreme Court found evidence similar to that submitted in this case (statements from attorneys concerning the unavailability of counsel willing to take black lung cases) "anecdotal" and insufficient to "overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled." 494 U.S. at 723. The Court also stated that this type of evidence is insufficient, even if "entirely unrebutted." 494 U.S. at 724.

Petitioner's arguments here echo those made in *Triplett*. Complaints about the rates of pay and delays[53] in receiving attorney's fees are insufficient evidence upon which to establish a deprivation of a constitutional right. The "conclusory impressions of interested lawyers" does not demonstrate that Vaccine Act litigants are unable to retain qualified counsel, much less that the rates of pay authorized by this court are the cause of any such inability to find representation. *Triplett*, 494 U.S. at 726.

5. Conclusions Regarding a "Higher Cost" Exception.

In language with considerable applicability to recent Vaccine Act fees cases, the Second Circuit commented: "Our fee-setting jurisprudence has become needlessly confused – it has become untethered from the free market it is meant to approximate.

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[53] The delay in payment of fees until the case is resolved appears to be common to all cases involving fee-shifting statutes, not simply the Vaccine Act, because, under most fee-shifting statutes, attorney fees are paid only when a party prevails in the litigation. Under the Vaccine Act, fees are paid in most cases even when compensation is denied, so long as the claim was brought in good faith and upon a reasonable basis. The courts handling vaccine cases have been generous in finding both. *See Hamrick,* 2007 U.S. Claims LEXIS 415 at **9-21 (discussing the leniency special masters have demonstrated in finding a reasonable basis and good faith in petitions for compensation dismissed for lack of proof). As *Avera II* indicates that interim fees may be paid in Vaccine Act cases, delays in payment of fees are even less likely to constitute a reason for attorneys to cease handling vaccine litigation.

We therefore suggest that the district court consider...what a reasonable, paying client would be willing to pay, not just in deciding whether to use an out-of-district hourly rate in its fee calculation." *Arbor Hill,* 522 F.3d at 184. The court also noted that most reasonable paying clients would hire a local attorney or one whose rates approximated those of the local counsel. *Arbor Hill*, 522 F.3d at 190.

If there is a "higher cost" exception to *Avera II*, this case does not present the prerequisites for applying it. If such an exception to the forum rule exists, it would apply only if the additional factors of special expertise or unavailability of other counsel willing to take Vaccine Act cases could be established. The automatic applicability of a higher cost exception without such showing would eviscerate the forum rule *Avera II* established. If there are exceptions for both the substantially higher and substantially lower cost areas, the geographic rule that *Avera II* rejected will continue to govern most of our attorney fees cases. This will likely increase litigation over attorneys' fees, rather than provide predictability for the parties, which would decrease such litigation, at least over the hourly rate to be applied.

Petitioner has not established either of the two factors that might warrant applying a higher cost exception to the *Avera II* forum rule. A reasonable, paying client would not have hired Mr. McHugh at $450.00 per hour when attorneys of similar or greater skill and experience would have charged $300-350.00 per hour (or less). The advantage of geographic proximity to an attorney-client relationship does not justify a contrary conclusion; in this case, according to the fee application, Mr. McHugh met his client for the first time the day prior to the hearing. Fees App., Ex. I.

B. The Hours Claimed.

Not only must the hourly rate be reasonable, the hours expended must also be reasonable. As Judge Hewitt noted in *Sabella*, the determining factor is not whether the hours were actually expended, it is whether they were reasonably expended. 86 Fed. Cl. 205-06. Experienced attorneys command a premium fee in large part because they are expected to accomplish tasks more efficiently than attorneys of lesser experience. *See Plott v. Sec'y, HHS*, No. 92-633V, 1997 U.S. Claims LEXIS 313 at *4 (Fed. Cl. Spec. Mstr. Apr. 23, 1997). A trial court has discretion in determining the hours to be reimbursed because the trial court is in the best position to assess whether the hours claimed are reasonable. *Case v. Unif. School Dist. No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1256 (10th Cir. 1998). *See also Saxton*, 3 F.3d at 1521.

In this case, I agree with most of respondent's arguments concerning the reasonableness of the hours expended. However, I do not find respondent's objections to Mr. McHugh's practice of billing in 15 minute increments to be meritorious, in the absence of any rule requiring billing to be in smaller increments of time. Block billing is clearly disfavored. *Broekelschen*, 2008 U.S. Claims LEXIS 399, **13-14. Billing in six

minute increments may be the preferred practice (*see Thomas v. Sec'y, HHS*, No. 92-46V, 1997 U.S. Claims LEXIS 59, *13 (Fed. Cl. Spec. Mstr. Feb. 3, 1997) and *Rasmussen v. Sec'y, HHS*, No. 91-1566V 1996 U.S. Claims LEXIS 218, **4-5 (Fed. Cl. Spec. Mstr. Dec. 20, 1996)), but in view of Mr. McHugh's statement that he does not bill for matters requiring less than 1/4 hour, I will compensate for billing in 1/4 hour increments.

Respondent also lodged specific objections to particular blocks of time, in addition to the general notation that the total hours claimed were excessive. I note that petitioner filed nothing defending the hours claimed. I consider both the specific and general objections to be well taken.

Petitioner's counsel spent approximately 30 hours preparing for and participating in the hearing in this case (six hours on the prehearing memorandum and 14 hours in preparing for the hearing), in addition to nine hours billed for the day of the hearing itself. Fees App., Ex. I. This period appears reasonable, if a bit lengthy, for an attorney with Mr. McHugh's years of litigation experience.

Petitioner spent a total of 45 hours on the post-hearing brief, including the ten hours spent reading and annotating a transcript from the one-day hearing. Given the nature of the resulting project, I agree with respondent that this time is excessive. I award 25 hours for preparation of petitioner's initial post hearing filing.

Petitioner billed 17 hours for work on the reply brief. A review of that work-product, prepared by an attorney of Mr. McHugh's claimed level of expertise, convinces me that it reasonably could be performed in ten hours, the amount I award for this post-hearing filing.

One other attorney billing entry will not be compensated. Petitioner billed for 0.5 hours of work on May 6, 2007, for reviewing a one-page motion to strike one of respondent's own exhibits. This supplemental expert report had been filed two months earlier, but the exhibit designation was a duplicate of an earlier-filed exhibit. The document reviewed simply indicated that respondent was moving to strike the misfiled exhibit and would refile it with a new exhibit designation. A billing entry on March 13, 2007, reflected that the report was previously copied and furnished to petitioner's expert.[54] Thus, this was clearly not the first time Mr. McHugh had seen this document. I will not compensate this activity, as I determine that it could not have taken more than

[54] This entry is, itself, questionably billed as attorney hours. Attorneys do occasionally copy and fax documents themselves, but this is a clerical task that can be more inexpensively performed by support staff. Although a solo practitioner, Mr. McHugh does have at least one staff member, Ms. Cruz, who has signed several of the declarations of service in this case. *See, e.g.*, Petitioner's Prehearing Memorandum, second (unnumbered) page, containing the declaration of service. While I authorize payment here, Mr. McHugh is on notice that clerical and administrative tasks should not be billed as attorney time.

a minute to read it.

C. Compensating Travel Hours.

This case does not present the issue of work on the case performed during train or plane travel, as the travel was performed by automobile and there is no assertion that Mr. McHugh was not driving. Although Mr. McHugh may have been thinking about the hearing during his travel, he was not working during the four hours of his round-trip travel between New York and Philadelphia. I thus conclude that it is more reasonable to follow the usual Vaccine Act practice and reimburse him at half the forum rate for the time expended on travel.[55]

D. Costs.

Petitioner has the burden to establish that the costs claimed are reasonable. When costs are inadequately justified or are undocumented, the court may refuse to compensate them. *See Naporano Iron and Metal Co.*, 825 F.2d at 404; *Presault v. United States*, 52 Fed. Cl. 667, 670 (2002).

1. Petitioner's Own Costs.

No invoices were submitted for any of petitioner's own costs. I cannot determine from this fees application whether such invoices were included in the attachment missing from petitioner's affidavit. Rather than delaying this fees application any longer and ordering petitioner to document these costs, I use my general experience in the Program to determine if these costs are reasonable. *See English*, 2006 U.S. Claims LEXIS 356, at **45-51.

My approach in this case should not be interpreted as approval of Mr. McHugh's method of requesting either cost reimbursement for such matters as lodging expenses or for expert witness compensation in any future case. **Mr. McHugh is on notice that invoices shall be submitted for any costs, either those claimed personally by petitioners or those he claims on behalf of his practice, in future fees and costs applications or he risks the denial of all costs claimed for which invoices are not provided**. Invoices from experts should provide sufficient detail, included the dates the services were performed, the nature of the services, and the hourly rate, to permit a determination that the fees requested are reasonable.

The portion of Dr. Shane's fees paid by petitioner is compensated in full, in spite of the difficulty in determining precisely what the payment represents. During the same

[55] *See Carter v. Sec'y, HHS*, No. 04-1500V, 2007 U.S. Claims LEXIS 249 (Fed. Cl. Spec. Mstr. July 13, 2007) and *Scoutto v. Sec'y, HHS*, No. 90-3576V, 1997 U.S. Claims LEXIS 195, (Fed. Cl. Spec. Mstr. Sep. 5, 1997).

general time frame as petitioner's personal payment of $1,675.00 to Dr. Shane, the attorney time sheets reflect contact with Dr. Shane concerning his assertions about what the autopsy slides represented. Prior to this time frame, I conducted a Vaccine Rule 5 status conference in which I expressed my concern about the divergence in the expert opinions about what appeared on the autopsy slides and the general lack of support provided for the expert opinions on causation. *See* Order dated February 6, 2007. Thus, it is probable that these expenses involved the supplemental report of Dr. Shane and the reproduction of the autopsy slides as exhibits.

Given the time frame in which the fees personally paid by petitioner were incurred, I am reasonably confident that they represented Dr. Shane's second report and, possibly, the costs associated with reproduction of the autopsy slides. These costs appear reasonable.

In this case, I give petitioner the benefit of the doubt and authorize full reimbursement of his own costs claimed, including the portion of Dr. Shane's fee paid personally by petitioner.

2. Expert Witness Fees.

Petitioners have an obligation to monitor expert fees. *See Perreira v. Sec'y, HHS*, 90-847V, 1992 U.S. Claims LEXIS, 164436 at *10 (Cl. Ct. Spec. Mstr. Jun. 12, 1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). The Guidelines for Practice state that petitioner should explain costs "sufficiently to demonstrate their relation to the prosecution of the petition." *See* Section XIV.A. 4. Without invoices, it is impossible to determine precisely what services Dr. Shane rendered or at what cost.

Considering the affidavit of petitioner and his counsel's assertions in the fees application, it also appears that the as-yet unpaid $4,200.00 amount represents Dr. Shane's appearance fee for the hearing. Doctor Shane was present throughout the hearing, which lasted approximately six hours, including a short lunch break. Allowing for an additional two hours of time for preparation, this would represent an hourly rate of $525.00. Even assuming ten hours for the hearing and hearing preparation time, it would represent a $420.00 per hour rate of compensation. Based on my own experience with expert witness fees and a review of the cases authorizing such fees, and having heard Dr. Shane's testimony and reviewed his work-product, I have no difficulty in concluding that either of these two rates of compensation for a witness of Dr. Shane's qualifications would be a windfall.

In effect, petitioner is asking this court to authorize the award of a total of $7,375.00 in expert witness fees without knowing the hourly rate charged, the nature of all of the services rendered, or seeing the bills submitted. However, because I have had the opportunity to review the expert reports submitted and the prints made from the autopsy slides, as well as to hear the testimony provided, this case is unlike *Carrington*

*v. Sec'y, HHS*, No. 99-495V, 2008 WL 2683632 (Fed. Cl. Spec. Mstr. June 18, 2008) (unpublished), *aff'd* 85 Fed. Cl. 319 (2008), in which I denied most of the requested compensation for a medical consultant because the invoice submitted was insufficiently detailed as to the services performed. Here, I have work-product to use in assessing the fees charged.

The fees charged for Dr. Shane's expert reports that were paid by Mr. McHugh appear reasonable. However, a fee of $4,200.00 for Dr. Shane's hearing testimony and preparation does not, based on the hours involved, appear reasonable. At most, I would authorize a fee of $250.00 per hour for ten hours of work, encompassing Dr. Shane's hearing testimony and preparation time. I note that this is $50.00 per hour more than he was authorized seven years ago in *Macrelli v. Sec'y, HHS*, No. 98-103V, 2002 U.S. Claims LEXIS 22 (Fed. Cl. Spec. Mstr. Jan. 30, 2002). The $4,200.00 charge is thus reimbursed only in the amount of $2,500.00. This results in a total compensation for Dr. Shane of $5,675.00 ($1,675.00 paid to him directly by petitioner, $1,500.00 already to paid him by Mr. McHugh, and the $2,500.00 authorized here for the hearing).

**Once again, I place Mr. McHugh on notice that, without a detailed invoice from an expert witness or consultant, I am likely to disapprove any unsupported requests for expert costs in future cases.**

3. The $862.93 Charge.

As the Supreme Court noted in *Hensley*, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates...and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." 461 U.S. at 437. The same holds true for reimbursable costs. This charge is not otherwise explained and is only identified by the check number. The claimed amount is denied as inadequately justified.[56]

4. The National Law Journal Subscription.

This $90.00 fee represents overhead expenses, not a compensable cost. It is disallowed.

[56] Another approach would be to ask petitioner to supplement his fees application. I note that petitioner's counsel, whose initially requested fees were higher than those awarded to any other attorneys who practice in this Program and who justified those high fees based on his expertise, skill, and experience, billed four hours of time to prepare this fees request. The problem with this cost should have been obvious to an attorney with far less experience.

## V. Computing the Allowable Fees and Costs.

A. Fees.

Mr. McHugh is to be compensated at a rate of $310.00 per hour for the 17 hours authorized for 2006, $320.00 per hour for the 94 hours authorized for 2007, and $330.00 per hour for the 20 hours authorized for work performed in 2008. He is authorized $335.00 per hour for work performed in 2009. His four hours of travel time in 2007 are authorized at half the hourly rate for that year. These rates of compensation represent my determination of the market rate in Washington, DC, for similar work performed by an attorney of Mr. McHugh's experience and reputation. This represents a total of $42,590.00.

From this amount I deduct $320.00, representing an hour of his time in 2007, based on Mr. McHugh's poor performance in preparing and filing the exhibits in this case. As noted in my orders of September 14, 2007, and July 17, 2008, the court was forced to devote several hours of time to reviewing and renumbering mislabeled petitioner's exhibits prior to the hearing in this case, because Mr. McHugh assigned duplicate numbers to several exhibits. Apparently the orders calling this matter to his attention had little effect, as many of the exhibits in the fees application process were not assigned exhibit numbers, not paginated, or used the letter designations reserved by our practice guidelines for respondent's exhibits. *See* Order dated September 5, 2006. An attorney with 40 years of litigation experience and over five years of experience in the Vaccine Program should be able to file exhibits in accordance with the Guidelines for Practice and court orders.

I recognize that this fee structure is less than the fee awarded Mr. McHugh by Special Master Abell in *Kantor*. What another special master determined to be a reasonable hourly rate for work performed between 2001 and 2006 is relevant to, but not binding upon, my decision on the same issue.[57] Moreover, the hourly rate awarded in *Kantor* was determined before the Federal Circuit decision in *Avera II*, and thus represents the geographic rate, not the forum rate. In *Davis*, the Court of Appeals for the District of Columbia noted that application of the forum rule to lawyers who practice in a higher cost market might result in undercompensating those attorneys, but concluded that the ease of application inherent in the forum rule militated against a

[57] The decisions of the Court of Appeals for the Federal Circuit are binding on special masters. *Guillory v. Sec'y, HHS*, 59 Fed. Cl. 121, 124 (2003), *aff'd*, 104 Fed. Appx. 712 (Fed. Cir. 2004). Decisions issued by special masters and judges of the Court of Federal Claims constitute persuasive, but not binding, authority. *Hanlon v. Sec'y, HHS*, 40 Fed. Cl. 625, 630 (1998). Because a special master's determination of what constitutes a reasonable hourly rate would ordinarily be a factual, not a legal, determination, a decision that a particular hourly rate was appropriate would not bind other special masters or judges. Of course, there are good and cogent reasons for the special masters to give careful consideration to what others have awarded a particular attorney or expert as an hourly rate, with predictability for the parties and reduction in fees litigation high among them.

"higher cost" exception, absent special circumstances that do not obtain here. *Davis*, 169 F.3d at 760.

With regard to the hourly rate of compensation for Mr. Gaynor, I have considered both his qualifications and the nature of the work performed. As noted above, this work was not "complex litigation." If Mr. McHugh chooses to contract out part of his workload on cases, he must consider the nature of the work to be performed before agreeing to pay an hourly rate that is higher than that awarded in any previous Program case for litigating a contested causation issue, much less in a brief filed in support of a fees and costs application.

Work on Vaccine fee petitions is often performed by associates in larger firms; when performed by attorneys commanding higher rates, commensurate reductions in the hours needed to defend a fees application are the norm. A fee of over $10,000.00 is not warranted by the nature of the work or its quality in this case. Taking into consideration Mr. Gaynor's skill, experience in Vaccine Act litigation,[58] years of practice, and the nature and quality of the work actually performed, I award Mr. Gaynor $270.00 per hour for 9.8 hours of work performed in 2008 and $275.00 per hour for 12.6 hours of work performed in 2009, for a total of $6,111.00.

B. Costs.

Deducting the $2,652.93 in costs detailed in Section IV, above, I award $9,014.55 in costs in this case.

## VI. Conclusion.

Petitioner originally requested a total of **$118,956.39**. The requested amount represented $2,252.16 for litigation costs personally incurred by petitioner, $11,667.48 for litigation costs incurred by petitioner's counsel, John McHugh, $94,641.75 (based on the amended request, which raised his initial request from $65,925.00) for attorney fees for Mr. McHugh, and $10,395.00 for attorney fees for Mr. Gaynor. Based on the objections interposed by respondent and my own review of the fees and costs applications, I have determined that the following amounts are reasonable and appropriate. Accordingly, I hereby award the total of **$59,647.71**[59] issued as:

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[58] Although Mr. Gaynor indicated that he worked with Mr. McHugh on four additional Vaccine Act cases, the nature of his work in those cases was not explained, and court records do not reflect his appearance as co-counsel. Thus, whatever experience he may have, the nature of the services performed was office practice or legal writing, not litigation.

[59] This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally, Beck v. Sec'y, HHS*, 924 F.2d 1029

- **$2,252.16**, in the form of a check payable to petitioner, Mr. Gabriel Gene Rodriguez, for litigation costs incurred personally.

- **$57,395.55**, in the form of a check payable jointly to petitioner and petitioner's counsel, Mr. John E. McHugh, for attorney fees and costs.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.[60]

**IT IS SO ORDERED.**

**Denise K. Vowell**
Special Master

(Fed. Cir. 1991).

[60] Entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review. *See* Vaccine Rule 11(a).