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

No. 06-221V
Filed: November 10, 2011
Published

HILMI and SAMAR AMAR, as parents and next friends of their daughter, RUSHIA AMAR,	)	
Petitioners,	)	Attorney fees and costs; Attorney hourly rate; Reasonable hours expended on attorneys' fees and costs litigation; Davis County exception
v.	)	
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
Respondent.	)	

Robert T. Moxley, Robert T. Moxley, P.C., Cheyenne WY, for Petitioner.
Althea Walker Davis, U.S. Department of Justice, Washington, D.C., for Respondent.

ATTORNEYS' FEES AND COSTS DECISION[1]

GOLKIEWICZ, Special Master.

I. Introduction

The underlying vaccine injury Petition was filed pursuant to the Vaccine Act[2] on March 20, 2006, and entitlement was resolved with a Decision on the parties' joint Stipulation on March 25, 2010.

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

[2] This Vaccine Act comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) (hereinafter "the

With the entitlement portion concluded, determination of an award for attorneys' fees and costs remains. This Decision on Attorneys' Fees and Costs results after numerous filings from petitioners, ceaselessly requesting interim fees despite the posture of the case and the undersigned's Order, filed March 23, 2011, which directed petitioners to file a final request for attorney's fees and costs. Petitioners also make wholesale attempts to raise their attorney's hourly rate, without sufficient support for the increase requested, as has been done in several previous cases under the Vaccine Act by the same attorney.

The undersigned views petitioners' efforts here mostly as a re-litigation of issues that have been pursued by petitioners' counsel since the Federal Circuit's 2008 Decision in Avera. Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008).[3] In fact, significant portions of the evidence presented by petitioners were addressed in cases that arose subsequent to Avera; those being Masias, Friedman, Avila, and Dougherty. Masias v. Sec'y of the Dept. of Health & Human Servs., 634 F.3d 1283 (Fed. Cir. 2011), aff'g Masias v. Sec'y of the Dept. of Health & Human Servs., No. 99-67V, 2009 WL 1838979 (Fed. Cl. Spec. Mstr. 2009);[4] Friedman v. Sec'y of the Dept. of Health & Human Servs., 94 Fed. Cl. 323 (Fed. Cl. 2010), aff'g Friedman v. Sec'y of the Dept. of Health & Human Servs., No. 02-1467V, 2009 WL 4975267 (Fed. Cl. Spec. Mstr. 2009); Avila v. Sec'y of the Dept. of Health & Human Servs., 90 Fed. Cl. 590 (Fed. Cl. 2009), aff'g Avila v. Sec'y of the Dept. of Health & Human Servs., No. 05-685V, 2009 WL 2033063 (Fed. Cl. Spec. Mstr. 2009); Dougherty v. Sec'y of the Dept. of Health & Human Servs., No. 05-700V, slip op., 2011 WL 5357816 (Fed. Cl. Spec. Mstr. October 14, 2011).

As noted in Masias, petitioners' attempts herein appear to be counsel's efforts to "circumvent Avera's application . . . ." Masias, 634 F.3d at 1290. In fact, counsel makes no pretense of doing otherwise. Petitioners write, "[a]s this special master and the government's counsel [are] aware, beginning with Avera v. Secretary of DHHS . . . the petitioner's undersigned counsel has mounted a comprehensive legal challenge to the Vaccine Program's long-standing practice of awarding non-federal 'local rates' to Program petitioners' counsel . . .

Program," "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. §§ 300aa of the Act.

[3] Petitioners' counsel herein first sought higher hourly rates in Avera. However, the decision in Avera addressed the paradigm under which to award fees, application of the forum rate and utilization of the Davis County exception, and whether interim fees are authorized under the Act. The resolution did not reach petitioner's argument of whether Laffey Matrix rates apply to work done under the Act. The issue of Laffey Matrix rates was addressed in Masias, which petitioners recognize as rejecting Laffey Matrix rates. P Reply to Government's Submissions and Amended Description of Appropriate Summary Judgment Relief, in the Wake of Federal Circuit Masias Case, filed May 19, 2011, at p. 2 ["P Reply to Government Submissions" or "P Reply"]; P Status Report at 1, n. 1, filed Jun. 2, 2011.

[4] A petition for writ of *certiorari* was filed on August 26, 2011, in Masias, case number 11-266 at the Supreme Court. In another important case in the Federal Circuit's case law on attorneys' fees in the Vaccine Program, Rodriguez v. Sec'y of the Dept. of Health & Human Servs., 632 F.3d 1381 (Fed. Cir. 2011), a petition for writ of *certiorari* was filed on July 27, 2011, in Rodriguez, case number 11-129 at the Supreme Court.

." P Mot for Int. Award.[5] In pursuing his challenge, counsel "is determined . . . to expose the economic discrimination that makes the Program much more effective as instrument of oppression against vaccine injured American citizens, than as a tribunal for the quick, easy, certain and generous remedy which Congress envisioned." P Brief in Support at 22.[6] The remedy for the Program's ills is presumably more money for counsel, as "[n]ot until petitioners' counsel are made as effective as market-rate fees can make them, can the Program possibly realize that ideal." Id. at 22-23. The reality is that Mr. Moxley's arguments have been evaluated by the special masters, the Court of Federal Claims and the Federal Circuit. He has been awarded market rates pursuant to existing court precedent. He simply does not like the result. Contrary to Mr. Moxley's doomsday assessments of the Program, with one or two exceptions, other attorneys continue to successfully litigate their cases in the Program and further continue to settle quickly with respondent their fees applications while Mr. Moxely battles on. In doing so, Mr. Moxley blames everyone but himself for delays in receiving compensation and contends that everyone, with the exception of himself, is misreading applicable case law.[7] Mr. Moxley's litigiousness must end, or at least payment for his litigiousness must end.

The most prominent and recurring aspect of petitioners' arguments is the overall dissatisfaction with past awards of attorneys' fees in other Vaccine Act cases. Oftentimes petitioners broadly focus on the forest, when identifying particular trees is what is required. Countless criticisms and disagreements are lodged at special masters, the Court of Federal Claims and the Federal Circuit in an attempt to re-litigate issues that have been previously decided. Mr. Moxley does raise one issue supported by evidence that has not been analyzed previously, which will be done so here. Specifically, beyond the policy and legal arguments that have been decided in Federal Circuit cases speaking to the validity of the Davis County exception[8] and Laffey Matrix[9] rates, petitioners claim the local rate of their attorney is higher than what has been decided for Mr. Moxley in the recent past.

---

[5] P Motion for Interim Award of "Current Rate" Fees and Costs with Stay Pending *Masias* Appeal, and in the Alternative for a Final Award at Current "*Laffey* Matrix" Rates, filed October 22, 2010 ["Motion for Interim Award" or "P Mot for Int. Award"].

[6] P Brief in Support of Motion for Partial or Complete Summary Judgment, Etc., filed Feb. 25, 2011 ["P Brief in Support"].

[7] For example, petitioners state "the Federal Circuit has now departed so far from federal case law of fee-shifting that the Laffey Matrix solution developed by the District of Columbia Circuit Court of Appeals has been stripped of its evidentiary value and utility in avoiding extended fees litigation." P Reply to Government's Submissions and Amended Description of Appropriate Summary Judgment Relief, in the Wake of Federal Circuit Masias Case, at p. 18, filed May 19, 2011 ["P Reply to Government Submissions" or "P Reply"]. Further, petitioners argue that "[t]he masters and DOJ alike have completely ignored the showing that local rates have **never** been sufficient for Program practice to pay its own way in the 22-year practice of petitioner's counsel . . . ." Id. at 18, n. 34. Petitioners state that "[d]isbelief is not a viable substitute for competent evidence, even though it sufficed in the defense of the Avera and Masias cases, all the way through the Federal Circuit." Id. Also according to petitioners, "Davis County itself – and *a fortiori* the Federal Circuit's radical expansion of its result in Avera – is implicitly repudiated by Richlin, *supra*, which reversed the outlook of the Federal Circuit's conservative faction, Judges Rader and Dyk among them." P Mot for Int. Award, at p. 11, n. 22.

[8] The Davis County exception is derived from Davis County Solid Waste Mgmt. & Energy Recovery Special Servs. Dist. v. EPA, 169 F.3d 755 (D.C. Cir. 1999). Masias v. Sec'y of the Dept. of Health & Human Servs., 2009 WL

II. Procedural History

This recitation of the underlying case is slightly more detailed than usual due to petitioners' claims that payment of attorneys' fees and costs has been extremely delayed, justifying an award of current rates for the entire period of work or enhancement of the lodestar figure. These arguments pertain to this case specifically and thus the history is presented with this in mind.

This Petition was filed on March 20, 2006, and assigned to another special master. Petition, filed Mar. 20, 2006; Notice of Assignment, filed Mar. 20, 2006. The respondent's Rule 4(c) Report was filed June 14, 2006, which is within the ninety day period prescribed for the filing of the government's response to the petition. R Rule 4(c) Report, filed Jun. 14, 2006; CFC Vaccine Rule 4(c). Between July 25, 2006, and December 11, 2006, petitioner was investigating information from a treating physician and from a potential expert witness. Status Report Order, filed Jul. 25, 2006; P Status Report, filed Sep. 15, 2006; Status Report Order, filed Sep. 20, 2006; P Status Report, filed Oct. 16, 2006; Status Report Order, filed Oct. 17, 2006; Order, filed Nov. 20, 2006; Status Report Order, filed Dec. 4, 2006; P Status Report, filed Dec. 11, 2006.[10]

Petitioners' expert report was filed on January 22, 2007, and petitioners were ordered to file additional medical records on January 26, 2007. P Expert Report, filed Jan. 22, 2007; Scheduling Order, filed Jan. 26, 2007. Respondent's expert report was filed March 30, 2007. R Expert Report, filed Mar. 30, 2007. Thereafter, supplemental expert reports were obtained. R Expert Report, filed May 31, 2007; P Expert Report, filed Oct. 15, 2007. Further factual development also occurred. P Supplemental Sworn Declaration, filed Dec. 6, 2007. On

---

1838979, at *25, n. 16 ("the Davis County exception . . . is part of the law for determining attorneys' fees in the Program. To change this result, [petitioner] must seek review from an entity with the authority to overrule Avera."), aff'd 634 F.3d 1283, 1288 (reaffirming application of the Davis County exception).

9

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

Schueman v. Sec'y of the Dept. of Health & Human Servs., No. 04-693V, 2010 WL 3421956, *4 n. 12 (Fed. Cl. Spec. Mstr. Aug. 11, 2010). Special masters' rejection of Laffey Matrix rates has been upheld by the Federal Circuit. Rodriguez v. Sec'y of the Dept. of Health & Human Servs., 632 F.3d 1381 (Fed. Cir. 2011); Masias, 634 F.3d 1283 (Fed. Cir. 2011).

[10] During this time, the 240-day Notice was filed and petitioners elected to remain in the Program. Notice, filed Nov. 20, 2006; Election to Continue in Vaccine Program, filed Dec. 4, 2006.

December 20, 2007, the previous special master ordered the filing of status reports regarding updated medical records, the possibility of informal resolution and potential dates for a hearing. Order, filed Dec. 20, 2007. Thereafter, the parties engaged in discussions of informal resolution. P Status Report, filed Mar. 6, 2008; P Status Report, filed Apr. 3, 2008; P Status Report, filed Jun. 16, 2008; R Status Report, filed Jul. 11, 2008. A hearing was scheduled for July 31, 2008, but was later cancelled in light of the parties' discussion of settlement. Order, filed Mar. 19, 2008; Order, filed Jul. 22, 2008.

The case was reassigned to the undersigned on July 17, 2008, and discussions of resolution continued; it appears difficulties were experienced in acquiring information regarding Medicaid liens, an unfortunate but not uncommon problem with Vaccine Act cases. E.g., Order, filed Jul. 17, 2008; Joint Status Report, filed Aug. 21, 2008; Joint Status Report, Sep. 22, 2008; Order, filed Oct. 23, 2008; Order, filed Dec. 11, 2008; Joint Status Report, filed Dec. 12, 2008; Joint Status Report, filed Jan. 12, 2009; Order, filed Jan 23, 2009; Joint Status Report, filed Mar. 13, 2009; Joint Status Report, filed Jul. 22, 2009.

The parties reached a tentative agreement and a 15 Week Stipulation Order[11] was filed on October 15, 2009. Order, filed Oct. 15, 2009. The parties filed their Stipulation on an award on March 11, 2010. Stipulation, filed Mar. 11, 2010. A Decision on entitlement for the alleged vaccine-related injury was filed on March 25, 2010. Decision, filed Mar. 25, 2010. Judgment entered on April 30, 2010. At this time, petitioners were reminded that they had 180 days to file a request for attorneys' fees and costs. Order, filed May 10, 2010 (citing 42 U.S.C. § 300aa-15(e); CFC Vaccine Rule 13).[12]

Up to this point in the proceedings, in the undersigned's experience, this case followed a fairly typical process and schedule. Reviewing the docket, twenty months passed from the initial filing of the Petition on March 20, 2006, until the time when settlement was first noted as a possibility in the Order filed on December 20, 2007. In the nearly two years devoted to settling this case, one year involved the Medicaid lien, an issue dependent upon the actions of State officials and out of the parties' and the court's control.

Petitioners filed a Status Report, in compliance with the May 10, 2010 Order, noting costs were still being accrued and introducing petitioners' plan to seek interim fees and rates based upon the Laffey Matrix. P Status Report, filed Jul. 12, 2010. On October 22, 2010, prior to the expiration of the 180 day statutory deadline to request fees, petitioners filed a Motion for Interim Award with Stay and alternatively a Final Award at Current "Laffey Matrix" Rates. P Mot for Int. Award. It should be noted that counsel's application was filed a full seven months after the Decision on the merits of this case. Petitioners argue for an award of current rates to

[11] In this Program, the "15 Week Order" evolved over the years with agreement of the parties to memorialize the "meeting of the minds" of counsel and to give respondent's counsel sufficient time to obtain the requisite approval of appropriate supervisory officials within government.

[12] Letters of Guardianship, as required in the parties' Stipulation, were filed on December 16, 2010. Petitioners note that, as these are claimed costs, they waited to submit a request for fees until the 180 days had nearly elapsed.

compensate for consideration that this case constituted extended litigation, Laffey Matrix rates, inapplicability of the Davis County exception, and moves for interim fees and a stay pending petitioners' counsel's appeal in Masias or a final award at Laffey Matrix rates. Along with this filing, petitioners filed attorney invoices for fees and costs, counsel's affidavit, evidence submitted in Avera, Masias, Friedman, Avila, and Dougherty, an economist's declaration, which tracks arguments made since Avera and includes criticism of courts' ruling on fees.[13]

Respondent filed her response on December 6, 2010. R Resp.[14] Respondent argued an interim award was not authorized in this case, that Laffey Matrix rates do not apply in the Vaccine Program and that petitioners had not established their counsel's current rate of $300 per hour. Further and more specifically, respondent objected to: attorney hours spent in a conference that was vaguely described, time spent briefing and otherwise working on Laffey Matrix and interim fees issues, the vague time entries from a paralegal and clerk/associate, and the rate change for the clerk/associate. Respondent also objected to the costs associated with establishment of the guardianship.

A status conference was held on January 26, 2011, wherein the undersigned expressed the opinion that an interim award was not appropriate since the entitlement phase of this case was completed. Order, filed Jan. 26, 2011. The undersigned discussed three possible resolutions: the undersigned would deny interim fees and petitioners would move forward with their fee request as a final request based on the higher claimed or Laffey Matrix rates, petitioners could opt to stay proceedings until the Federal Circuit's decisions in Masias and other attorneys'

[13] The undersigned finds as follows regarding the evidence submitted in prior cases where counsel has litigated these issues of attorney fees and costs. Petitioners' exhibits 24, 24.1, 24.2, 24.3, 25, 25.1, 25.2, 25.3 are attorney affidavits regarding rates and the complexity of litigation under the Vaccine Act, which were discussed in previous cases, and the undersigned finds they hold little persuasive value for the same reasons they were thus found in Masias. Masias, 2009 WL 1838979, at *19-29 (discussing affidavits from Mr. Shockey, Mr. Evans, Ms. Bush and Mr. Tolliver), aff'd 634 F.3d 1283. Exhibits 24.5 and 25.4 are affidavits of economist Michael Kavanaugh, essentially advocating Laffey Matrix rates and discussing the economist's criticism of Avera. Regarding Laffey Matrix rates, the Federal Circuit accepted special masters' finding that those rates are not applicable in this Program and petitioners ultimately accepted this during the briefing of these issues. P Status Report at 1, n. 1, filed June 2, 2011. Petitioners' exhibit 26 is an affidavit from Baltimore, MD, attorney Michael Snider. As was found in Friedman, this affidavit is unpersuasive. Friedman, 2009 WL 4975267, at *6-7. Exhibit 28, an affidavit from Cheyenne, WY, attorney Donald Schultz, was utilized in Masias and Avila. Again, the deficiencies with this affidavit were noted in Avila, 2009 WL 2033063, at *3, and the undersigned concurs. Furthermore, evidence in this case and other Vaccine Act cases fails to substantiate the local $375-$405 rates averred by Mr. Shultz. P Exs 45, 45.1, 45.2 (attesting to a rate of $300 per hour for attorney Richard Gage in Cheyenne, WY). Finally, petitioners' exhibits 45, 45.1 and 45.2 were submitted in Dougherty. Dougherty, No. 05-700V, slip op. at 4 n. 6, 10-11. The special master in Dougherty found these affidavits to hold some evidentiary worth but also found they failed to support an award of $300 for work under the Vaccine Act as petitioner failed to show the cases related to Vaccine Act work. Id. at 11. The undersigned notes that evidence may have been submitted in cases that are not mentioned in this decision; the references to where the evidence is duplicated in other cases are not meant to be exhaustive.

[14] Response to Petitioner's Motion for Interim Award of "Current Rate" and Fees and Costs with Stay Pending Masias Appeal, and in the Alternative for a Final Award at Current "Laffey Matrix" Rates, filed Dec. 6, 2010 ["R Response to Motion" or "R Resp."].

fees cases were issued, or the undersigned would deny the interim fees motion and petitioners could request final fees in line with counsel's usual, lower attorney rate. Id.

On February 25, 2011, petitioners moved for partial or complete summary judgment and, alternatively, for trial and leave to conduct discovery. P Mot. Summ. J.[15] A Brief in Support was also filed. P Brief in Support. Summary judgment was sought regarding entitlement to an interim award, "factual and legal issues surrounding petitioners' claim for reasonable rates," and on all material facts regarding appropriate rates. P Mtn. Summ. J. at 2. Petitioners claimed a trial pertaining to attorney rates was necessary if summary judgment is denied, including interrogatories to be served on respondent regarding respondent's resources and payment of Department of Justice attorneys. P Mtn. Summ. J.; P Proposed Discovery in Aid of Application for Reasonable Attorneys Fees and Reimbursement of Costs Incurred, filed Feb. 25, 2011.[16]

---

[15] P Motion for Partial or Complete Summary Judgment, and in the Alternative for Trial, and Leave to Conduct Discovery, filed Feb. 25, 2011 ["P Motion for Summary Judgment" or "P Mot Summ. J."].

[16] Mr. Moxley has questioned the undersigned's motivations regarding several actions flowing from this status conference, contending that petitioner is being "punished." P Motion for Reinstatement of Interim Fees Award, for "Current Rates," and for Rate "Enhancement" to Account for Factors Not Subsumed in Program Lodestar, at p. 9, filed April 22, 2011 ["Motion for Reinstatement" or "P Mot for Reinstatement"]. He also alleges "flop-flopping" by the undersigned. Id. Unfortunately, the status conference calls were not recorded. However, my memory is clear. At the time of the call, all involved were awaiting further guidance from the Federal Circuit on several key fees issues flowing from Avera. Favorable rulings for petitioners would undoubtedly mean greater fees in Vaccine cases. Thus, it was quite understandable that counsel wanted to await those decisions. It was also quite understandable that counsel wanted an interim award while awaiting those decisions. However, causing a roadblock to such an apparently simple resolution was respondent's legal contention that interim fees pursuant to Avera were not as clear as the special masters and petitioners contend. Following this status conference, respondent, in fact, appealed this issue. McKellar v. Sec'y of the Dept. of Health & Human Servs., No. 09-841V, Motion for Review docketed July 5, 2011. On November 4, 2011, Judge Bruggink at the Court of Federal Claims granted respondent's Motion for Review and remanded McKellar for "a renewed determination of petitioners' application for attorneys' fees and costs." McKellar, slip op. at 14, filed Nov. 4, 2011. Although the case was remanded on the issue of the appropriateness of interim fees in that case, Judge Bruggink found an award of interim fees under the Act is allowed prior to an entitlement decision.

Thus, the undersigned faced the conundrum of dealing with the legal issue of whether interim fees were appropriate, which would entail briefing, a ruling and a possible appeal, or issuing a final decision consistent with the special masters' decisions in Masias, Hall, and Rodriquez, which would have forced an appeal by Mr. Moxely. Neither of these resolutions met Mr. Moxley's desire to receive compensation while he waited the Federal Circuit's rulings. Thus, after securing from Mr. Moxley on two separate occasions the assurance that Masias would resolve either for or against his fees issues, the undersigned posed the practical solution of respondent agreeing to an interim award in this somewhat unique posture to prevent useless, duplicative, and potentially costly further litigation in this case. Respondent correctly sets forth this summary of events. R Opposition to Petitioner's Motion for Reinstatement of Interim Fees Award, for "Current Rates," and for Rate "Enhancement" to Account for Factors Not Subsumed in Program Lodestar, at p. 4, filed May 9, 2011 ["Respondent's Opposition" or "R Opp'n"]. Mr. Moxley's description of the telephonic status conferences as "disputatious" and "hostil[e]," P Mot for Reinstatement at 3, is perplexing and incorrect. Legitimate positions and options were discussed, and a resolution was posed and implemented. It is inconceivable how Mr. Moxley can describe these telephone calls otherwise.

Further, and as will be discussed, the Federal Circuit's affirmance of Masias was issued one day following the interim award of fees and the undersigned withdrew the interim fees decision in light of this. This was a sensible tactic since Mr. Moxley had assured the court that Masias would resolve his fees issues. Thus, since there was no longer a reason for an interim award, the appropriate award would be a final award of attorneys' fees and costs. Mr.

A status conference was held on March 2, 2011, wherein petitioners' recent filings were discussed. Minute Entry, filed March 3, 2011. Although not recorded, it was at this time that the undersigned encouraged the parties to informally agree to an undisputed minimal amount of fees and costs in order to prevent much litigation over the issues pending before the Federal Circuit.

Respondent filed another response on March 11, 2011. R Supp. Resp.[17] R Supplemental Response to Petitioners' Motion for Interim Award of Attorney's Fees and Costs, filed Mar. 11, 2011 ["R Supplemental Response" or "R Supp. Resp."]. Respondent disputed a summary judgment motion was the appropriate vehicle for the issues and maintained her objection to an interim award. However, in response to the undersigned's encouragement during the status conference, respondent noted $27,391.63 of fees and costs that were not unreasonable to have been incurred in this case, without waiving any objections. A Decision awarding this amount was issued on March 14, 2011. Decision, filed Mar. 14, 2011.

On the following day, March 15, 2011, the Federal Circuit issued its Decision in Masias, **which was the basis for petitioners' request for an interim award and stay**. Masias v. Sec'y of the Dept. of Health & Human Servs., 634 F.3d 1283 (Fed. Cir. 2011). The Circuit reaffirmed use of the Davis County exception and again agreed with the special master's rejection of Laffey Matrix rates. Masias, as stated previously, involved the same counsel as herein and counsel's hourly rate of $220 in 2008 was affirmed. In light of this decision, the undersigned withdrew the March 14, 2011 Decision. Order, filed Mar. 23, 2011. Petitioners were ordered to file their request for final fees and costs by no later than April 22, 2011. Id.

However, instead of a final request, petitioners filed their Motion for Reinstatement of Interim Fees Award, which also argued for current rates and enhancement. P Mot for Reinstatement.[18] Petitioners argued that "[t]he Program has never, in its history, adjudicated a fair 'local' rate." Id. at 10. On the same day, petitioners filed a supplemental affidavit of counsel, claiming Mr. Moxley charges a local rate of $300 per hour, and an additional invoice.

Moxley sees these actions as "punishment" and "flip-flopping," but the undersigned sees them as logical and based upon Mr. Moxley's own representations.

[17] R Supplemental Response to Petitioners' Motion for Interim Award of Attorney's Fees and Costs, filed Mar. 11, 2011 ["R Supplemental Response" or "R Supp. Resp."].

[18] Petitioners' April 22, 2011 Motion for Reinstatement, at page 5, note 11, references the March 14, 2011 Fee award, noting "cryptic reference to discussion" at a status conference. Petitioners further discuss a conversation with the undersigned's office regarding the Decision. Petitioners' aspersions about the cryptic or surreptitious nature of this Decision are false. Respondent's current position is that interim fees are rarely, if ever, appropriate and respondent recently appealed the appropriateness of an interim award on this current position. See, e.g., McKellar v. Sec'y of the Dept. of Health & Human Servs., No. 09-841V, Motion for Review (filed July 5, 2011), *remanded* for determination of reasonable basis, slip op. (Fed. Cl. Nov. 4, 2011). The undersigned omitted reference to the interim nature of the award to aid to petitioners, hoping to avoid an appeal by respondent of an interim award. Petitioners were simply assured it was not a "final" decision and that issues regarding fees and portions of petitioners' request remained outstanding.

On May 9, 2011, respondent filed a respondent's Opposition. Respondent also filed a response to counsel's affidavit and the final invoice. R Response to Petitioner's Notice of Filing, Filed May 13, 2011.

On May 19, 2011, petitioners filed further evidence regarding counsel's local rate and a reply to respondent's oppositions. P Reply. Petitioners also included another supplemental invoice. P Ex 46. Petitioners next filed a Status Report on June 2, 2011, acknowledging Laffey Matrix rates were no longer viable, offering expert testimony regarding fees, and stating petitioners are "entitled to notice of the cases, legal doctrine and facts that for the master's view, and the opportunity to respond to novel arguments or evidence 'noticed.'" P Status Report at 3, filed Jun. 2, 2011.

Respondent filed a final reply on June 16, 2011, reiterating prior objections and arguing that petitioners had not established $300 was a reasonable hourly rate for their attorney. R Reply.[19]

Finally, on August 22, 2011, petitioners filed their Second, Verified Motion for Reinstatement of Interim Fees award.[20] This filing adds no value to petitioners' case.

Petitioner and the undersigned agree that the most tortuous phase of this case has been the attorneys' fees and costs portion. See P Reply at 1. The question is: who is to blame for that tortured history? Petitioners' own award for their child's alleged vaccine injury has already been paid at this time. Even if the parties disagreed on rates and certain other fees issues, petitioners' generalized denouncements of the handling of attorneys' fees in the Program and convoluted arguments and procedural requests turned what should have been a straightforward fees application into a legal spectacle.

III. Legal Standard

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

[19] Response to Petitioners' Reply to Government's Submissions and Amended Description of Appropriate Summary Judgment Relief, in the Wake of Federal Circuit Masias Case and Response to Petitioners' June 2, 2011 Status Report, filed Jun. 16, 2011 ["R Reply"].

[20] P Second, Verified Motion for Reinstatement of Interim Fees Award, filed Aug. 22, 2011 ["P Second Mot for Reinstatement"].

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

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

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

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

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

My colleague discussed the reasonableness standard in the context of "reasonable costs" "'Reasonableness' may be evaluated from a paying client's perspective. The United States Supreme Court stated that '[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority.'" Sabella v. Sec'y of the Dept. of Health & Human Servs., No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Sept. 23, 2008) aff'd in part & rev'd in part (on other grounds), Sabella v. Sec'y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201 (2009)(hereinafter Sabella II)(quoting Hensley, 461 U.S. 424, 433-34 (emphasis in original)); Riggins v. Sec'y of the Dept. of Health & Human Servs., 406 F. App'x 479, 481 (Fed. Cir. 2011)("The Supreme Court has created a guiding principle in determining whether hours are reasonable: '[h]ours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority.' Hensley, 461 U.S. at 434, 103 S.Ct. 1933 (emphasis omitted)").

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

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

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

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

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

IV. Attorney Hourly Rate

Ultimately, it is counsel's local rate and the application of the Davis County exception that are at issue in this case. Reviewing past cases regarding counsel's fees, it appears that counsel is waging consecutive battles in his war to ratchet up his hourly rate. Counsel's numerous tactics can be seen in the decisions mentioned herein and these tactics change, sometimes only slightly, with each decision. Herein, it appears that counsel disregards all past

analysis of his rate in this Program and declares $300 a reasonable and necessary hourly fee with the ultimate hope being to overcome the Davis County exception and be awarded forum rates.

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

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

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

Since the issuance of Avera, the Federal Circuit had the opportunity to speak further on the issue of attorney rates. In Rodriguez, 632 F.3d 1381 (Fed. Cir. 2011), the Circuit discussed whether the Laffey Matrix should determine the reasonable hourly rate for attorneys practicing under the Vaccine Act. The Circuit found the special master had properly considered the evidence before her and did not err in rejecting petitioner's proffer of the Laffey Matrices for determination of the attorney rate. In Masias v. Sec'y of the Dept. of Health & Human Servs., 634 F.3d 1283 (Fed. Cir. 2011), the Circuit reaffirmed use of the Davis County exception and again agreed with the special master's rejection of Laffey Matrix rates. Finally, in Hall v. Sec'y of the Dept. of Health & Human Servs., 640 F.3d 1351 (Fed. Cir. 2011), the Davis County exception was again upheld and the Circuit discussed what constitutes a "significant difference" when applying the Davis exception was had; the Federal Circuit therein approved of applying the Davis County exception as there was a 59% difference between the forum and local rates, favoring the forum.

a. Attorney Forum Rate

First, the special master must determine the forum rate for attorneys of similar "skill, experience and reputation." Avera, 515 F.3d at 1348 (citing Blum, 465 U.S. 886, 888 (1984)). In Vaccine Act cases, Washington, D.C., has been found to be the applicable forum. Avera, 515 F.3d at 1348; Hall v. Sec'y of the Dept. of Health & Human Servs., No. 02-1052V, 2010 WL 1840837, at *6, 8 (Fed. Cl. 2010), aff'd 93 Fed. Cl. 239 (Fed. Cl. 2010), aff'd 640 F.3d 1351 (Fed. Cir. 2011). Once the forum rate is calculated, the special master must determine if the Davis County exception applies; if so, the local rate is awarded, if not, petitioner is entitled to the forum rate. Id. The Davis County exception applies if the "bulk of the work" was performed outside the forum and the forum rate is significantly higher than the local rate. Id. Thus, the first step of the analysis is to determine Mr. Moxley's forum rate.

The forum rate calculated and affirmed in Masias was $350 in the special master's 2009 Decision. P Reply to Government Submissions at p. 3, n. 7; Masias, 2009 WL 1838979, at *25, aff'd Masias, 634 F.3d 1283. Petitioners also cite the special master's decision in Rodriguez,

2009 WL 2568468, setting a forum rate between $275 and $360 per hour. P Reply to Government Submissions at p. 3, n. 7. The range of rates was figured to match a range of years, "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." Rodriguez, 2009 WL 2568468, at *15.

Recently, in Dougherty, the special master utilized the yearly percent changes in the Laffey Matrix to extrapolate Mr. Moxley's forum rate from the 2009 rate found in Masias. Dougherty, slip op. at 10. The special master calculated a 2.15% change for years 2010-11 and a 4.21% for 2011-12. Utilizing these figures sets Mr. Moxley's forum rate as $360 per hour in 2010-11 and $375 for 2011-12. The decision in Dougherty also calculates Mr. Moxley's forum rate, based on percent changes in the Laffey Matrix, for years prior to 2009-10; his rates are $305 for 2005-06, $320 for 2006-07, $330 for 2007-08, and $350 for 2008-09. Dougherty, slip op. at 10.The undersigned finds this analysis reasonable and thus relies upon the prior analysis of Mr. Moxley's forum rate, beginning with Masias and as extrapolated in Dougherty.

Year	Forum Rate
2006-07	$320
2007-08	$330
2008-09	$350
2009-10	$350
2010-11	$360
2011-12	$375

b. Location where the "bulk of work" was performed

Next, if the bulk of the work was done outside the forum, the special master must determine the market or local rate for the attorney. E.g., Avera, 515 F.3d at 1347-49. There is no evidence that Mr. Moxley performed work in the forum and there is no argument that the bulk of work in this matter was performed in the forum, Washington, DC. In fact, it is clear from the record in this case that virtually all, if not all, of the work was performed outside the forum. Therefore, the first necessity for applying the Davis County exception is fulfilled: the bulk of work in this case was performed outside of the forum. The next step is to determine the attorney's local rate and then determine whether there is a significant difference between the local and forum rate.

c. Attorney Local Rate

As stated by petitioners, "petitioners' undersigned counsel has mounted a comprehensive legal challenge to the Vaccine Program's longstanding practice of awarding" attorney fees in a manner Mr. Moxley does not approve. See also P Ex 23 ("This tribunal is surely aware that I have undertaken the task of litigating for fees reform in the Vaccine Program, beginning with the Avera case, and continuing to the present."). Thus, there is now a plethora of cases analyzing Mr. Moxley's local hourly rate.

Recently, the Federal Circuit affirmed a 2009 Decision awarding Mr. Moxley an hourly rate of $220 for work performed in 2008. Masias v. Sec'y of the Dept. of Health & Human Servs., 634 F.3d 1283, 1292-93 (Fed. Cir. 2011). See also Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008)(awarding Mr. Moxley $200 per hour for work performed in 2004 through 2006). Also, in Friedman, Mr. Moxley was awarded a rate ranging from $200 to $220 per hour for work performed in 2008 and 2009. Friedman v. Sec'y of the Dept. of Health & Human Servs., No. 02-1467V, 2009 WL 4975267 (Fed. Cl. Spec. Mstr. Dec. 4, 2009), aff'd 94 Fed. Cl. 323 (Fed. Cl. Jun. 18, 2010)(affirming the rates awarded for work between 2006 and 2008 and denying petitioner's requests for interim fees and "fees for fees"); see also Avila v. Sec'y of the Dept. of Health & Human Servs., 90 Fed. Cl. 590 (Fed. Cl. Dec. 22, 2009)(affirming special master's award of $200 per hour for work between 2004 and 2006 and $250 per hour thereafter, and denying petitioner's request for interim payment of fees not objected to by respondent); Dougherty v. Sec'y of the Dept. of Health & Human Servs., No. 05-700V, slip op. at 13-14 (Fed. Cl. Spec. Mstr. Oct. 14, 2011)(awarding Mr. Moxley attorney fees at a rate of $210-$250 for work performed between 2005-1012).[21] The Masias decision cited more cases that determined Mr. Moxley's hourly rate.[22]

In the undersigned's view, it is unnecessary to analyze evidence submitted repeatedly by petitioners' counsel in past cases awarding him attorney fees.[23] The often-thorough analysis in

[21] Discussions of another attorney's awarded rate is also informative, especially in light of Mr. Gage's affidavit supplied in this case. Previously, Mr. Moxley partnered with Richard Gage, an attorney in Cheyene, Wyoming, who also practices in the Vaccine Program. Hall v. Sec'y of the Dept. of Health & Human Servs., 640 F.3d 1351 (Fed. Cir. Apr. 1, 2011)(affirming a range of $220 to $240 per hour for work performed between 2002 and 2009); Doe/11 v. Sec'y of the Dept. of Health & Human Servs., 89 Fed. Cl. 661 (Fed. Cl. Nov. 10, 2009)(citing Hall v. Sec'y of the Dept. of Health & Human Servs., 2009 WL 3094881, at *4 (Fed. Cl. Spec. Mstr. Jul. 28, 2009), and awarding interim fees at a rate of $219 in 2006, $233 in 2007, $239 in 2008 and $239 in 2009). Of note, Mr. Gage was recently awarded $260 per hour for work performed in 2010. Stewart, No. 06-287V, slip op. at 18 (Fed. Cl. Spec. Mstr. Oct. 17, 2011).

[22]

> Hart v. Sec'y of the Dept. of Health & Human Servs., No. 01–357V, 2004 WL 3049766, at *2–3 (Fed.Cl. Dec. 17, 2004) ($200 per hour to Mr. Moxley and his partner for work done in 2004); Gallagher v. Sec'y of the Dept. of Health & Human Servs., No. 95–191V, 2002 WL 1488759 at *1, tbl. nn. 1–2 (Fed.Cl. May 22, 2002) ($175 per hour to Mr. Moxley for work done in the early 2000s); Barnes v. Sec'y of the Dept. of Health & Human Servs., No. 90–1101V, 1999 WL 797468, at *2–3 (Fed.Cl. Sept. 17, 1999) ($160 per hour to Mr. Moxley for work done in 1998); Walker v. Sec'y of the Dept. of Health & Human Servs., No. 90–1398V, 1992 WL 92243, at *1 n. 2 (Fed.Cl. Apr. 10, 1992) ($100 per hour to Mr. Moxley for work done in the early 1990s); Estabrook v. Sec'y of the Dept. of Health & Human Servs., No. 90–752V, 1991 WL 225096, at *1 n. 3 (Fed.Cl. Oct. 16, 1991) ($100 per hour to Mr. Moxley for work done in 1990).

Masias, 634 F.3d at 1292; Masias, 2009 WL 1838979, Table 1. Of note, petitioner in Dougherty, No. 05-700V, filed a notice not to seek review of the Decision Awarding Attorneys' Fees and Costs on October 26, 2011.

[23] The exhibits that were considered in previous cases include: P Ex 24, in five parts, considered in Avera; P Ex 25, in five parts, considered in Masias; P Ex 26, considered in Friedman; P Ex 28, considered in Avila; and P Ex 36, P Ex 37, P EX 38, P Ex 39, P Ex 40, P Ex 41, P Ex 45, Ex 45.1, Ex 45.2 considered in Dougherty.

those cases relied upon much of the evidence duplicated by petitioners in this matter. "We see no error in the special master's reliance on determinations relating to attorneys' fees in prior Vaccine Act cases and in other types of cases in Wyoming." Masias, 634 F.3d at 1292. However, petitioners make slightly different assertions and have submitted new evidence, some particular to this case, which must be considered. The undersigned does note that many arguments and pieces of evidence appear to be counsel's continued attempt to "circumvent" Avera. Masias, 634 F.3d at 1290.

In summary, the new evidence consists of: 1) attorney invoices from this case reflecting "historic" rates similar to Laffey Matrix rates; 2) Mr. Moxley's affidavit regarding his views on attorney compensation decisions in the Program; 3) an affidavit from Michael Kavanaugh, a Ph.D economist who was utilized in this and other cases by Mr. Moxley; 4) a supplemental affidavit from Mr. Moxley attesting to his current practice of charging $300 per hour; and 5) an article concerning considerations to be made with setting an attorney's hourly rate. After petitioners' acceptance of the Federal Circuit's rejection of Laffey Matrix rates, petitioners' new arguments focus on Mr. Moxley's local rate and, once the local rate is found, the application of the Davis exception. A review of the evidence regarding attorney rate and the Davis exception follows.

First, the undersigned notes that petitioners' submitted invoices are labeled "historic rates" and evidence rates ranging from $405 per hour in 2005 and up until May 2006; $425 per hour from June 2006 until May 2007; $440 per hour from June 2007 until May 2008; $465 per hour from June 2008 until May 2010; and $475 from June 2010 and thereafter. P Exs 21, 46, 48. Petitioners' counsel has never been awarded such rates, nor does he claim these are his usual local rates.[24] As these figures appear based on Laffey Matrix rates, which are not *prima facie* evidence of an attorney forum or local rate, the undersigned finds the assertions in the invoices to carry no value.

Second, petitioners' counsel filed a twenty-three page affidavit on October 22, 2010. P Ex 23. The affidavit discusses Mr. Moxley's 31 years in practice, his litigation experience in myriad courts, and his practice in the Vaccine Program since 1989. The affidavit continues on, expressing Mr. Moxley's discontent with the courts' fees jurisprudence. Mr. Moxley characterizes the law in the area of attorneys' fees as a "systemic insufficiency of compensation," "unlawful and oppressive," and "onerous." Id. at p. 3, 6. It also describes tactics used in other cases, similar to those attempted herein, for counsel to obtain an award of interim fees. Id. at 7-8 (discussing counsel's unsuccessful attempts to secure interim fee awards or summary judgment with present payment of undisputed fees in Avila and Friedman). The affidavit includes arguments regarding application of Laffey Matrix rates, that the Vaccine Program constitutes complex, federal litigation, and championing a federal specialty rates; arguments that were disposed of by the Federal Circuit in Decisions that were issued in March and April of 2011, after this filing. Masias, 634 F.3d at 1290 ("We reject Masias's argument for

[24] These rates are also significantly higher than the forum rates calculated for Mr. Moxley in Dougherty, slip op. at 10.

a federal specialty rate as an attempt to circumvent Avera's application of the Davis County exception."); Masias, 634 F.3d at 1288, n. 6 ("In Rodriguez, we addressed 'whether the reasonable hourly rate for attorneys handling Vaccine Act cases in the District of Columbia should be determined by applying the Laffey Matrix.")(upholding the special master's decision to not apply Laffey Matrix rates); Rodriguez, 632 F.3d at 1385-86 (affirming the finding that Vaccine Act practice is not analogous to complex, federal litigation). The affidavit consists preponderantly of arguments that the Vaccine Program, as a whole, does not reimburse attorney fees at a rate sufficient for petitioners' counsel. Counsel's overarching arguments are not persuasive given the current, established paradigm for calculating attorney fees. They are also not evidence.

Third, petitioners present an affidavit from Michael Kavanaugh, a Ph.D. economist utilized by petitioners' counsel since the Avera litigation. P Ex 27. The affidavit discusses Mr. Kavanaugh's work in Avera, Masias and Avila. P Ex 27 at ¶ 5.[25] Mr. Kavanaugh critiques and disagrees with the Federal Circuit's decision; he also opines to the continuing validity of the Laffey Matrix rates, which were rejected by the Federal Circuit. Mr. Kavanaugh's testimony has been considered in the prior cases and found unpersuasive. The undersigned has reviewed this affidavit from Mr. Kavanaugh and finds the same here.

Lastly, petitioners submitted an article discussing aspects and considerations of setting legal fees. P Ex 47, Ward Bower, Pricing Legal Services, Report to Legal Management 4-6 (Altman Weil, Inc., March 2004).[26] Petitioners submit this article as basis for their "cost-plus-profit" calculation presented in earlier affidavits. P Reply at 2, n. 4; P Mot for Int. Award, 5-6, n. 11. Petitioners state this publication supports petitioners' argument that Wyoming rates for complex federal litigation are not substantially lower than those in Washington, DC. P Mot for Int. Award, 5, n. 11. Upon review, this article merely discusses considerations an attorney examines to set the hourly rate. The special master in Friedman discussed Mr. Moxley's arguments regarding profit. As "profit" is a subjective measurement with many variables not under the purview or control of this court, petitioners' arguments are as unpersuasive as they were in the past. See, e.g., Friedman, 2009 WL 4975267.

> Masias already rejected an argument about profitability. . . . the lack of profitability may be due to excessive costs, not inadequate revenues. Moreover, fee shifter statutes are "not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client."

Friedman, 2009 WL 4975267, at *7 (citations omitted).

[25] Affidavits from Mr. Kavanaugh were also filed in Friedman as petitioner's exhibits 33 and 34 in that case.

[26] Altman Weil, Inc. is a legal consulting firm. Altman Weil homepage, http://www.altmanweil.com/ (last visited August 31, 2011). This article was also submitted in Dougherty, No. 05-700V, P Ex. 53, but does not appear to be discussed in the decision.

1. Petitioners' Arguments

Regarding petitioners' counsel's local rate, petitioners' counsel claims a rate of $300 per hour.[27] P Ex 43. The affidavit continues counsel's arguments that Vaccine Act practice is costly and complex.[28] Again, counsel makes general accusations that the Program as a whole does not provide reasonable remuneration to petitioners' counsel. The undersigned finds these arguments unpersuasive and holding little evidentiary value in this case. In fact, this filing adds little substantive value to petitioners' previous arguments, simply reiterates counsel's assertions and fails to acknowledge the precedential law found in the Federal Circuit's Masias and Rodriguez decisions. Moreover, it is not until in petitioners' Reply to Government Submissions, filed May 19, 2011, that petitioners overtly acknowledge the Federal Circuit's decisions regarding application of Laffey Matrix rates in the Vaccine Program.

Petitioners argue the Davis County exception does not apply in this case as the claimed local rate of $300 is not significantly different from the forum rates, as calculated in other Vaccine cases, including Masias.[29] Petitioners also argue that current rates or an enhancement of the lodestar value must be awarded for the entirety of the case, citing Perdue v. Kenny A. ex rel Winn, 130 S.Ct. 1662 (2010), and arguing that petitioners' time spent litigating the fees portion of this case should be awarded over respondent's objections. With this filing though, petitioners

[27] In this affidavit, counsel notes motions for rehearing have been and will be filed in Rodriguez and Masias. Rehearing was denied in Rodriguez on April 28, 2011, and in Masias on June 1, 2011. As previously stated, petitions for writ of *certiorari* were filed on July 27, 2011, in Rodriguez, case number 11-129 at the Supreme Court, and on August 26, 2011, in Masias, case number 11-266 at the Supreme Court.

[28] As with the Masias case, petitioners' case regarding entitlement to a vaccine award did not "present any novel issues of law, and did not require appellate review on the merits." In fact, petitioners' case appears to have proceeded in a usual fashion, much of the time taken up with discussions of informal resolution, and resulted in a stipulated award. See, e.g., Masias, 634 F.3d 1290 (rejecting contention that underlying case was complex federal litigation).

[29] The forum rate calculated and affirmed in Masias was $350 in the special master's 2009 Decision. P Reply to Government Submissions at p. 3, n. 7; Masias, 2009 WL 1838979, at *25, aff'd Masias, 634 F.3d 1283. Petitioners also cite the special master's decision in Rodriguez, 2009 WL 2568468, setting a forum rate between $275 and $360 per hour. P Reply to Government Submissions at p. 3, n. 7. Petitioners overstate this finding slightly. The range of rates was figured to match a range of years, "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." Rodriguez, 2009 WL 2568468, at *15. The Rodriguez case was filed in 2006, like the case *sub judice*, and resolved with a settlement on November 29, 2007; the litigation over attorney fees and costs began in February 2008, briefing on fees concluded in April 2008, and this culminated in the July 2009 decision by the special master. Id. at *1. Also, petitioners cite Schueman v. v. Sec'y of the Dept. of Health & Human Servs., 2010 WL 3421956 (Fed. Cl. Spec. Mstr. Aug. 11, 2010). The undersigned recently issued an attorney fees decision concerning the same attorney as the one representing petitioners in Schueman; the undersigned agreed with the forum rate but respectfully disagreed with the findings regarding the attorney's local rate in Schueman. Hocraffer v. Sec'y of the Dept. of Health & Human Servs., No. 99-533V, slip op., 2011 WL 3705153 (Fed. Cl. Spec. Mstr)(finding the forum rate for an attorney practicing in Huntington, VT, to be $300 in 2009). The undersigned notes that petitioners state an incorrect range of forum rates found in Schueman as $250 to $300 per hour. The rates found by Special Master Vowell were "between $275.00 and $360.00 for work performed in 2006 and beyond" under the Act. Schueman, 2010 WL 3421956, at *4.

submitted additional evidence regarding his local rate: the affidavit from attorney Richard Gage and the two supporting attorney affidavits, discussed below.

2. Respondent's Arguments

Respondent objects to an award of local rates at $300 per hour. R Resp. to Mot for Int. Award, 11-12; R Final Resp., 5-8. Respondent asserts that no case under the Vaccine Act has found Mr. Moxley's rate to be $300 per hour; respondent cites the then-recent decision on the attorneys' fees work done in the Masias case, where Mr. Moxley was awarded $220 per hour. R Resp. to Mot for Int. Award, 11 (citing Masias, 2010 WL 1783542, aff'd 634 F.3d 1283). Respondent also discusses Mr. Moxley's awarded rate in Avila, which was $200 for work from 2004 to 2006 and $250 for work in 2006 and beyond. Id. (citing Avila, 2009 WL 2033063, aff'd 90 Fed. Cl. 590). Regarding Mr. Gage's affidavit and the two supporting affidavits, respondent notes that these fail to evidence the nature and extent of work performed by Mr. Gage in these cases. R Resp. to Mot for Int. Award, 6. Respondent points out that this in contrast to Mr. Gage's award of hourly rates in Hall, 640 F.3d 1351. In the Hall final fees decision, Mr. Gage was awarded a range from $220 to $240 for work performed after January 2006. Hall, 2009 WL 3423036, at *26, aff'd 93 Fed. Cl. 239, aff'd 640 F.3d 1351. Additionally, the special master in Hall created impressive tables of decisions in the Vaccine Act, and in cases outside of the Act, setting attorney rates for Mr. Gage and other attorneys in Wyoming. Hall, 2009 WL 3423036, at *31, Tables 1-3.

3. Analysis of the Attorney Local Rate

First and foremost, the undersigned takes into account the large body of case law setting Mr. Moxley's rate well below this proffered rate of $300. Review of the underlying decisions that have set Mr. Moxley's rate shows a great deal of consideration and analysis. In this Program, it appears that the highest rate awarded Mr. Moxley was $250 per hour for work performed after August 2006. Avila, 2009 WL 2033063, at *4, aff'd 90 Fed. Cl. 590; see also Avera, No. 04-1385, Order Amending Judgment, filed Jun. 24, 2008 (according to Mr. Moxley, the award here calculated out to grant a rate of $250 per hour based on the total amount awarded). The special master in Avila appears to have accepted the increase in Mr. Moxley's rate between $200 in 2004 to 2006 and $250 from 2006 onward and did so without questioning the increase. Most recently in Dougherty, the special master awarded Mr. Moxley a local rate of $210 in 2005-06; $220 in 2006-07; $225 in 2007-08; $240 in 2008-09; $240 in 2009-10; $245 in 2010-11; and $250 in 2011-12. Dougherty, slip op. at 13, 23.

Actually bearing somewhat on the issue of an appropriate local rate, the affidavit of Attorney Richard Gage was submitted with the May 19, 2011 filings. P Ex 45. And on a repeating theme in this decision, Mr. Gage's affidavit, P Ex 45, and the two attorney affidavits supporting it, P Ex 45.1 and P Ex 45.2, were also filed and considered by the special master in Dougherty v. Sec'y of the Dept. of Health & Human Servs., No. 05-700V, slip op. (Fed. Cl. Spec. Mstr. October 14, 2011).

Mr. Gage practices in this Program, was formerly a partner of Mr. Moxley and still works in the same location as Mr. Moxley, Cheyenne, Wyoming. P Ex 45. This affidavit states Mr. Gage's understanding that Mr. Moxley charges $300 per hour, which Mr. Gage finds reasonable, and that Mr. Gage worked two cases on an hourly fee basis, both of which paid $300 per hour. Id. Two additional affidavits are included, P Ex 45.1 and P Ex 45.2, which confirm Mr. Gage's rate in these two cases and describe them as a Fair Labor Standards Act case, P Ex 45.1, and a wrongful death-asbestos exposure case, P Ex 45.2.

The undersigned first notes that Mr. Gage's opinion that $300 per hour is reasonable in the Vaccine Program carries little persuasive value as he is "far from [a] disinterested observer." Masias, 2009 WL 1838979, at *20, *27. However, the undersigned does find the fact that Mr. Gage has earned this rate, along with the supporting affidavits, as some evidence of the local rate. See also Dougherty, slip op. at pp. 10-11 (finding these affidavits show some evidence of local rate but that they are lacking in regards to how Mr. Gage's $300 per hour cases relate to Vaccine Act work and that they are evidence that the local rate is something less than $300 per hour); see also Stewart v. Sec'y of the Dept. of Health & Human Servs., No. 06-287V, slip op. at 9, 16-17, 2011 WL 5330388 (Fed. Cl. Spec. Mstr. Oct. 17, 2011)(finding petitioner failed to evidence similarity between Vaccine Act work and the work discussed in these affidavits from Mr. Gage, Mr. Kline and Mr. Ashkin). Regarding this evidence, the undersigned accepts it as evidence of the local rate while acknowledging other evidence of the local rate as submitted and analyzed in previous cases.[30]

Affidavits were submitted from other attorneys Anne Toale, Altom Maglio, Brewster Rawls, and Sandra Cassidy.[31] P Exs 36, 37, 38, 39. These affidavits were also submitted and considered in Dougherty. Each of these attorney affidavits attests to the financial burdens of Vaccine Program practice and the strains placed on counsels' ability to accept more Vaccine Act cases, claiming that attorneys are turning away deserving cases. Other than opining that higher rates should be paid in the Program, the attorney affidavits do not provide evidence related to

[30] Additionally, in a case currently on appeal, Mr. Gage submitted an interim request for attorneys' fees and costs wherein he requested a range of rates from $220 to $250 per hour. Stone v. Sec'y of the Dept. of Health & Human Servs., No. 04-1041V, Petitioners' Application for Award of Interim Attorneys' Fees and Reimbursement of Costs (filed Jul. 15, 2010). In that application, Mr. Gage characterizes the rates requested as his "lowest potential hourly rates. The rates requested have been previously paid in this Program and by this Special Master. The undersigned reserves the right to request his full hourly rates in his final fee petitioner in this case." Id. Further, Mr. Gage recently submitted a second request for interim fees in this case, wherein Mr. Gage again requested a rate of $250 per hour for work performed as recently as September 12, 2011. Stone, No. 04-1041V, Petitioners' Application for Interim Award of Attorneys' Fees and Reimbursement of Costs (filed Sept. 21, 2011). Presumably, Mr. Gage requested these rates to avoid a dispute over the rate at this interim stage.

As stated previously, Mr. Gage was recently awarded $260 per hour for work performed in 2010. Stewart, No. 06-287V, slip op. at 18 (Fed. Cl. Spec. Mstr. Oct. 17, 2011).

[31] Notably, Ms. Cassidy states, "I am not over busy with vaccine cases and in fact have just been added to the list." Although Ms. Cassidy does appear on the list of attorneys willing to take Vaccine Act cases found on the Court's website, a search of CM/ECF shows Ms. Cassidy represents no petitioners under the Vaccine Act. See http://www.uscfc.uscourts.gov/sites/default/files/Vaccine%20Attorneys%202%2024%2011.pdf (listing "attorneys who have agreed, upon request, to accept referrals in certain vaccine injury cases").

counsel's local or forum rates, and are thus unpersuasive. "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." Rodriguez, 2009 WL 2568468, at *18 (citing U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 726 (1990)). The undersigned has not seen or even heard of evidence that runs counter to these findings in Rodriguez. Further, as discussed in other decisions, it is in these attorneys' best interest to advocate higher rates as it would benefit them; therefore, the affidavits do not hold the persuasive value of unbiased testimony. Masias, 634 F.3d at 1290 (approving of the special master's fact finding in which the special master found attorneys providing affidavits "far from disinterested observers.").

Petitioners' exhibits 40 and 41 are affidavits of Dawn Richardson, co-founder of Parents Requesting Open Vaccine Education and director of Advocacy for the National Vaccine Information Center, and Dawn Winkler, the director of Health Advocacy in the Public Interest.[32] Both affiants state they are contacted by persons alleging vaccine-related injuries and attorneys willing to take these cases are in short supply. Both argue that the amount and timing of awards of attorneys' fees under the Program causes a shortage of attorneys willing to take Vaccine Act cases. As with the four attorney affidavits discussing the financial burdens facing petitioners' counsel, these affidavits do not provide evidence related to counsel's local or forum rates and are unpersuasive. Regarding a due process challenge and an argument for a "higher cost exception" to the forum rule, the petitioner in Rodriguez argued that the fees awarded in the Program caused a shortage of attorneys willing to take on Vaccine Act claims. Rodriguez, 2009 WL 2568468, at *16-18. In response, the special master stated:

> The evidence that [petitioner] 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. . . . .
>
> 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

[32] These affidavits were also filed in Dougherty, slip op. at p. 4, n. 6.

> 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.

Rodriguez, 2009 WL 2568468, at * 17. The special master in Rodriguez cited a similar analysis showing an expansion of the number of attorneys practicing in the Program that was performed in Sabella v. Sec'y of the Dept. of Health & Human Servs., 2008 WL 4426040, at *5-6 (Fed. Cl. Spec. Mstr. 2008). The undersigned's experience is likewise.

In light of the analysis of Mr. Moxley's rate in the previous cases of Avera, Masias, Avila and Pestka, petitioner's evidence of local rate appears comparatively weak. Further, the undersigned notes that petitioner in the Masias case submitted a 2006 affidavit from Mr. Moxley himself that stated the rate of $250 was "a very high hourly rate for the Cheyenne market." Masias, 634 F.3d at 1291 (citing Masias, 2009 WL 1838979, at *5).

As in other cases where Mr. Moxley represented petitioners, petitioners here make countless complaints that have been rejected over and over again as they pertain to petitioners' counsel.

> The lengthy litany of complaints about the "injustice" done to Vaccine Act practitioners as a result of decisions reached in prior attorneys' fees cases is irrelevant to showing any undue hardship sustained during the court of litigation in this case. . . . Mr. Moxley is on a mission to relieve Vaccine Act attorneys from the penury to which he complains that the Office of Special Masters and the courts have consigned them by rebuffing their fee applications and thereby belittling the value of their advocacy on behalf of Vaccine Act petitioners.

Avila, 90 Fed. Cl. at 599.

The affidavits of counsel supporting a rate of $300 per hour are the most relevant and arguably persuasive of the evidence presented by petitioners. P Ex 23; P Ex 43; P Exs 45, 45.1, 45.2. In exhibit 23, counsel states his local rate was $200 per hour from 2004 to 2006, $250 per hour from 2006-2010, and $300 per hour as of March 1, 2010. Petitioners provide no support or justification for the initial rate or for the increases. Petitioners also do not show what type of work counsel performs locally for this rate or how that work compares to Vaccine Act practice. However, petitioners' exhibits 45, 45.1 and 45.2 have some weight in corroborating this local rate for at least two cases.

Table 1 in the special master's Hall Decision is helpful in assessing Mr. Moxley's claimed increases. Decisions between 2002 and 2004 show an increase of $25 in rate for the Cheyenne attorneys, Mr. Moxley and Mr. Gage. In fact, the amount awarded in the 2004 case of Hart v. Sec'y of the Dept. of Health & Human Servs., No. 01-1357V, 2004 WL 3049766, was $200 and this was the amount requested by these attorneys. Hall, 2009 WL 3423036, Table 1. This amount, $200 per hour, is consistent with what counsel claims he charged non-vaccine

clients in 2004. However, in Masias and Friedman, Mr. Moxley's local rate of $250 in years thereafter "was not considered dispositive." Friedman, 2009 WL 4975267, at *9, aff'd 94 Fed. Cl. 323. As noted in Friedman, the amounts awarded to Mr. Moxley in Masias, Friedman and Avila "all fall within the same general range of reasonableness," about which "reasonable people can disagree reasonably." Friedman, 2009 WL 4975267, at *9, n. 8. Most of the newly submitted evidence lacks objective persuasiveness and thus does not change the results reached in those cases.

Considering and agreeing with the cogent analysis of Mr. Moxley's hourly rates in prior cases, the undersigned relies upon those decisions in setting Mr. Moxley's rate and bases the following rates on the findings in Avila and Dougherty. Avila, 2009 WL 2033063, at *4, aff'd 90 Fed. Cl. 590; Dougherty, No. 05-700V, slip op. at 23. **Accordingly, the undersigned finds Mr. Moxley's local attorney rates are: $220 per hour for work performed through May 2007; $225 per hour for work performed through May 2008; $240 for work performed through May 2009; $240 for work performed through May 2010; $245 for the work performed through May 2011; and $250 for the remainder of the work performed thereafter.**

Year	Local Rate
2006-07	$220
2007-08	$225
2008-09	$240
2009-10	$240
2010-11	$245
2011-12	$250

Utilizing the forum rates found above, supra p. 13, and as it was found for Mr. Moxley in prior Vaccine Act cases awarding attorneys' fees, there remains a "very significant difference" between his local and forum rates. The undersigned employs Table 3 in Dougherty, which shows the percentage difference between the forum and local rates in that case and herein. Dougherty, No. 05-700V, slip op. at 13-14; see also Hall v. Sec'y of the Dept. of Health & Human Servs., 640 F.3d 1351, 1357 (Fed. Cir. 2011)(finding 46% to 60% difference in local and forum rates to be very significant).

Forum and Local Rates with Percent difference

Year	Forum Rates	Local Rates	Percent Difference
2006-07	$320	$220	45%
2007-08	$330	$225	47%
2008-09	$350	$240	46%
2009-10	$350	$240	46%
2010-11	$360	$245	47%
2011-12	$375	$250	50%

In conclusion, because the bulk of the work in the instant case was done outside the forum and there is a very significant difference between the local and forum rates, the Davis County exception applies and petitioners are awarded local rates for their attorney as found above.

d. Current Rate or Enhancement of the Lodestar Figure to Compensate for Delay

Petitioners make two similar arguments that would grant their attorney higher rates due to "delay" of these proceedings. First, they argue that the current rate ought to be applied for all past work to compensate for the delay in reimbursement. Second, they argue that an enhancement to the lodestar figure is due because of the delay in reimbursement. As will be discussed, petitioners are not awarded current rates for all attorney work, nor are they awarded an enhancement.

This Petition was filed in 2006. The question is whether an adjustment should be made to petitioner's attorney's rate for the earlier years of work, applying the current rate for all hours claimed under this Petition. Petitioners argue that awarding the entirety of the hours claimed at the current rate is appropriate due to the delay that petitioners in the Vaccine Program endure to be reimbursed for attorney fees and costs. Petitioners base their argument on Perdue v. Kenny A. *ex rel* Winn, 130 S.Ct. 1662 (2010). E.g., P Mot for Int. Award at 8-10. Petitioner states that Perdue supports "an 'enhanced' rate that recognizes the systemic delay and extraordinary investment required of counsel in Program cases. . . . [A]lso under Perdue, the law requires award of 'current rates'." P Reply at 3.

Perdue involved a claim for attorneys' fees under a federal fee-shifting statute. The district court awarded fees under the lodestar method, with a $4.5 million enhancement based on the quality of counsel's performance. The Supreme Court reversed and remanded, essentially finding the district court's enhancement was "not supported by any discernable methodology." Perdue, 130 S.Ct. at 1669, 1677, n. 8.

The undersigned notes that Perdue dealt with enhancement of the lodestar figure attributed to superior attorney performance.[33] Perdue approved of enhancement of the award of attorney fees only in rare and exceptional cases but reiterated the strong presumption that the lodestar calculation is sufficient in most cases. Perdue, 130 S.Ct. at 1673. The decision does mention awarding current rates to account for exceptional delay. "[A]n enhancement may be appropriate where an attorney's performance involves exceptional delay in payment of fees." The Court, however, did not give guidance as to what constituted a significant delay and, as shown earlier, there was no significant delay in this case. Supra pp. 4-5.[34] Further, regarding

[33] As discussed later in this Decision, "Enhancement of Lodestar," there was suggestion in Perdue, albeit *dicta*, that *extraordinary* delay may authorize an enhancement. However, petitioners' arguments focus on the Program in general and not on this specific case. Regardless, that issue is dealt with below.

[34] Petitioners also cite Hutto v. Finney, 437 U.S. 678 (1978)(finding an "award of attorney fees [against a state] for bad faith served the same purpose as a remedial fine imposed for civil contempt" and such an award was not

superior attorney performance, the Court found it would be "rare" and "exceptional" and "require specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'" Id. at 1674 (citing Blum v. Stenson, 465 U.S. 886, 897 (1984)). The undersigned notes that this argument has been used in Mr. Moxley's other cases, Pestka v. Sec'y of the Dept. of Health & Human Servs., No. 06-708V, 2011 WL 4433634 (Fed. Cl. Spec. Mstr. 2011); Dougherty, No. 05-700V, slip op. at 14-19.

The special master in Dougherty discussed the many facets of the Supreme Court's decision in Perdue, but found none of the factors warranting enhancement were present in the case. The undersigned finds likewise here. As petitioner did in Dougherty, slip op. at 16 n. 15, petitioners here fail to use the present facts and situation of this case to show their attorney is due an enhancement. However, the special master in Dougherty generously examined the situations that might warrant a rare and exceptional enhancement: "1) when the method used to determine the hourly rate for the lodestar calculation does not adequately measure the attorney's true market value; 2) if there is an extraordinary outlay of expenses and the litigation is exceptionally protracted; and 3) if there is exceptional delay in the payment of fees. . . . Additionally, . . . where there is superior attorney performance that the lodestar fee does not adequately take into account." Dougherty, slip op. at 17 (citing Perdue, 130 S.Ct. at 1674-75).

As in Dougherty, the undersigned does not find these situations apparent in this case. In the myriad cases discussing Mr. Moxley's hourly rate, his location, firm size, his years practicing law, as well as years practicing in this program, the type of work performed under the Vaccine Act in comparison with other forms of litigation, have all been taken into account. See, e.g., Friedman, 2009 WL 4975267, at *9 (comparing rates of another petitioners' firm based on work performed and experience of the attorney performing the work); see also Perdue, 130 S.Ct. at 1674 (finding enhancement may be appropriate if an hourly rate is determined by taking only one or a few factors into account). Further, petitioners have not provided proof that Mr. Moxley's "performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." Perdue, 130 S.Ct. at 1674. Petitioners mostly argue that Vaccine Act cases are protracted and costly, but petitioners' evidence herein does not show this case to be especially protracted or expensive. No hearings were held; no travel required by petitioners or their counsel; expert reports were obtained but the expert's bill amounts to $3,090.00, not an extraordinary outlay when compared to other Vaccine cases. There was no showing and indeed no evidence in this case to support an enhancement due to superior performance. Petitioners' arguments that go beyond the instant case are unpersuasive. Finally, despite arguments that Vaccine cases are generally protracted, petitioners' case does not show that Mr. Moxley's "performance involves exceptional delay in the payment of fees." Id. at Petitioners' first request for fees came in October 2010. Next, delay originally occurred at petitioners' reasonable suggestion, pending the issuance of the Federal Circuit's decision in Masias. P Mot for Int. Award. Thereafter, petitioners engaged in much briefing regarding arguments on how the Vaccine Program denies reasonable rates generally and attempting procedural avenues

---

prevented by the Eleventh Amendment.) P Mot for Int. Award at 10. The undersigned finds the portion of Hutto cited by petitioners, pages "607-698 [sic]" inapplicable to petitioners' desire for current rates or enhancement due to delay.

unnecessary considering a final fees request and decision were appropriate. Still though, less than one year has passed since petitioners' original request. This does not constitute exceptional delay. Finally, although Mr. Moxley secured a favorable outcome for his clients and is a quality attorney in the undersigned's view, there was not the sort of "superior quality" involved in this case that would warrant an extraordinary and rare enhancement envisioned in Perdue.

Petitioners also rely upon Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463 (1989). P Mot for Int. Award at 8-10, n. 19. Jenkins was an attorney fees case under the Civil Rights Attorney's Fees Awards Act of 1979, 42 U.S.C. § 1988, following a desegregation litigation in Kansas City, Missouri. Jenkins, 491 U.S. at 275. That Act required the party prevail in order to receive attorney fees. 42 U.S.C. § 1988. The issues discussed in the case included whether the Eleventh Amendment prohibits enhancement of a fee award under § 1988 against a State to compensate for delay of payment, relevant here, and whether to reimburse rates for paralegals, law clerks and recent law graduates at market rates or their cost to the attorney. Jenkins, 491 U.S. at 278, 284. The Supreme Court held that the Eleventh Amendment does not prohibit enhancement of a fee award against a state. This holding was based upon Hutto v. Finney, 437 U.S. 678 (1978), wherein attorney fees "were held to be 'costs' not subject to Eleventh Amendment strictures." Jenkins, 491 U.S. at 281, n. 3. Petitioners fail to acknowledge the Supreme Court distinguished Jenkins from cases against the United States. Jenkins, 491 U.S. at 281, n. 3 (holding the "'no-interest rule' that was at issue in Shaw . . . is applicable to the immunity of the United States and is therefore not at issue here . . .").

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

As the Court stated in Short v. United States:

> . . . despite the general waiver of sovereign immunity allowing suit, interest is **not** allowable in claims against the United States unless a Fifth Amendment taking has occurred, or unless interest is provided for in an express contractual provision or by statute. 28 U.S.C. § 2516(a) (1982); Library of Congress v. Shaw, 478 U.S. at 314; United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49

> (1951); United States v. Mescalero Apache Tribe, 207 Ct.Cl. 369, 380 (1975), cert. denied, 425 U.S. 911, (1976). Interest can not be awarded on the basis of policy, United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 658-59 (1947), or implied notions of just compensation, United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588-90 (1947).

Short v. United States, 25 Cl. Ct. 722, 724 (1992)(emphasis in original).

"More specifically, the court stated "[i]nterest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money." Applegate, 52 Fed. Cl. at 770 (citing Shaw, 478 U.S. at 322); see also Chiu v. United States, 948 F.2d 711, 719–20 (Fed. Cir.1991)(refusing to enhance attorneys fee for "adjustment for loss of use of the money by reason of delay"); United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369, 518 F.2d 1309, 1322 (1975), cert. denied, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); see also 10 Moore's Federal Practice § 54.190[3][e] (Mathew Bender 3d ed. 2002) (noting general approval of a delay adjustment, but observing that "[i]f the opponent is the United States, sovereign immunity prevents the implementation of any delay enhancement."). Thus, enhancement for delay is not authorized.

Viewing an enhancement as an award of interest, the special master in Pestka noted that petitioner's "argument has some logical appeal, [but] is foreclosed by another Supreme Court case, Library of Congress v. Shaw, 478 U.S. 310 (1986), and a Federal Circuit case, Chiu v. United States, 948 F.2d 171 (Fed. Cir. 1991)." Pestka, 2011 WL 4433634, at *5. Both cases found that sovereign immunity precluded such adjustments, equating them to an award of interest against the United States. The special master in Pestka observed, "[w]hether Perdue requires the Federal Circuit to revise its holding in Chiu that attorneys are compensated using historic (not current) rates when seeking attorneys' fees from the United States is a question for the Federal Circuit. Until that time, attorneys should be awarded compensation at historic rates as explained in Chiu." Pestka, 2011 WL 4433634, at *5 (citing Strickland v. United States, 423 F.3d 1335, 1338 & n. 3 (Fed. Cir. 2005). The undersigned agrees and has found the same. Hocraffer v. Sec'y of Health & Human Servs., No. 99–533V, 2011 WL 3705153, at *17–19 (Fed. Cl. Spec .Mstr. July 25, 2011), motion for review filed (Aug. 24, 2011)).

Petitioners also make the argument that, through the Vaccine Act, the United States is acting as a "private commercial enterprise" lacking sovereign immunity and subject to interest. P Reply at 13 (citing Standard Oil Co. of New Jersey v. United States, 267 U.S. 76 (1925)(finding insurance policies issued by the Bureau of War Risk Insurance granted the right to sue the United States in the event of a disagreement and the Court assumed the United States "accepted the ordinary incidents of suits in such business."). Petitioners cite a 1987 pamphlet regarding the Vaccine Program and likening it to a "federal insurance system." Id. at 14. Nothing in the Vaccine Act is congruent with commercial enterprise. The undersigned does not find the alternative compensation system of the Vaccine Act to be synonymous with the government's issuance of insurance policies. See also Hocraffer, 2011 WL 3705153, at *19.

The undersigned does not find petitioners' case warrants enhancement due to the factors discussed in Perdue. Further, at present, application of the current rate for all past work is also denied. Both are denied.

V. Attorney Hours

Until the hours spent by counsel on attorneys' fees issues, respondent objects to very few attorney hours. Respondent objects to 0.4 hours billed for a conference with another attorney on May 8, 2008, as the time entry is vague. R Resp., 12, n. 12. Petitioners bristle and appear incredulous to this objection, P Brief in Support at 9, n. 16. Petitioners must understand that, at the very least, the entry must be detailed enough to determine this conference was related to this case. The undersigned appreciates respondent's concern about vagueness and cautions petitioners' counsel that vagueness in entries should be avoided to enable the court to make a determination of reasonableness. However, given the small amount of time and counsel's usually reasonable billing entries, this time is not deducted.

Respondent does object to "time spent briefing Laffey rates and interim award issues, including working with Dr. Kavanaugh to prepare yet another affidavit advocating Laffey rates for Vaccine Program attorneys." R Resp. to Mot for Int. Award, 12.

The undersigned cannot agree with respondent's position with regard to time spent up through petitioners' October 22, 2010 filing, petitioners' Motion for Interim Award. At the time of that filing, the Masias case was at the Federal Circuit and petitioners arguably had reason to believe Laffey Matrix rates might prevail. Further, petitioners' counsel bills a total of 11.4 hours to prepare these filings submitted on October 22, 2010; this is not an unreasonable amount even when one accounts for the exhibits and arguments that counsel duplicated from other fees cases. P Ex 21. Petitioners are awarded the claimed hours as evidenced in petitioner's Motion for Interim Award, p. 16, up through petitioners' October 22, 2010 filing. This amounts to 77.9 attorney hours: 29.6 hours at $220 per hour; 17.5 hours at $225 per hour; 18.4 hours at $240 per hour; and 12.4 hours at $245 per hour.

The remainder of the time claimed by petitioners is evidenced by petitioners' Exhibits 44 and 48.[35] It is during this period of work that the undersigned finds much agreement with respondent's objections to the "fees for fees" work.

First, the entitlement portion of this case was concluded. Appropriately, petitioners' first request for fees was filed on October 22, 2010. Second, given respondent's response on December 6, 2010, petitioners were due to reply to respondent's objections. However, petitioners immediately began work on their summary judgment motion and brief. P Ex 44 (showing summary judgment work began on December 6, 2010). Petitioners worked on this motion, P Ex 44 at 1-2, but were on notice that the undersigned did not favor an interim award

[35] The entries in Exhibit 46 are subsumed by Exhibit 48. Also, there appears to be no billing for petitioners' August 22, 2011 filing.

when a final request and decision on fees was appropriate. Order, filed Jan. 26, 2011. In the January 26, 2011 Order, petitioners were directed to file their response to respondent's objections. Instead, on February 25, 2011, petitioners filed responses along with their requests for summary judgment, a trial and discovery. Much of the evidence and argumentation offered at this point provided little substance to petitioners' arguments. Following the undersigned's withdrawal of the interim award, petitioners were again on notice that the case was ripe for a final fees request and decision. Order, filed Mar. 23, 2011. Petitioners were ordered to file their final fees and costs request. Id.

Instead, petitioners filed a second request for interim fees along with evidence of petitioners' final fee request on April 22, 2011. With the exception of the requested and truly responsive portions of this filing, the undersigned finds a large quantity of the April 22, 2011 filings to be unreasonable. Much of this information reflected materials previously filed and found unpersuasive in other cases and argumentation that provided little, if any, relevant support. Supra pp. 2, 14 n. 23, 16 n. 25, 16 n. 26, 19, 20 n. 32. At this time, the Federal Circuit's decisions were issued in Rodriguez and Masias, two cases with great ramifications on this case. Much of the argumentation in petitioners' April 22, 2011 filings fail to grasp the Circuit's holdings and railed against the undersigned for his view that the case was ripe for final adjudication of fees. It is not until petitioners' May 19, 2011 filings that petitioners are able to crystallize arguments somewhat appropriate post-Masias and post-Rodriguez.

Ultimately, petitioners' claim an additional 65.8 hours for their attorney's work beyond the initial attorneys' fees and costs request. P Ex 44; P Ex 48. Although some of petitioners' arguments are debatably reasonable, petitioners' counsel spent unreasonable amounts of time pursuing arguments that did not account for precedential case law and on process that was unreasonable given the posture of this case. "This writing style may serve as an outlet for counsel's frustration, but it ignores the *relevant* legal issues and poorly advocates his *client's* case." Dougherty, No. 05-700V, slip op. at 21. "The lengthy litany of complaints about the 'injustice' done to Vaccine Act practitioners as a result of decisions reached in prior attorneys' fee cases is irrelevant to showing any undue hardship sustained during the course of litigation in this case." Avila, 90 Fed. C. at 599.[36]

Considering the foregoing, petitioners are awarded a generous 20 hours following the October 22, 2010 filing. As stated supra page 3, "payment for [Mr. Moxley's] litigiousness must end." The undersigned will not award time or expenses for arguments and evidence considered and rejected by multiple other special masters or other courts. Even with a 70% reduction, the undersigned still considers this award of hours generous. As such, 19 hours will be awarded at the 2010-11 rate of $245. An additional 1 hour spent on petitioners' June 2, 2011 Status Report is awarded at $250 per hour.

[36] Additionally, as discussed throughout this decision, much of the material filed herein was mere reproduction from prior Vaccine Act cases litigated by petitioners' counsel.

Rate	Hours	Total
$220	29.6	$6,512.00
$225	17.5	$3,937.50
$240	18.4	$4.416.00
$245	31.4	$7,693.00
$250	1	$250.00
TOTAL	**97.9**	**$22,808.50**

This amounts to 97.9 attorney hours and a total amount awarded for petitioners' counsel is **$22,808.50**.

VI. Paralegal and Law Clerk Fees

Petitioners request a total of $8,150 in fees for paralegal, law clerk and associate work performed on their case. P Mtn for Int. Award, 16. Respondent objects to entries in this category as vague, possible duplication and the rate increase of one of counsel's employees. R Resp. to Mot for Int. Award, 12-13. Petitioners filed a supplemental affidavit of counsel, P Ex 42, on February 25, 2011, in response. Regarding the rate increase, counsel explains that it reflects the time when the employee, who was a law clerk, became an attorney. Id. at 2. Regarding the vagueness of entries from the paralegal, counsel asserts that more specification is hardly possible with tasks such as in medical records review, organization and summarizing. Counsel further states that "[t]here is no legitimate requirement for a petitioner to demonstrate that certain paralegal hours had a particular 'benefit' in the case" and extols the benefits of utilizing paralegals for such tasks. Id. at 2-3. Counsel explains specific blocks of challenged time that occurred when counsel changed firms and time spent in the effort to complete the record in this case.

Petitioners are awarded the requested number of hours for the paralegal, law clerk and associate work. Review of the total hours appears reasonable for this case and the rates are similar to rates previously awarded these individuals. Avila, 2009 WL 2033063, at *5 (citing Avera, 2006 WL 5618158, at *3 (Fed. Cl. Spec. Mstr. 2006)); Friedman, 2009 WL 4975267, at *14 (citing Masias, 2009 WL 4975267, at *5). Again though, petitioners are reminded that enough basic specificity must be found in billing entries to allow the court to assess the reasonableness of the hours, especially when duplication of tasks is possible. Petitioners are awarded the requested **$8,150.00.**

VII. Costs

With the exception of costs associated with the establishment of the guardianship for receipt of Program funds, petitioners' costs associated with this litigation are not contested.

a. Establishment of Guardianship

Regarding litigation costs, respondent objects only to an award of fees and costs associated with the establishment of a guardianship in this matter. The special masters

examining this and similar issues have determined that the appropriate test by which to analyze reimbursement of such costs is a "but for" test. See, e.g., Capriola v. Sec'y of the Dept. of Health & Human Servs., No. 08-835V, slip op. (Fed. Cl. Spec. Mstr. 2010); Ceballos v. Sec'y of the Dept. of Health & Human Servs., 2004 WL 784910 (Fed. Cl. Spec. Mstr. 2004); Velting v. Sec'y of the Dept. of Health & Human Servs., No. 90-1432V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. 1996); Thomas v. Sec'y of the Dept. of Health & Human Servs., No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. 1997); Gruber v. Sec'y of the Dept. of Health & Human Servs., No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. 2009), vacated 91 Fed. Cl. 993, 2010 WL 966640 (Fed. Cl. 2010)(remanding the case for further proceedings but not reversing the special master's grant of fees for petitioner's probate attorney).

Herein, the parties' Stipulation states, "No payments pursuant to this Stipulation shall be made until petitioners provide the Secretary with documentation establishing their appointment as guardians/conservator's of [their daughter's] estate." Stipulation at ¶ 12, filed March 11, 2011. The undersigned previously noted that:

> in the majority of cases involving a guardianship, the guardianship is set up to fulfill a condition of receiving the vaccine award. If this condition is set by either court order or as an element of the agreed-upon settlement with respondent, which the special master must ultimately approve, the undersigned sees no distinction from the myriad of other costs incurred by third parties in executing critical pieces of the damages puzzle. The fact that the third party is another court does not change the critical fact that the special master requires that piece of the puzzle to complete the compensation picture.

Ceballos v. Sec'y of the Dept. of Health & Human Servs., No. 99-97V, 2004 WL 784910, 20 (Fed.Cl. Spec. Mstr. 2004)(finding guardianship costs unreimbursable as petitioners established the guardianship for their own purposes, not under direction of respondent or the court).

Petitioners herein were required to set up guardianship as a condition of receiving the stipulated award. Further, it appears that the guardianship process was initiated just prior to the filing of the parties' Stipulation. E.g., P Ex 31; P Ex 31a. As evidenced by Exhibit 31a, petitioners are requesting $3,520.50 in fees and costs involved in establishment of the guardianship. As petitioners set up the guardianship for the purpose of receiving the stipulated award, petitioners' fees and costs related to it are granted. Petitioners are awarded **$3,520.50.**

b. Expert Fees and Other Costs

Respondent does not object to and the undersigned finds nothing unreasonable regarding petitioners' expert costs. Petitioners' other costs are not contested. Petitioners are awarded

$3,090.00 in costs for the services of Dr. Clinton Merrill and $1,247.63 for other costs; totaling **$4,337.63**.[37]

VIII. Miscellaneous Issues

a. Award of Interim Fees and Costs and Petitioners' Motion for Summary Judgment

Interim fees and costs awards were authorized by Avera, 515 F.3d at 1351; however, the Federal Circuit declined to award interim fees in that case. Id. at 1352. Some characteristics of a case that may warrant an interim award, as offered by the Federal Circuit, include protracted proceedings, costly experts, and undue hardship. Id. Petitioners here claim an interim amount of attorney fees and costs is due. Petitioners make numerous arguments regarding the systemic grievances regarding attorneys' fees from petitioners' counsel; however, petitioners fail to make a persuasive case that the case *sub judice* was protracted, that the expert employed in their case was costly or that they suffered undue hardship in proceeding on this Petition.

The withdrawn Decision awarding partial fees and costs was issued due to the undersigned's inability to predict when the Federal Circuit's Masias decision would be filed and to avoid a duplication of litigation questions to be answered therein. With the issuance of that decision, petitioners' reason for the interim award and stay disappeared. As stated by the Court of Federal Claims in another case where Mr. Moxley represented the petitioners, "[t]he court determines that an award of interim attorneys' fees ultimately is not justified when the amount of the fees is the only matter being appealed." Avila v. Sec'y of the Dept. of Health & Human Servs., 90 Fed. Cl. 590 (Fed. Cl. 2009). An interim award is denied. Likewise, petitioners' request for summary judgment is also denied as moot, considering the case is ripe for a final fees and costs decision, and also inappropriate, given the significant disagreements between the parties regarding an award of attorneys' fees and costs.

b. Petitioners' Request for a Hearing on Attorney Fees and Costs

Petitioners' request for a hearing to take testimony pertaining to attorneys' fees is denied. Petitioners state they "believe that a hearing is required by virtue of the evidence in his affidavit (Exhibit 23) and the Sworn Declaration of Ph.D. economist Michael Kavanaugh (Exhibit 27), to illuminate the economics of the Program practice . . . ." P Mot for Int. Award, 13. This decision is based on the written submissions. As these exhibits speak to petitioners' arguments regarding the injustice in past fees decisions, or the Program's treatment of fees generally, and is not particularly relevant to the issue of counsel's local and forum rates, an evidentiary hearing is unnecessary. The Vaccine Act gives special masters the discretion to hold proceedings, including the taking of testimony.

[37] In compliance with General Order #9, petitioners filed a Statement on October 22, 2010, stating petitioners "have incurred no actual litigation expenses in the prosecution of this matter." Sworn Declaration under General Order #9, filed October 22, 2010.

> The Vaccine Act commits to the special master the decision to hold an evidentiary hearing. See 42 U.S.C. § 300aa-12(d)(3)(B)(iii), (v) ("In conducting a proceeding on a petition a special master . . . may require the testimony of any person and the production of any documents as may be reasonable and necessary . . . [and] may conduct such hearings as may be reasonable and necessary."). Similarly, Vaccine Rule 8 provides that the special master "may conduct an evidentiary hearing to provide for questioning of witnesses," Vaccine R. 8(c)(1), and may "decide a case on the basis of written submissions without conducting an evidentiary hearing," Vaccine R. 8(d). Both provisions use the discretionary word "may," so the decision not to hold a hearing squarely falls within the discretion of the special master.

Veryzer v. Sec'y of the Dept. of Health & Human Servs., 98 Fed. Cl. 214, 225 (Fed. Cl. 2011).

IX. Conclusion

The undersigned hereby awards the petitioners attorney's fees in the amount of $22,808.50, fees for other staff in the amount of $8,150.00, and costs in the amount of $7,858.13. **Specifically, petitioners are awarded a lump sum of $38,816.63 in the form of a check payable jointly to petitioners and petitioners' attorney.**

The Clerk of the Court is directed to enter judgment accordingly.[38]

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

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