



related death is subject to the Vaccine Act. Pet at 32; P Ex 7; see also § 300aa-11(a)(2). The parents claims, which are not covered by the Act, were permitted to continue in State court. Pet at 32.

In the case *sub judice*, following the filing of additional supporting records and deposition testimony from the State court action, respondent filed his Vaccine Rule 4(c) Report on September 4, 2008. Respondent filed expert reports on October 21, 2008. Petitioners filed an expert report on January 15, 2009. The undersigned then ordered respondent to file rebuttal expert reports by no later than February 27, 2009. Before the time for respondent's rebuttal expert reports ran, the undersigned issued the 240-day order, pursuant to § 12(g) of the Act. See also Vaccine Rule 10(d). On February 19, 2009, petitioners exercised their right to withdraw their Petition from the Program. An Order concluding the Vaccine Act proceedings was issued on February 20, 2009.

On August 17, 2009, petitioners filed a Fee Petition requesting a total of \$157,089.00 for fees and \$21,649.70 for costs. Respondent filed Respondent's Objections to Petitioners' Fee Petition ("R Object"), which in summary took issue with: the number of hours claimed by petitioners' counsel and his paralegal, neither of which were supported by billing records; the requested hourly rate for both counsel and his paralegal; and the claimed costs, most of which were undocumented. Petitioners filed a Response to Respondent's Objection to Fees and Costs ("P Resp"), which provided a narrative of counsel's actions on the Petition, claimed that the Laffey Matrix<sup>2</sup> is indicative of the forum rate to be applied to counsel, and included an affidavit from Dr. Sulzinski, petitioners' expert, in support of his requested fees. Petitioners claimed an additional 16.25 hours for preparing and filing the Response. Once again, no billing records were supplied.

Respondent filed a Sur-Reply to Petitioners' Fee Petition ("R Sur-Reply"), taking issue with the applicability of the Laffey Matrix to the Vaccine Program, noting that Dr. Sulzinski once again failed to provide an invoice, and questioning the reasonableness of the time spent preparing petitioners' Response. Finally, petitioners filed a Reply to Respondent's Sur-Reply to Petitioners' Fee Petition ("P Reply"), defending the application of the Laffey Matrix and condemning the actions of respondent and the processes used for deciding cases under the Vaccine Act. Petitioners claimed 10.75 hours for preparing the pleading; no billing records were supplied. The issue is ripe for decision.

Before reviewing the case law and analyzing petitioners' Fee Petition and the various arguments presented by the parties, it is important to provide some context for this Decision. This case was pending for 274 days - the Petition was filed on May 22, 2008 and, after receiving the court's notification that 240 days had expired, petitioners exercised their statutory right to withdraw their Petition on February 19, 2009. During the pendency of the Petition, the only proceedings consisted of completing the record with relevant information required by the statute and submitting expert reports. Petitioners' claim for fees and costs is nothing less than extraordinary, as it far

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<sup>2</sup> 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 (D.D.C. 198), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Dir. 1984), cert. denied, 472 U.S. 1021 (1985).

surpasses any similar requests seen by the undersigned by multiples.<sup>3</sup> There was nothing extraordinary about the proceedings before the undersigned. The manner in which the parties' actions were undertaken, and the timeframes allowed for their completion, are essentially similar to the proceedings of hundreds of other causation-in-fact cases processed under the Act. Petitioners' counsel throughout the three briefs creates several strawmen - including the Vaccine Act's unwarranted complexity, the alleged delays by respondent (although there were none), respondent's alleged unreasonable information demands (respondent requested only what the Vaccine Act required petitioners to file, see § 300aa-11(c)) - to justify this extraordinary fee and cost request. Under these circumstances, it is necessary to keep in perspective the limited issues before the undersigned: first, how to determine counsel's reasonable hours worked when petitioners' request is devoid of billing records; and second, what are the reasonable and necessary fees and costs for pursuing a Petition for 274 days. While counsel directs his harangue at anyone that requests, questions or requires him to perform in accordance with the Vaccine Act, counsel failed to meet his obligation of documenting his billings. Counsel has no one to blame but himself for this failure.

## A. General Legal Background

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<sup>3</sup> Characterizing this fee petition as extraordinary is based upon the undersigned's nearly 22-year experience in the Vaccine Program and an objective comparison of this request to those in other cases. The undersigned has seen nothing even remotely approaching the size of this request in relation to the paucity of proceedings that took place. The extraordinary size of the fees request in this case can be seen from a cursory review of awards in other cases with limited proceedings. See Schweitzer v. Sec'y of the Dept. of Health & Human Servs., No 07-856V, slip op. (Fed. Cl. Spc. Mstr. Dec. 3, 2008)(awarding \$10,873.76 in attorney fees and litigation costs for approximately five months of proceedings on the underlying petition); Feldman v. Sec'y of the Dept. of Health & Human Servs., No. 07-891V, slip op. (Fed. Cl. Spc. Mstr. Dec. 17, 2008)(awarding \$24,163.51 in attorney fees and litigation costs for approximately eleven months of proceedings on the underlying petition); Riley v. Sec'y of the Dept. of Health & Human Servs., No 08-026V, 2010 WL 1732286 (Fed. Cl. Spc. Mstr. 2010)(awarding \$57,500.00 in attorney fees and litigation costs for approximately twenty-two months of proceedings on the underlying petition); Hughie v. Sec'y of the Dept. of Health & Human Servs., No 08-061V, slip op. (Fed. Cl. Spc. Mstr. Dec. 22, 2008)(awarding \$29,651.11 in attorney fees and litigation costs for approximately eleven months of proceedings on the underlying petition); Rebello v. Sec'y of the Dept. of Health & Human Servs., No 08-316V, 2009 WL 2762764 (Fed. Cl. Spc. Mstr. 2009)(awarding \$14,471.43 in attorney fees and litigation costs for approximately fourteen months of proceedings on the underlying petition).

Even more demonstrative, is a comparison of petitioners' request in this case with fees requested by petitioners for cases that proceeded to evidentiary hearing, participated in post-hearing proceedings and even moved through the appellate process. The undersigned notes a final fees decision recently issued, Moberly v. Sec'y of the Dept. of Health & Human Servs., No. 98-910, slip op. (Fed. Cl. Spc. Mstr. June 11, 2010). In Moberly, \$226,317.40 in fees and \$41,703.26 in costs were requested; totaling \$268,020.66 for the life of the case. Ultimately, petitioner was awarded \$211,829.30 in fees and 26,956.05 in costs. This totals \$238,786.05 in fees and costs awarded for a case spanning twelve years, involving 126 docket entries, six decisions, including appellate decisions by the U.S. Court of Federal Claims and the Court of Appeals for the Federal Circuit, and the attendant status conferences and briefs that accompanied those proceedings. See Moberly, No 98-910, slip op. (Fed. Cl. Spc. Mstr. June 11, 2010); Moberly, No. 98-910, slip op. (Sept. 15, 2008).

Pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury Act,<sup>4</sup> special masters may award “reasonable” attorney fees as part of compensation. This is true even if a petitioner was unsuccessful on the merits of the case. §300aa-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 1343, 1347-48 (quoting Hensley) (Fed. Cir. 2008); Saxton v. Sec’y of the Dept. of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993). The resulting lodestar figure is an initial estimate of reasonable attorneys’ fees, which may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434. See also, Ceballos v. Sec’y of the Dept. of Health & Human Servs., No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

The requirement that attorneys’ fees be reasonable applies likewise to costs, for example, 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).

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). 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 (“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). In making reductions, the special master is not necessarily required to base his or her decisions on a line-by-line evaluation of the fee application. Wasson, 24 Cl. Ct. at 484 (affirming the special

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<sup>4</sup> The National Vaccine Injury Compensation Program (hereinafter Program) 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. (2006) (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff'd, 988 F.2d 131 (Fed. Cir. 1993). Moreover, 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). Just as "[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." Saxton, 3 F.3d 1517, 1521 (Fed. Cir.1993) (citing Farrar v. Sec'y of the Dept. of Health & Human Servs., 1992 WL 336502, \*2-3 (Cl. Ct. Spec. Mstr. Nov. 2, 1992) (requested fees of \$24,168.75 reduced to \$4,112.50)); Thompson v. Sec'y of the Dept. of Health & Human Servs., No. 90-530V, 1991 WL 165686, \*2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991)(requested fees of \$18,039.75 reduced to \$9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662 (Fed. Cl. Spec. Mstr. Jan. 2, 1992), aff'd, 988 F.2d 131 (Fed. Cir. 1993)(requested fees of \$151,575 reduced to \$16,500; the special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty)).

Additionally, a special master may reduce an unreasonable fees and costs request *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, 86 Fed. Cl. at 208-09; 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, \*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).

## **B. Issues**

Three fundamental issues are presented in this case: (1) how do you determine the reasonable number of hours spent by counsel and his paralegal in the absence of billing records; (2) what are the reasonable hourly rates for counsel and his paralegal; and, (3) what are the reasonable costs to be compensated. These issues will be addressed *seriatim*.

### **1. Reasonable Hours**

#### **a. Attorney Hours**

Petitioners request the following time for Mr. Kops' efforts:

-- 98 hours for "reviewing and preparing for the dictation of the Petition." Fee Pet at 12.

- - 18.1 hours for “dictating and amending the Petition,” submitting the Petition to petitioners and “discussing the same with Michael A. Sulzinski, Ph.D., the Petitioner’s expert.” Id.
- - 11.5 hours for attending several status conferences and preparing various pleadings. Id. at 14.
- - 66.5 hours to review Respondent’s Exhibits A to E, “as well as comparing the various other exhibits and documents including the literature that was submitted by the Respondent.” Id. at 15.
- - 87.45 hours to review two expert reports from respondent and “to compare their current reports with their previous reports [from prior SV40 litigation] as well as comparing it to the various testimony given by these witnesses and the general literature.” Id. at 16. In addition, counsel performed legal research. Id. at 17.
- - 9.5 hours advising his client whether to withdraw the claim in order to pursue a civil remedy. Id.

However, petitioners’ counsel failed to provide any billing records for his claimed time. The Vaccine Guidelines specifically note a fee “petition should include” among other items:

Contemporaneous time records that indicate the date and specific character of the service performed, the number of hours (or fraction thereof) expended for each service, and the name of the person providing such service. Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court’s ability to assess the reasonableness of the request.

Guidelines for Practice Under the National Vaccine Injury Compensation Program at 19.<sup>5</sup> See also Savin, 85 Fed. Cl. 316-317 (“[t]hese guidelines reflect the accumulated wisdom of numerous decisions . . . that fee records . . . must ‘avoid mixed’ entries that lump together several activities” and approving the Special Master’s reduction of the instant law firm’s request for fees and costs associated with lumping together entries in the fee application). “[F]ee records must be specific . . .” Savin, 85 Fed. Cl. 313, 316-17 (2008) (Order denying Motion for Review). See, e.g., Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992) (affirming reduction of hours where “several entries contain[ed] only gauzy generalities” too nebulous to allow the opposing party to dispute their accuracy or reasonableness); In re Donovan, 877 F.2d 982, 995 (D.C. Cir. 1989) (confirming that the district court properly excluded hours with “vague description[s] such as legal issues,” “conference re all aspects,” and “call re status”); Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986) (affirming reduction in hours where plaintiff listed hours spent on “research” without greater specificity).

This is not the first time petitioners’ counsel has failed to document his time. In Ceballos,

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<sup>5</sup>See <http://www.uscfc.uscourts.gov/sites/default/files/OSM.Guidelines.pdf>.

No. 99-97V, 2004 WL 784910 (Fed.Cl. Spec. Mstr. 2004), Mr. Kops was guilty of the same legal sin, that being the failure to keep contemporaneous time records despite notice of that requirement. As noted in that decision:

Mr. Kops essentially contends that he maintained no exact records because he does not charge on an hourly basis in his usual practice. The court finds this argument without merit. As early as the initial Order in this case, petitioners' counsel was forewarned that precise record-keeping was necessary. Regarding fees, the Order instructed that the application “must include a photocopy of such contemporaneous time and activity records of *each person* for whom time is being charged (summarized by person)” and “[*t*]ime entries that contain broad descriptive categories that do not allow an intelligent determination of the reasonableness of the hours claimed will not suffice.” [italics in original] Further, the Guidelines for Practice Under the National Vaccine Injury Compensation Program (“Guidelines”) provide that regarding requests for attorney's fees in the program, “[e]ach fee petition shall include ... [c]ontemporaneous time records that indicated the date and specific character of the service performed, the number of hours (or fraction thereof) expended for each service, and the name of the person providing the service.” Guidelines at 31. For reasons that escape the court, petitioners' counsel failed to comply with these instructions. Moreover, despite being afforded ample opportunity to substantiate the record, counsel failed to do so.

Ceballos, No 99-97V, 2004 WL 784910, \*10 (Spec. Mstr. Fed.Cl.)(internal citations omitted).

Six years later, the undersigned faces the same situation. Unlike in Ceballos, Mr. Kops makes no effort to explain or justify his failure to keep contemporaneous time records. Like Ceballos, Mr. Kops requested “chunks” of time related to broad categories of efforts. As respondent correctly notes “it is impossible to know what work was performed, when it was performed, and who performed it because petitioners filed no detailed billing records or documentation.” R Object at 10.

The burden is on the fee applicant to demonstrate by competent and probative evidence all elements of the claimed fees. Monteverdi v. Sec’y of the Dept. of Health & Human Servs., 19 Cl. Ct. 409, 418 (1990). To meet this burden, the applicant must submit evidence supporting the number of hours expended and the hourly rate claimed. “In determining reasonable[ attorney’s fees], it is not only logical, but proper practice, to require Petitioners' attorneys to document the fees claim submitted in a manner that will enable the Special Master to reach a reasoned decision.” Gruber ex rel. Gruber v. Sec’y of the Dept. of Health & Human Servs., 91 Fed. Cl. 773, 791 (Fed. Cl. 2010) (internal citations omitted).

Jurisprudence dictates that petitioner is required only to provide “reasonably specific documentation.” Comm. Heating & Plumbing Co., Inc. v. Garrett, III, 2 F.3d 1143, 1146 (Fed. Cir.1993).

To demonstrate “reasonable hours” worked, the applicant should provide contemporaneous time records and a personal affidavit in support of the fee petition. In reporting time expended, the applicant need not account for every minute. However, “at least counsel should identify the general subject matter of his time expenditures.”

Ciotoli v. Sec’y of the Dept. of Health & Human Servs., 18 Cl. Ct. 576, 593 (Cl. Ct. 1989)(citing Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Hensley, 461 U.S. at 434).<sup>6</sup> However, 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, 825 F.2d at 404 (citing St. Paul Fire and Marine Insurance v. United States, 4 Cl. Ct. 762, 771 (Cl. Ct. 1984).

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<sup>6</sup> Regarding the Supreme Court’s opinion in Hensley v. Eckerhart, 461 U.S. 424 (1983), Chief Justice Burger stated:

I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought. It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim under 42 U.S.C. § 1988 as a lawyer would be required to show if his own client challenged the fees. A District Judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

A claim for legal services presented by the prevailing party to the losing party pursuant to § 1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate “billing judgment,” and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for a payment under § 1988. That statute requires the losing party in a civil rights action to bear the cost of his adversary's attorney and there is, of course, no relationship of trust and confidence between the adverse parties. **As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.** Hensley v. Eckerhart, 461 U.S. 424, 440-441 (1983)(internal citation omitted)(Burger, C.J., concurring)(emphasis added).

In this case, petitioners' counsel submitted no documentation of any sort. Counsel makes no effort to explain why records of billings were not kept or how the claimed blocks of time were computed.<sup>7</sup> Instead, Mr. Kops comes out verbally swinging at the strawman - respondent's use of the word "allegedly" to describe Mr. Kops' claimed hours. In retort, Mr. Kops states, "[t]here is nothing 'alleged' about the hours spent - those were the hours which Petitioner's [sic] counsel utilized to review[,] document, and to base 242 Statements of Fact covering 42 pages of dictation." P Resp at 6. What counsel fails to understand is that there is no time sheet documenting the expenditure of time. What counsel is essentially asking the undersigned to do is to look at the work product and accept counsel's statement that the time stated was the time spent. As was explained in Ceballos and reiterated herein, it is counsel's burden to substantiate the time spent, the court is under no obligation to accept the unsupported statements of counsel. See Naporano, 825 F.2d at 404 (rejecting "unequivocally any suggestion that the Claims Court had an obligation to reconstruct the bills" for counsel by matching the fee application to the court's docket sheet to determine the specific work involved for any claimed amount).

As stated throughout this decision, as the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault v. United States, 52 Fed. Cl. 667, 670. When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have denied awarding compensation. See, e.g., Gardner-Cook v. Sec'y of the Dept. of Health & Human Servs., No. 99-480V, 2005 WL 6122520 \*4 (Fed. Cl. Spec. Mstr. June 30, 2005). "Petitioners bear the burden of producing evidence, **not just argument**, to support a request for fees and costs. The failure to submit evidence can justify the denial of an award of fees and costs." Doe ex rel. Estate of Doe v. Sec'y of the Dept. of Health & Human Servs., 2010 WL 529425, \*11 (Fed. Cl. 2010)(citing Naporano, 825 F.2d at 404 (affirming Claims Court's denial of fees and expenses under the Equal Access to Justice Act, which requires an itemized statement of fees and expenses, when the party seeking the award was substantiated only by the attorney's affidavit)(emphasis added); Presault, 52 Fed. Cl. 667, 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970))." Masias v. Sec'y of the Dept. of Health & Human Servs., 2009 WL 1838979, \*37 -38 (Fed. Cl. 2009). "[T]he failure to document the claimed costs results

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<sup>7</sup> In Ceballos, Mr. Kops argued that he maintained no exact records because he does not charge on an hourly basis in his usual practice. The undersigned found no merit to that argument. As the undersigned noted:

petitioners' counsel respectfully submits that "the courts do not require petitioners' counsel to start a whole new system of logging in minutes, and building a computer system so that respondent can see how the petitioners' counsel spent hundreds of hours preparing for each of the defenses raised by respondent." The court notes that pursuant to Program requirements, documentation of time expended is required. However, as respondent argues, and the court agrees, documentation of hours does not require an automated system. Rather, documentation merely requires a pen and paper with which to record contemporaneous activities. In addition, numerous inexpensive computer programs exist to track attorney billings." Mr. Kops simply made no effort to comply with the essential and practical requirement that counsel maintain some form of contemporaneous billings.

Ceballos, 2004 WL 784910, \*11 fn. 19.

in denial of that claim.” Wilcox v. Sec’y of the Dept. of Health & Human Servs., No. 90-991V, 1997 WL 101572, at \*4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997) (“It is incumbent upon petitioner to explain to the court why the hours spent on the case were reasonable.”).

Further, “[c]aselaw clearly and uniformly shows that the failure to document the claimed costs may result in denial of that claim. See Fritz v. White, 711 F. Supp. 1350,1357, (E.D. Pa. 1989); Vitug v. Multistate Tax Comm., 883 F. Supp. 215, 222, (N.D. Ill. 1995); Fietzer v. Ford Motor Co., 454 F. Supp 966, 968, (E.D. Wis. 1978)(defendant’s refusal “to comply with the plaintiff’s inquiry as to how that rate was arrived at and as to what the employee’s usual rate of pay is” along with other discrepancies, resulted in denial of fees.” Wilcox, 1997 WL 101572, \*4 (Fed. Cl. 1997). See also Hensley, 461 U.S. 424, 438, fn. 13 (1983)(although remanding on a different issue, approving of the lower court’s 30% reduction in attorney hours “to account for his inexperience and failure to keep contemporaneous time records.”); Baker v. Sec’y of the Dept. of Health & Human Servs., No. 99-653V, 2005 WL 6122529, 4-6 (Fed. Cl. 2005)(approving of the special master’s reduction of hours awarded for an expert, 79.3 hours were awarded when approximately 404 hours were claimed, when insufficient documentation of contemporaneous records was submitted).

Petitioners’ failure to document the claimed hours prevents the undersigned from evaluating the reasonableness of the specific hours requested by petitioners for their counsel’s efforts. Faced with the lack of documentation, the undersigned has several options available in addressing petitioners’ deficient request. Petitioners’ request could be denied in total. See, e.g., Grendel’s Den, Inc. v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984)(“As long ago as Souza v. Southworth . . . , we warned that a failure to document time ‘might merit disallowal, or at least drastic reduction, of a fee award’. We recently strengthened that admonition in Wojtkowski v. Cade . . . , by advising attorneys to ‘maintain detailed, contemporaneous time records.’ Other courts have taken the additional step of requiring such contemporaneous time records. See, e.g., Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir.1983) (prospectively requiring the filing of contemporaneous time records); New York Ass’n for Retarded Children v. Carey, 711 F.2d 1136, 1148 (2d Cir.1983) (taking identical action); National Ass’n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir.1982). We now take the same step and serve notice that henceforth, in cases involving fee applications for services rendered after the date of this opinion, the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance.”).

However, this harsh result, while somewhat justified given that counsel was forewarned in past decisions and orders, is unattractive to the undersigned as it has been to other courts facing the issue. See, e.g., IJR, Inc. v. Sodick, Inc., 1989 WL 51421, 1 (N.D.Ill.) (N.D.Ill.,1989)(“several other circuits have refused to adopt a rule denying all fees where the fee requester has not provided contemporaneous time and billing records. See, e.g., MacDissi v. Valmont, Indus., Inc., 856 F.2d 1054, 1061 (8th Cir.1988); Jean v. Nelson, 863 F.2d 759, 779 (11th Cir.1988); Yohay v. Alexandria Employees Credit Union, Inc., 827 F.2d 967, 974 (4th Cir.1987).”).

Another option is to utilize past experience in reviewing the description of tasks performed

in determining a reasonable number of hours for the work product produced. The Federal Circuit sanctioned this approach. Just as “[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications.” Saxton, 3 F.3d 1517, 1521 (Fed. Cir.1993)(citing Farrar, 1992 WL 336502, \*2-3 (Cl. Ct. Spec. Mstr. 1992) (requested fees of \$24,168.75 reduced to \$4,112.50)); Thompson, No. 90-530V, 1991 WL 165686, \*2-3 (Cl. Ct. Spec. Mstr. 1991) (requested fees of \$18,039.75 reduced to \$9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662 (Fed. Cl. Spec. Mstr. 1992), aff’d, 988 F.2d 131 (Fed. Cir. 1993)(hourly rates reduced, and requested fees of \$151,575 reduced to \$16,500; special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty)). Such discretion is sensible given the trial court’s familiarity with the proceedings in the case. Duncan, No. 99-445V, 2008 WL 2465811 (Fed. Cl. Spec. Mstr. May 30, 2008), aff’d, 2008 WL 4743493 (Fed. Cl. Aug. 4, 2008)(finding that the special master is in a better position than the court reviewing the decision of the special master to “critique the hours spent”). The special master can choose to reduce the award by a percentage. Hensley, 461 U.S. at 438 n. 13 (“In addition, the District Court properly considered the reasonableness of the hours expended, and reduced the hours of one attorney by thirty percent to account for his inexperience and failure to keep contemporaneous time records.”); Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1203 (10th Cir.1986) (“A general reduction of hours claimed in order to achieve what the court determines to be a reasonable number is not an erroneous method, so long as there is sufficient reason for its use.”). “The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel’s burden to prove and establish the reasonableness of each dollar, each hour, above zero.” Mares, 801 F.2d at 1210. When faced with counsel’s previous failure to document his time in Ceballos, the undersigned utilized past experience with similar cases in applying a general reduction in hours claimed. See Ceballos, 2004 WL 784910, \*8. The benefits of the special master utilizing past experience is that it provides counsel some compensation for his efforts, despite counsel’s failure to produce the basic evidentiary support, while at the same time compensating counsel reasonably since the compensation granted is consistent with compensation provided to other counsel for similar services. This resolution provides a level of fairness to counsel, while at the same time it protects the fiscal integrity of the Program funds. That approach will be utilized once again here. Accordingly, the undersigned examines petitioners’ requested hours.

-- Petitioners claimed a total of 116.1 hours to produce the Petition. Fee Pet at 12. Petitioners state simply, again with no documentation, that “those were the hours which Petitioner’s [sic] counsel utilized to review document, and to base 242 Statements of Fact[, there are actually 210,] covering 42 pages of dictation.” P Res at 6. For perspective, the undersigned reviewed several recent cases and this review showed a range of allowable hours for preparation of petitions. See P Resp at 8 (Counsel “urge[d]” the undersigned to make such a comparison).<sup>8</sup> Counsel explained that in order

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<sup>8</sup> Although a specific breakdown of time spent preparing a petition cannot always be made, the following are examples of time awarded for the petition creation and pre-petition phases of vaccine injury cases. Broekelschen v. Sec’y of the Dept. of Health & Human Servs., No. 07-137V, 2008 WL 5456319, \*6-7 (Fed. Cl. Spc. Mstr. 2008)(awarding

to prepare the Petition it was necessary to review depositions and trial testimony of at least twelve doctors and regulators involved in the ongoing civil actions dealing with the same causation issues. Id. at 6-7. This was necessary so that “[p]etitioner’s [sic] counsel was confident that each and every fact, allegation, and contention would be supported by Respondent’s own employees.” Id. at 7. However, respondent notes that petitioners’ counsel is counsel of record in the underlying New Jersey state court action and as such is familiar with the facts and issues of petitioners’ claims. As such, counsel should have been “more efficient in preparation of petitioners’ case.” R Object at 11. Respondent recommends that no more than 10 hours be awarded. Id.

The Petition in this case is obviously detailed and thorough. How much of it is necessary is another question. The issues presented in this case were whether Simian Virus 40 was contained in the polio vaccine received by Lindsay Rivard, and whether the SV40 caused Lindsay’s medulloblastoma, which ultimately resulted in her death. It is clear from reading the Petition that much of the information contained therein relates directly and is thus relevant to these issues. It is also apparent, however, that the Petition contains much extraneous information. For example, whether or not the manufacturers complied with regulatory production standards is not relevant to the issues before the undersigned. The manufacturers are not subject to the undersigned’s jurisdiction. The questions for the undersigned are simply did the vaccine contain the SV40 and did it cause Lindsay’s unfortunate demise. Much of the historical recitation contained in the Petition falls outside of the undersigned’s purview and was thus unnecessary.

As to the relevant portions, the undersigned agrees with respondent that counsel’s intimate familiarity with the issues involved with the polio vaccine should have translated into an efficient production of the Petition. In fact, in counsel’s own words, he has spent his entire legal career developing an expertise in polio vaccine litigation. See Fee Pet at 1-5; P Resp at 15-16; P Reply at 3-4. Counsel conducted much of the discovery in the underlying litigation. P Reply at 6. Thus, when one views the detailed Petition through the prism of counsel’s extensive knowledge and experience with polio litigation, see P Resp at 13, it becomes apparent that the Petition does not contain original research that would understandably take hours to amass. It actually represents an amalgam of background information that has been used as the basis for counsel’s previous litigation. From that perspective, the Petition takes on the look of boilerplate, tailored to the facts of Lindsay

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petitioner’s counsel thirty-eight attorney hours and three paralegal hours for compiling information for and preparing a complete petition); Sabella, 86 Fed.Cl. 201, 210 -12 (Fed.Cl.,2009)(affirming the award of only \$10,000 to petitioner’s counsel, Shoemaker & Associates, when petitioner claimed a total of \$27,000, or 109.3 hours, for time spent prior to filing the petition); Kantor v. Sec’y of the Dept. of Health & Human Servs., No. 01-679V, 2007 WL 1032378, \*10 (Fed.Cl.) (Fed. Cl. 2007)(“The Court finds that less than 20 hours to prepare a petition, which includes fact witness affidavits and medical records as thorough as the one at issue, is not unreasonable.”); LeBlanc v. Sec’y of the Dept. of Health & Human Servs., No. 90-1607V, 1995 WL 695202, \*2 (Fed. Cl. Spc. Mstr. 1995)(“By comparison to the thousands of cases that have passed through this program, this file is barely average in size and complexity. I am unable to imagine how 69.25 hours could be spent for this task. I have had attorneys request less than 69.25 hours for cases that went to full entitlement hearings. . . . A deduction of 60 hours is required.”); Thomas, No. 05-1151, 2008 WL 4410156, \*2 (Fed. Cl. Spc. Mstr. 2008)(awarding thirty minutes for preparation of a minimal petition); Yeoman v. Sec’y of the Dept. of Health & Human Servs., 1994 WL 387855, \*3 (Fed. Cl. Spc. Mstr. 1994)(awarding 10 hours in paralegal time for organizing, reviewing medical records, drafting and revising a petition).

Rivard's case.

One additional factor cannot be overlooked - that is the role of the paralegal in constructing the Petition. In addition to the 116 hours claimed for counsel, petitioners claim 72 hours for the paralegal's efforts on the Petition. See infra at p. 16. It was the paralegal's efforts that produced the documentation provided to this court. See P Resp at 5 (Ms. Teti "secured from the millions of pages of Exhibits those that were pertinent to the Court."). Given Ms. Teti's efforts of identifying and securing the pertinent records for this litigation, counsel's efforts become highly questionable. But the undersigned need not answer that question since petitioners failed completely in meeting their burden of production. **With this background and considering awards in other cases and the lack of supportive documentation in this case, petitioners are awarded 25 hours for preparing the Petition.**

-- Petitioners request 11.5 hours preparing for and attending various status conferences. In addition, counsel requests reimbursement for "prepar[ing] the various pleadings" discussed at the status conferences. Fee Petition at 14. Respondent suggests no more than four hours be awarded, noting that there were three status conferences and the two motions filed by petitioners were deemed "frivolous" by the undersigned. Respondent is correct, and is very generous suggesting up to four hours for Mr. Kops' time. The conference calls conducted in this case were procedural in nature, required minimal if any preparation and were extremely short in duration. Petitioners' motions were indeed frivolous, lacking in any substantive value. **The undersigned will award 3 hours, and finds that to be extremely generous, with or without documentation from counsel.**

-- Petitioners' claimed 66.5 hours to review Respondent Exhibits A to E. Fee Petition at 15. Again, no documentation of this effort was submitted. Instead, counsel explains that he "reviewed the entirety of the compact disk, as well as comparing the various other exhibits and documents including the literature that was submitted by the Respondent." Id. Respondent suggests no more than 5 hours for his effort because these exhibits are depositions and exhibits from petitioners' own New Jersey state court action where Mr. Kops is counsel of record in that underlying case, attended most of the depositions and prepared most of the exhibits. R Object at 12; see also P Resp at 13; P Reply at 6. Petitioners make no effort to address respondent's central contention, which challenged the necessity for counsel to read these documents because counsel was already familiar with them or contended that review should have taken minimal amounts of time. Instead, counsel unleashed a series of *ad hominem* attacks that do nothing to advance petitioners' case.

First, it should be noted that counsel refuses to recognize his burden to substantiate the fees request. Thus, counsel writes, "[r]espondent has offered nothing more than rhetoric and pure speculation without any justification other than plucking out of the air how much time they believe was reasonable for Petitioner's [sic] counsel, and his paralegal to spend in this litigation." P Reply at 13. Petitioners bear the burden to substantiate the fees and costs claimed, not respondent. See, e.g., Presault, 52 Fed. Cl. at 670. Petitioners' response to respondent's objections consisted of one line, "Though Petitioner's [sic] counsel had previously read these depositions, Petitioner's [sic] counsel had to reread the depositions in light of the arguments made by Respondent's claims made

in this particular litigation.” P Resp at 13. That one-line explanation, especially in the absence of any supporting documentation, is simply insufficient to explain the reasonableness of the claimed time. It must also be kept in mind that petitioners claimed 84.25 hours for an expert to review and comment on the materials submitted in this case. See infra at p. 19. Counsel’s efforts to place blame on respondent, the Vaccine Act, and the defendants in the underlying state court action for successfully getting this case removed to the Vaccine Program, are all a subterfuge for counsel’s failure to document and justify his time spent on this case. The simple facts are that counsel had substantial materials related to Lindsay’s case at his fingertips from the state court action, counsel was conversant with those materials as he participated in their production, counsel stubbornly insisted that respondent in the litigation before the undersigned had in his possession these materials because another arm of the Department of Justice, the U.S. Attorney’s Office, was involved in the state court action, see Fee Pet at 9, and thus counsel balked at producing information that was necessary for considering Lindsay’s case. It was counsel’s recalcitrance, not respondent’s or anyone else’s, that caused delay and resulted in respondent filing Exhibits A - E. Counsel’s efforts to shift blame for his refusal or inability to produce billing records for this task fails completely. **Counsel is awarded 5 hours for reviewing these exhibits.**

- - Petitioners claim 87.45 hours for counsel’s time spent “after receiving the reports of the two experts, who were retained and who had previously been retained by the United States of America in other SV40 litigation, to compare their current reports with their previous reports as well as comparing it to the various testimony given by these witnesses and the general literature.” Fee Petition at 16. Respondent suggests no more than 10 hours be awarded for this activity, noting that: the expert reports total 20 pages, the issues addressed are identical to the issues raised in the New Jersey state court action, Mr. Kops represented petitioners in the state court action, Dr. Sulzinski is the expert, and given Mr. Kops experience in vaccine cases, extensive legal research was unnecessary. R Object at 12-13. Petitioners do not address in their Response respondent’s objections. In resolving this requested block of time, the undersigned first notes that there is no documentation of the time spent. It is also noted that petitioners claimed 84.25 hours for Dr. Sulzinski to read and respond to respondent’s expert reports. See infra at p. 19. Petitioners failed to document their request, explain the necessity and reasonableness of the time spent given the extensive efforts of their expert and thus are awarded 5 hours. This is sufficient time to read the materials, which counsel is intimately familiar with from the underlying litigation and his extensive experience with polio litigation. Counsel is also awarded 10 hours to research the law regarding causation under the Program. The undersigned awards more time than recommended by respondent because the law changed significantly from the time of counsel’s last case in the Program. **Thus, a total of 15 hours is awarded for this block request.**

- - Petitioners’ claim 9.5 hours for “determining that it would be in the best interest of the client to withdraw the action and file the formal pleading to do the same.” Fee Petition at 17. Petitioners are awarded 2 hours. Counsel stated repeatedly that petitioners were forced into the Act, blaming respondent, see P Res at 2, 14 and P Reply at 5, and that it was petitioners’ intention to remove the case to civil litigation upon the expiration of the 240 day statutory time frame. See Fee Petition at 15-16 (petitioners discussed with respondent that petitioners would remove the case if not decided

within 240 days); see also P Reply at 9. Having previously determined their litigation strategy, it is incomprehensible how more than a full work-day was spent determining what petitioners maintained from day one. Id. **Again, petitioners are awarded 2 hours for the determination to withdraw from the Program.**

-- Petitioners seek 7 hours for preparing the Fee Petition. Attachment B to Fee Petition. Petitioners claimed 16.25 hours for their Response. P Resp at 18 n.3. Finally, petitioners claimed 10.75 hours for their Reply Brief. No billing records were submitted with any of these claims. The undersigned awards a total of 6 hours for the submission of the three filings. The fee petition is to be complete when submitted, Duncan, 2008 WL 4743493; thus, the fee petition should have included the requested hours, hourly rates and the supporting documentation necessary to show reasonableness. It was petitioners' failure to present a complete fee petition that generated the objections and the need for petitioners' subsequent filings. Petitioners presented no information in their Response and Reply that was not reasonably expected to be filed with a complete fee petition. Stated another way, it was petitioners' glaring failings that created the need for subsequent filings and the resultant additional claims for fees. This is unreasonable, unnecessary and represents time that would not be billed to a client. Sabella, No. 02-1627V, 2008 WL 4426040, \*9, rev'd on other grounds. **The total time requested is therefore disallowed and petitioners are awarded 6 hours for the Fee Petition and subsequent filings.**

#### **b. Paralegal Hours**

Petitioners claimed 72 hours for paralegal efforts. Like the claim for counsel, no billing records were submitted. The Fee Petition states that the time represents efforts "for the paralegal in securing the records, collating the records, furnishing the records to the various courts and/or consultants. . . ." Fee Petition at 10; see also Fee Petition, Attachment B. Petitioners also claimed 2 hours for the paralegal's efforts on the Fee Petition; respondent did not object to this claim. R Object at 14 n. 5. Respondent did raise three general objections: 1) petitioners' reference of "various courts" and "consultants" implied efforts beyond this Petition; 2) since the filed records resulted from the underlying state court action, there was no need to "secure" the records, and 3) petitioners sent the records out for copying, thus minimizing the paralegal time. Id. at 14-15. Petitioners responded contending that counsel cannot find the quoted language - "various courts" and "consultants" in the paralegal's affidavit. P Res at 5. Counsel is correct that the language is not in the paralegal's affidavit, but counsel has no one to blame but himself as the quoted language comes directly from the text of the Fee Petition. Fee Petition at 10. ("The total time for the paralegal work in securing the records, collating the records, furnishing the records to the *various courts and/or consultants . . .*")(emphasis added). But the undersigned agrees that it appears from both the Fee Petition and the affidavit that the paralegal's efforts were devoted solely to the vaccine Petition. Second, petitioners argue that the documents had to be paginated in compliance with the court's requirements and the paralegal had to secure from the millions of pages of underlying records the relevant records for this case. P Resp at 10. Once again, counsel cannot resist taking a verbal swipe at respondent, blaming respondent for the need to file the records. Once again, counsel is badly mistaken. It is the statute that requires petitioners to file the supporting medical records, whether

or not respondent has them in his possession.<sup>9</sup> Petitioners use of the paralegal to accomplish these tasks, as opposed to a lawyer, is applauded. It is noted that this is further evidence of the unreasonableness of the 116 hours claimed by counsel in preparing the Petition. See supra p. 13. However, petitioners do not address why the paralegal was collating the documents, apparently for over 20 hours, when a copying service was utilized. See Fee Petition at Attachment B. **Given the lack of supporting documentation and the bill for using a copying service, but also recognizing the size and complexity of the case, the undersigned awards 45 hours for paralegal time in this case.**

## 2. Hourly rates

### a. Attorney's Rate

Petitioners requested an hourly rate of \$500 per hour for counsel and \$112 per hour for his paralegal. Fee Petition at 7-10. No objective support in the form of supporting affidavits or Bar association surveys was submitted to support the request. In lieu of objective support for the request, counsel referenced a recent “requested” rate of \$598 per hour by an attorney from a major law firm in a case before the Seventh Circuit Court of Appeals, id. at 7, an award of \$340 per hour to an attorney in a vaccine case, id. at 8, and awards of \$340 per hour to another vaccine attorney. Id. at 9. Respondent objects to the \$500 requested rate on the basis of the lack of supporting information, and details the significant differences between Mr. Kops and the attorneys petitioners presented for comparative purposes. R Object at 7-9. Respondent suggests a reasonable local rate would be the \$250 per hour found in Ceballos. Id. at 9.

Petitioner rejoined with the statement that “[r]espondent claims that Petitioner’s [sic] counsel has not furnished this Court either with the information necessary to determine the rate of compensation using the location of Petitioner’s counsel’s office or the forum rate.” P Resp at 14. Once again, counsel’s finger pointing should be directed to himself, respondent is simply stating the fact that counsel failed to support his hourly rate. It is petitioners’ burden to support all facets of the claimed fees. See, e.g., Wasson v. Sec’y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1 (1991). The petitioners failed to do so. Petitioners now submit that the Laffey Matrix evidences the appropriate forum rate. P Resp at 14-15.<sup>10</sup> Petitioners also argue that counsel does not have a “single locale,” but does have a “single address.” Id. at 15. Finally, counsel states that

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<sup>9</sup> Again, the court dismisses as utterly ridiculous the notion that lawyers in the Vaccine Section of the Department of Justice have imputed knowledge of and access to records maintained in the U.S. Attorney’s Office.

<sup>10</sup> As correctly noted by respondent, the applicability of the Laffey Matrix to Vaccine Act cases has been rejected by the Court of Federal Claims and the special masters. See Rodriguez v. Sec’y of the Dept. of Health & Human Servs., No. 06-559, 91 Fed. Cl. 453 (Fed. Cl. 2010); Friedman v. Sec’y of the Dept. of Health & Human Servs., No. 02-1467V, slip op. (Fed. Cl. June 18, 2010); Masias, 2009 WL 1838979 (Fed. Cl. 2009), appeal pending, No. 10-5077 (Fed. Cir. April 26, 2010); Kantor, No. 01-679V, 2007 WL 1032378 (Fed. Cl. Spec. Mstr. 2007); English v. Sec’y of the Dept. of Health & Human Servs., No. 01-61V, 2006 WL 3419805 (Fed. Cl. Spec. Mstr. 2006); Ray v. Sec’y of the Dept. of Health & Human Servs., No. 04-184V, 2006 WL 1006587 (Fed. Cl. Spec. Mstr. 2006).

“[i]f this Court wishes to utilize the opinions of other vaccine compensation attorneys, Petitioner’s counsel has spoken with several of these attorneys - - each of them who believe that this Petitioner’s counsel is entitled to no less than \$500/hour. . . . If the Court wishes we can secure affidavits from these attorneys.” Id. at 16-17.

Counsel obviously misunderstands the respective burdens of the those involved in this litigation. It is not respondent’s responsibility nor the court’s role to investigate or otherwise seek out information to support counsel’s request for fees. If counsel wants to be paid, counsel must produce the necessary support and justification for the amounts and hours requested. “The burden is upon the fee applicant to submit evidence sufficient to support the number of hours expended and the hourly rates claimed.” Plott v. Sec’y of the Dept. of Health & Human Servs., No. 92-633V, 1997 WL 842543, \*8 (Fed. Cl. Spec. Mstr. 1997); see also Naporano, 825 F.2d at 404. Counsel failed to produce a single piece of probative evidence to justify his requested hourly rate.<sup>11</sup> Counsel’s failure is all the more confusing because the requirements were laid out clearly in Ceballos and also in respondent’s Objections. It is unclear to the undersigned whether counsel fails to understand the legal precedent regarding attorney’s fees or counsel stubbornly refuses to comply with these legal requirements. Regardless, it is counsel’s obligation to submit any and all support for his fees; it is not for the Court to request the information if the Court “wishes.” “The request for fees must be complete when submitted.” Duncan v. Sec’y of the Dept. of Health & Human Servs., No. 99-455V, 2008 WL 474493, \*1 (Fed. Cl. Aug. 4, 2008). “The special master had every right to insist upon receiving accurate bills in the first instance and was not obligated to offer petitioners’ counsel a second chance to do what he should have done *ab initio*.” Savin, 85 Fed. Cl. 313, 318 (Fed. Cl. 2008).

The Federal Circuit has held that “to determine an award of attorneys’ fees, a court in general should use the forum rate in the lodestar calculation.” Avera, 515 F.3d at 1349. However, the Federal Circuit recognizes an exception to the forum rule ““where the bulk of [an attorney’s] work is done outside the jurisdiction of the court and where there is a *very significant* difference in compensation favoring D.C.”” Id. (quoting Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA, 169 F.3d 755, 758 (D.C. Cir.1999))(emphasis in Davis). In such a case, the applicable market rate is the community where the bulk of the work was performed. Avera, 515 F.3d at 1350. Petitioners’ counsel appears to make two separate arguments for compensating counsel under the forum rule and utilizing the Laffey Matrix as the measure of hourly rates. First, petitioners’ counsel contends that “Philadelphia is no different than Baltimore and/or Washington” in determining an appropriate hourly rate for counsel. P Reply at 6. This argument would appear to address the second prong of the Davis exception, whether there is a significant difference in the compensation between the local and forum rates. Second, petitioner argues that the bulk of the work was actually conducted within the forum area, explaining that “the Petitioner in the within matter conducted much of the discovery on the issues underlying this litigation in Washington, D.C.” Id. Neither of these arguments is persuasive.

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<sup>11</sup> Petitioners did file a copy of the Laffey Matrix. P Resp, Attachment B. However, as noted supra footnote 10, the Laffey Matrix has been found to be inapplicable to Vaccine Act cases.

The primary reason that petitioner's first argument must fail is that counsel has not produced any objective evidence establishing a local hourly rate or a forum rate. Accordingly, it is impossible to make a comparison of the local and forum rates for counsel in order to determine whether a significant difference exists. The singular thread woven through counsel's arguments is the that blind acceptance of counsel's statements should be used as to what his rate should be. Evidence establishes the rate, not counsel's statements and unsupported arguments. As stated on numerous occasions above, petitioners have failed to provide any evidence to support counsel's requested hourly rate.

Petitioners' second contention must fail as well. The first prong of the Davis exception looks to where "the bulk of [an attorney's] work is done" in the case before the court. Clearly, the bulk of the work, in fact all of the work, in this case was done from counsel's home office in Philadelphia. The efforts in this case consisted of filing medical records and depositions, participating in conference calls with the court, and responding to respondent's expert reports. The conducting of discovery took place in the underlying action, not in the case before this court. Counsel throughout this litigation conflates the handling of the underlying civil litigation with the Vaccine Act Petition; they are two separate proceedings. The fact that the discovery produced the information in the underlying civil court action and was thereafter used in the vaccine case before the undersigned does not alter where the bulk of the work was performed for the vaccine case.

Given that counsel has failed completely to substantiate an appropriate hourly rate for either his local or for the forum rate, how does one determine an appropriate hourly rate? As recognized by the parties, the undersigned awarded Mr. Kops \$250 per hour in Ceballos, which was decided over six years ago. Respondent recommends that same rate for Mr. Kops today. Mr. Kops noted in his briefs that his more than forty years of experience in litigating polio cases in various federal courts compares very well with the experience and abilities of other vaccine attorneys that have been awarded \$340 per hour. Fee Petition at 8-9. But other than counsel's statements, and number of years experience for each, there is no information in the record that allows for a comparative analysis of the attorneys to determine whether awarding their hourly rates to Mr. Kops is warranted. Thus, the Ceballos decision remains the best information available for Mr. Kops. However, given that the decision is six years old, it would be unjust to award \$250 per hour. Thus, the undersigned applied a 3% growth factor compounded annually, which resulted in a rate of \$298.50. **The undersigned will round this figure up to \$300 per hour and finds that a reasonable hourly rate for Mr. Kops.**

**b. Paralegal's Rate**

Petitioner requested \$112 per hour for his paralegal. No supporting documentation was submitted for this rate. Petitioner did submit an affidavit from the paralegal stating that she has worked for six years as a paralegal. Fee Pet, Attachment B. The paralegal states therein, "I have been advised that the rate for this type of litigation is between \$112 and \$150 an hour." Id. Obviously, this self-serving, unsupported statement is not worthy of consideration. The same discussion above pertaining to counsel's hourly rate applies again to the paralegal's rate. Accordingly, the same resolution holds. The undersigned awarded \$75 per hour in Ceballos for the

paralegal time. **Applying a 3% growth factor compounded annually produces a rate of \$89.55, which the undersigned rounds up to \$90 per hour. It is so found.**

### 3. Costs

#### a. Expert costs

Petitioners claimed 84.25 hours at \$125 per hour for a total of \$10,531.25 for services of Michael Sulzinski, Ph.D. Fee Pet at 11. In response to respondent's objections regarding costs requested, petitioners submitted an affidavit from Mr. Sulzinski. P Resp at Ex A.

Experts are subject to the same documentation requirements and reasonableness standards that an attorney must meet. Sabella, 86 Fed. Cl. 201, 206 (citing Baker v. Sec'y of the Dept. of Health & Human Servs., No. 99-653V, 2005 WL 589431, at \*1 (Fed. Cl. Spec. Mstr. Feb. 24, 2005) (“Fees for experts are subject to the same reasonableness standards as fees for attorneys.”). Mr. Sulzinski provided no billing records for his requested time. While the description in the affidavit clearly describes substantial efforts and a review of the expert report supports the description, P Ex 47, the undersigned has no independent basis for determining whether the time spent was reasonable. Accordingly, the undersigned reduces the request by 20% and awards 67.4 hours at \$125 per hour for a total of \$8,425. See, e.g., Baker v. Sec'y of the Dept. of Health & Human Servs., No. 99-653V, 2005 WL 6122529 (Fed. Cl. 2005) (“In light of the broad estimations, inadequate records, and limited documentation policy, it was reasonable for the special master to apply her experience and background in Vaccine Act cases to determine the appropriate allotment of billable hours”); Carr v. Sec'y of the Dept. of Health & Human Servs., No 00-778V, unpublished Ruling on Life Care Planner's Cost (March 29, 2006) (reducing the time requested by petitioner's life care planner by 20% for “woefully inadequate” billing statements). The undersigned will not award the additional 1.25 hours claimed for preparing the affidavit since the supporting documentation should have been produced with the Fee Petition. **As stated above, petitioners are awarded 67.4 hours for Dr. Sulzinski, at a rate of \$125 per hour, for a total of \$8,425 in expert costs.**

#### b. Other Litigation Costs

Petitioners claimed costs totaling \$21,649.70. Fee Pet, Attachment B. Mr. Sulzinski's fee request was considered separately above, leaving a balance of \$11,118.45. In the body of the Fee Petition, petitioners list the expenses of litigation as \$250 for filing the Petition; copying expenses of \$2,198.20 (receipts attached at Attachment A); and \$523.71 for Federal Express charges. Fee Pet at 10-11. Thus, out of the \$11,118.45 of claimed costs, petitioners provided documentation for \$2,971.91. “[S]ufficient documentation requires ... ‘a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and other expenditures related to the case.’” Comm. Heating & Plumbing Co., Inc. v. Garrett, III, 2 F.3d 1143, 1146 (Fed. Cir. 1993) (citing Naporano, 825 F.2d 403, 404 (Fed. Cir. 1987)). This leaves \$8,146.54 undocumented. Respondent does not object to \$1,924.06 for photocopying and \$481.66 for Federal Express charges. R Object at 16. Thus, respondent does not object to \$2,405.72 for costs. Id. This leaves a contested balance

of \$8,712.73. The undersigned reviewed the supporting documentation and found, like respondent, that the photocopying charges totaled \$1,924.06, but that the documented Federal Express charges totaled \$506.65. Petitioners provided no additional documentation or explanation in their responsive brief.<sup>12</sup> **Therefore, the undersigned awards \$2,680.71 for the filing fee, photocopying and Federal Express charges.** The remaining undocumented \$8,437.74 of requested costs is disallowed.<sup>13</sup>

### CONCLUSION

The litigation involving this Fee Petition is grossly disproportionate to the work effort on the Petition itself. Petitioners failed to provide the necessary objective support for their request and the undersigned was thus duty bound to reduce the requested amounts accordingly. Petitioners are awarded \$16,800 (56 hours x \$300 per hour) for counsel's efforts; \$4,050 (45 hours x \$90 per hour) for the paralegal's efforts, for a total of \$20,850 in fees. Petitioners are awarded costs totaling \$11,105.71 (\$8,425.00 for Mr. Sulzinski and \$2,680.71 for other documented costs).

**Specifically, petitioners are awarded a lump sum of \$31,955.71 in the form of a check payable jointly to petitioners and petitioners' attorney.** The Clerk of the Court is directed to enter judgment accordingly.<sup>14</sup>

**IT IS SO ORDERED.**

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Gary J. Golkiewicz  
Special Master

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<sup>12</sup> In accordance with General Order #9, petitioners' counsel averred in a status conference on June 22, 2010, that petitioners personally incurred no costs in the pursuit of this Petition.

<sup>13</sup> The fact that petitioners claimed this undocumented \$8,437.74 in their Fee Petition and made no effort to substantiate the claim or even attempt to explain why it was claimed is very troubling. Why would petitioners include this amount if it had no basis in fact? If it had a basis in fact, why is there no explanation or substantiation for the amount? Given that petitioners' entire fee and costs requests is devoid of adequate documentation, this claimed amount, which petitioners essentially abandoned, both supports the undersigned's drastic reduction in the undocumented requests for fees and raises concerns as to whether further reductions might have been appropriate. Stated another way, did petitioners' counsel pluck numbers out of the air in claiming time spent on this case, or were they grounded in some fact-based estimate? (One assumes the hours claimed are not exact since we have no billing records.) The undersigned is reasonably comfortable based upon the comparative analysis that the time ultimately awarded reflects the work output before this court.

<sup>14</sup> 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 HHS, 924 F.2d 1029 (Fed. Cir. 1991).