

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-700V

FILED: October 14, 2011

For Publication

JOHN A. DOUGHERTY,

*

*

Petitioner,

*

*

v.

*

Attorneys' Fees and Costs;

*

Reasonable Fees; Hours Expended;

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

*

Perdue

*

*

Respondent.

*

*

Robert T. Moxley, Cheyenne, WY, for petitioner.

Michael P. Milmo, Washington, DC, for respondent

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

On June 27, 2005, petitioner Dr. John Dougherty filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10-34 (2006) ("Vaccine Act") or ("Act"), alleging that a measles-mumps-rubella ("MMR") vaccination caused his arthritis, myalgias, and arthralgias, and also alleged a Table arthritis injury after measles vaccination. Respondent denied that petitioner's MMR vaccination was a cause-in-fact of his arthritis, myalgias, and arthralgias, and that petitioner had a Table arthritis, but nonetheless agreed to settle the case informally. The undersigned issued a decision awarding damages to petitioner on October 28, 2009. Judgment entered on December 1, 2009. Petitioner waited to file a motion for attorneys' fees and costs until August 30, 2010, asking for interim fees and a stay pending an appeal in another case before the Federal Circuit. Subsequently, the parties engaged in lengthy litigation over attorneys' fees, continuing to file materials until September 15, 2011. The recent decisions of the Federal Circuit on attorneys' fees and costs under the Act have resolved many of the

¹ Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public, unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

parties' issues. The undersigned now addresses the remaining arguments in this decision and issues a final award.

I. Procedural History

On December 3, 2009, the undersigned issued an order pursuant to Vaccine Rule 13 directing petitioner to file an application for fees and costs by August 30, 2010, or have them deemed waived. Petitioner filed a 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 ("Fee App.") on August 30, 2010.² In his motion, petitioner argued for a stay in the case while the Federal Circuit decided an appeal from *Masias v. Sec'y of HHS*, No. 99-697V, 2009 WL 1838979 (Fed. Cl. June 12, 2009). *See* Fee App. 6–7. At the same time, petitioner argued for an award of interim fees based on the Federal Circuit's decision in *Avera v. Sec'y of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). Specifically, petitioner requested **\$69,388.00** in attorneys' fees based on the Laffey Matrix, or in the alternative, **\$49,943.00** in attorneys' fees based on the current "local rates." Petitioner also requested **\$9,277.79** in costs. Fee App. 16.

On September 30, 2010, respondent filed a Response to Petitioner's Application for Attorneys' Fees and Costs ("Resp."). Respondent strongly objected to an award of interim fees contending that *Avera* contemplated an interim fees award only in a narrow set of circumstances, none of which applied to petitioner. Resp. 3. Furthermore, respondent argued that this case was in the same procedural posture as *Avera*—seeking interim fees pending appeal—in which interim fees were ultimately rejected. *Id.* Respondent objected to both hourly rates sought by petitioner's counsel: the \$475 hourly rate based on the Laffey Matrix as well as the \$300 hourly rate based on petitioner's counsel's claimed current local rate. *Id.* at 4–8. Respondent objected to all hours expended on briefing fees as well. *Id.* at 8–9. Lastly, respondent objected to the costs for Dr. Bennett, the expert retained in this case, as being "per se excessive." *Id.* at 9.

On November 5, 2010, petitioner filed his reply.³ Mainly, petitioner renewed fervently his argument that an award of interim fees was necessary in this case. Additionally, petitioner clarified his position on current rates, contending that an award at current rates for historical

²Included in petitioner's fee application are numerous affidavits from attorneys and an economist opining on the Vaccine Program's practice of awarding attorneys' fees and costs. Many of these affidavits were filed in previous cases in which Mr. Moxley represented the petitioners. *See* Pet'r's Ex. 33 (Gary L. Shockey Aff., filed in *Avera*); Pet'r's Ex. 33.1 (David F. Evans Aff., filed in *Avera*); Pet'r's Ex. 33.2 (Mari C. Bush Aff., filed in *Avera*); Pet'r's Ex. 33.3 (A. Leroy Toliver Aff., filed in *Avera*); Pet'r's Ex. 33.4 (Michael Kavanaugh, PhD Aff., filed in *Avera*); Pet'r's Ex. 34 (Mari C. Bush Aff., filed in *Masias*); Pet'r's Ex. 34.1 (David F. Evans Aff., filed in *Masias*); Pet'r's Ex. 34.2 (Clifford J. Shoemaker Aff., filed in *Masias*); Pet'r's Ex. 34.3 (Joel B. Korn Aff., filed in *Masias*); Pet'r's Ex. 34.4 (Michael Kavanaugh, PhD Aff., filed in *Masias*); Pet'r's Ex. 35 (Michael J. Snider Aff., filed in *Friedman*); Pet'r's Ex. 41 (Donald I. Schultz Aff., filed in *Avila*). Petitioner included a newly sworn affidavit of Michael Kavanaugh, PhD for the instant case, which provides an opinion on the Federal Circuit decision in *Avera v. Sec'y of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). *See* Pet'r's Ex. 36. Mr. Moxley also filed his own 21-page affidavit for the instant case detailing his experience in the Vaccine Program and how the attorneys' fees and costs procedure has affected his practice of law. *See* Pet'r's Ex. 38. Additionally, petitioner filed the affidavit of Steven Krafchik, Esq., which provided information on the reasonableness of the expert fees in the instant case. *See* Pet'r's Ex. 42.

³ On October 12, 2010, petitioner filed an Unopposed Motion for Extension of Time to file his reply, which the undersigned granted.

work is reasonable, if not required, to compensate for delay. Reply 2, 7. Petitioner also countered respondent's contention that awarding fees for fees is disfavored and chided respondent for "denigrating" the effort it takes to demonstrate the need for fees reform. *Id.* at 5–7. Petitioner included with his reply a subsequent fee invoice for work performed between September 13, 2010, and November 5, 2010. *See* Pet'r's Ex. 44.

On December 1, 2010, respondent filed her sur-reply.⁴ Respondent again stressed the procedural posture of the case, contending that it was the same posture as *Avera* where interim fees were denied. Sur-reply 3. Respondent interpreted *Avera* to require a showing of undue hardship for petitioner, not his counsel. *Id.* Respondent also renewed her objection to the hourly rates and hours expended briefing fees. *Id.* at 6.

On December 8, 2010, the undersigned held a status conference to discuss the fees litigation in this case. During the status conference, Mr. Moxley expressed, on behalf of petitioner, that he did not want the case decided before the Federal Circuit ruled on *Masias* but still wanted interim fees. Respondent's counsel communicated that he could not agree to interim fees. In an order issued on December 8, 2010, after the status conference, the undersigned indicated that an interim award would be appropriate while waiting for the Federal Circuit's decision in *Masias*, *Hall*, and *Rodriguez*. Accordingly, the undersigned directed the parties to submit an irreducible minimum for fees and costs by December 10, 2010. Petitioner filed what he believed was an irreducible minimum for fees and costs on December 17, 2010.

On December 17, 2010, the undersigned held another status conference to discuss an irreducible minimum figure. Respondent renewed a strong objection to an interim fees award and asserted that *Avera* prohibited an interim award given that the case-in-chief was over. Following the status conference, the undersigned issued an order directing respondent to file a statement reflecting her view of irreducible fees and costs by December 27, 2010.

On December 27, 2010, respondent filed her Response to Special Master's Order of December 17, 2010. Respondent first objected to the calculations petitioner submitted as not in dispute. Respondent also insisted that her list of specific objections in her initial Response to petitioner's fee application was not exhaustive, and, ultimately, the special master has the authority and obligation to determine a reasonable award. Resp. 2, Dec. 27, 2010. Once again, respondent contested an interim award, arguing both that the statute does not contemplate interim fee awards and that an award is not appropriate in the instant case. *Id.* at 3-4. In the end, respondent suggested the amount of \$25,000 as an irreducible minimum if the undersigned still planned on awarding interim fees.

Petitioner then filed a supplemental brief responding to the arguments posited in respondent's December 27 Response.⁵ Petitioner offered a statutory argument supporting awards

⁴ Respondent filed an Unopposed Motion for Extension of Time to file her sur-reply on November 24, 2010, which the undersigned granted.

⁵ The undersigned did not order the filing of petitioner's supplemental brief. Petitioner wanted to address what he thought were "new points of argument" in respondent's December 27 Response. *See* Pet'r's Supp. Br. 2, Dec. 29, 2010.

of interim fees. Pet'r's Supp. Br. 4–6, Dec. 29, 2010. Petitioner also suggested that a special master cannot raise objections to hours billed that are not raised by the government, claiming that fees are not discretionary under the Act and that a reasonableness inquiry is less, or not at all, appropriate. *Id.* at 6–10.

During this time, the Federal Circuit issued three decisions on attorneys' fees and costs under the Act that had bearing on the instant case: *Rodriguez v. Sec'y of HHS*, 632 F.3d 1381 (Fed. Cir. 2011), issued on February 9, 2011; *Masias v. Sec'y of HHS*, 634 F.3d 1283 (Fed. Cir. 2011), issued on March 15, 2011; and *Hall v. Sec'y of HHS*, 640 F.3d 1351 (Fed. Cir. 2011), issued on April 1, 2011.

It became apparent during a status conference in which Mr. Moxley participated and briefs he filed in other cases that he relied on the recent Supreme Court case *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), to support an award of an hourly rate of \$405 to \$495 an hour. Accordingly, the undersigned ordered briefing on the applicability of *Perdue* to this case on April 29, 2011. Petitioner filed his brief on the import of *Perdue* on May 26, 2011.⁶ Respondent filed her response on July 15, 2011.⁷

On September 1, 2011, petitioner filed the final invoice for attorneys' fees and costs for hours worked from April 14, 2011 to September 1, 2011. Respondent filed her response to the supplemental invoice on September 15, 2011. Respondent cited Special Master Moran's decision in *Pestka v. Sec'y of HHS*, 2011 WL 4433634 (Fed. Cl. Spec. Mstr. Aug. 30, 2011), in which Mr. Moxley, representing petitioner, sought interim fees. Respondent also objected to the number of hours expended by Mr. Moxley on petitioner's *Perdue* brief. Lastly, petitioner filed a renewed motion for interim fees and costs in this case on October 4, 2011.

II. Legal Standard for Attorneys' Fees and Costs under the Act

Section 15(e)(1) of the Vaccine Act states that a special master shall award, as part of an award of compensation for a petition filed under § 300aa-11, an amount that covers "reasonable attorneys' fees" and "other costs." 42 U.S.C. § 300aa-15(e)(1). The fee-shifting provision under the Vaccine Act differs from most other fee-shifting statutes because petitioners need not prevail in the case-in-chief in order to receive fees and costs. When a petitioner does not prevail in the case-in-chief, a special master may award attorneys' fees and costs if petitioner brought the claim in "good faith" and with a "reasonable basis" to proceed. *Id.* Good faith and a reasonable basis to proceed are presumed when a petitioner prevails, as petitioner did in this

⁶ Petitioner filed a Supplemental Invoice for hours worked from September 13, 2010 to March 7, 2011. Pet'r's Ex. 45. Petitioner also filed additional affidavits on March 7, 2011. See Pet'r's Ex. 46 (Anne C. Toale Aff.); Pet'r's Ex. 47 (Altom M. Maglio Aff.); Pet'r's Ex. 48 (Brewster S. Rawls Aff., filed in *Amar*); Pet'r's Ex. 49 (Sandra Cassidy Aff.); Pet'r's Ex. 40 (Dawn Richardson Aff.; filed in *Amar*); Pet'r's Ex. 51 (Dawn Winkler Aff., filed in *Amar*). Accompanying his supplemental brief on *Perdue*, petitioner filed additional affidavits addressing the local rate charged by practitioners in Cheyenne, WY. See Pet'r's Ex. 52 (Richard Gage Aff.); Pet'r's Ex. 52.1 (Stephen H. Kline Aff.); Pet'r's Ex. 52.2 (Roberta Ashkin Aff.). Petitioner's counsel also submitted his own supplemental affidavit. Pet'r's Ex. 54 (Robert Moxley Aff. discussing *Perdue* Enhancement Factors).

⁷ On June 27, 2011, respondent filed an Unopposed Motion for Extension of Time, which the undersigned granted.

case. In such a posture, the sole question is reasonableness of the attorneys' fees and costs. The special master has "wide discretion in determining the reasonableness" of attorneys' fees and costs. *See Ferreira v. Sec'y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994); *see also Saxton ex rel. Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1519 (Fed. Cir. 1993) ("Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications").

The Federal Circuit has approved the lodestar approach to determine "reasonable attorneys' fees" and costs under the Act. *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008). The lodestar approach involves a two-step process. First, a court determines an "initial estimate . . . by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Id.* at 1347–48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Second, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. *Id.* at 1348.

A reasonable hourly rate is "the prevailing market rate defined as the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* (citation and quotation omitted). In *Avera*, the Federal Circuit found that in Vaccine Act cases, a court should use the forum rate, i.e., the DC rate, in determining an award of attorneys' fees. *Id.* at 1349. At the same time, the court adopted the *Davis County* exception to prevent windfalls to attorneys who work in less expensive legal markets. *Id.* (citing *Davis County Solid Waste Mgmt. & Energy Recovery Spec. Serv. Dist. v. U.S. Envtl. Prot. Agency*, 169 F.3d 755 (D.C. Cir. 1999)). In cases where the bulk of the work is completed outside the District of Columbia, and there is a "very significant difference" between the forum hourly rate and the local hourly rate, the court should calculate an award based on local hourly rates. *Id.* (finding the market rate in Washington, DC to be significantly higher than the market rate in Cheyenne, Wyoming).

In 2011, the Federal Circuit expounded upon *Avera* in a trio of cases: *Rodriguez, Masias*, and *Hall*. In *Rodriguez*, the court decided whether the reasonable hourly rate for attorneys working on Vaccine Act cases in the District of Columbia should be determined by using the Laffey Matrix.⁸ 632 F.3d at 1384. The court affirmed the special master's finding that Vaccine Act litigation is "not analogous to 'complex federal litigation' . . . so as to justify use of the Matrix instead of considering the rates charged by skilled Vaccine Act practitioners." *Id.* at 1385. The court considered Vaccine Act litigation distinguishable based on its relaxed standards of legal causation, eased procedural rules, lack of discovery or rules of evidence, streamlined proceedings, and well-versed special masters who hear commonly repeated issues. *Id.* Furthermore, unlike other fee-shifting statutes, a party need not prevail in order to recover attorneys' fees and costs under the Vaccine Act fee provision; "Vaccine Act attorneys are practically assured of compensation in *every* case." *Id.* (emphasis in the original).

⁸ The Laffey Matrix is a fee schedule for attorneys practicing complex federal litigation, based on hourly rates allowed by the U.S. District Court for the District of Columbia in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *overruled by Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) ("We do not intend, by this remand, to diminish the value of the fee schedule compiled by the District Court in *Laffey*. Indeed, we commend its use for the year in which it applies.")

In *Masias* in which Mr. Moxley was also petitioner’s counsel, the Federal Circuit affirmed the reasoning of *Avera* and the adoption of the *Davis County* exception to forum rates. 634 F.3d at 1283 (“*Avera* remains binding precedent until it is overturned by the Supreme Court or by this court *en banc* *Avera* is thorough, well-reasoned, and has not been undermined.”) The court also affirmed the special master’s finding that Mr. Moxley failed to establish that his services were similar to services provided by attorneys practicing complex federal litigation. *Id.* at 1289–90. Ultimately, the court found that the special master’s determination that Mr. Moxley’s local rate was \$220 per hour was within his discretion. *Id.* at 1292–93 (stating it was “entirely reasonable” for the special master to rely on prior Vaccine Act cases and “relevant prior decisions addressing hourly rates for legal services in Wyoming” to determine Mr. Moxley’s hourly rate).

In *Hall*, the Federal Circuit summarized the petitioner’s appeal of the fees award as an attempt “to eliminate the *Davis County* exception to the general rule that forum hourly rates are used to calculate attorneys’ fees.” 640 F.3d at 1355. The court once again stated that *Avera* is the law and remains binding precedent. *Id.* Furthermore, the court held that it is within the special master’s discretion, rather than a question of law to be reviewed *de novo*, to determine what constitutes reasonable fees, including the application of the *Davis County* exception. *Id.* at 1356. Accordingly, the court affirmed the special master’s determination that Mr. Gage, petitioner’s counsel who also practices in Cheyenne, Wyoming, was entitled to the local hourly rate after finding a 59 percent difference between the forum hourly rate and the local hourly rate to be “very significant.”

Thus, the Federal Circuit confirmed in these three cases that *Avera* with its adoption of the *Davis County* exception is binding precedent and the legal rubric under which a special master decides what constitutes a reasonable hourly rate under the Vaccine Act. *Hall*, 640 F.3d at 1355; *Masias*, 634 F.3d at 1283; *Rodriguez*, 632 F. 3d at 1383–84.

III. Discussion

A. Petitioner’s Arguments for an Interim Award

Petitioner initially argued for an interim award when he requested a stay of the attorneys’ fees and costs decision until after the Federal Circuit decided *Masias*. See Fee App. 4–6; Reply 1–2. Petitioner did not want to litigate the same issues before the circuit court in *Masias* in a “final” fee application.⁹ See Fee App. 5–6. Respondent objected to an interim award because the entitlement and compensation phases of the litigation had been completed. Resp. 2.

Given that the Federal Circuit handed down their decision in *Masias* on March 15, 2011, the reasoning underpinning petitioner’s argument for an interim award is no longer a concern.

⁹ Petitioner’s arguments appeared to be motivated by which issues he wanted to preserve if he chose to appeal. See Fee App. 5 (“If this master issues a final “Decision that awards less than forum rates, the petitioner will lose his claim for forum rates unless he perfects appeal . . . via Motion for Review”); *id.* at 6 (“if fees and the costs are awarded on an interim basis . . . no expenditure of work by petitioners’ [sic] counsel . . . will be necessary in order to preserve the claim for the difference between local rates and forum rates”)

Moreover, the parties separately briefed the argument for “current rates” based on the *Perdue* case. Finally, petitioner’s counsel submitted a final invoice for all work performed in the case on September 1, 2011. An interim award is not necessary; all issues regarding attorneys’ fees and costs are ripe for a final decision.

B. Determination of a Reasonable Hourly Rate

The lodestar approach begins with an initial calculation, multiplying a reasonable number of hours expended by a reasonable hourly rate. *See Avera*, 515 F.3d at 1347–48. After *Avera*, the determination of a reasonable hourly rate for counsel involves finding where the bulk of the work in the case was performed; the forum rate; the local rate; and whether there is a very significant difference between local and forum rates such that the *Davis County* exception applies.

1. Where the Bulk of the Work Was Performed

There is nothing in the record to suggest that Mr. Moxley performed work in this case other than in Cheyenne, Wyoming, where his office is located. Petitioner’s counsel had no need to travel to Washington, DC, as the parties settled shortly before the hearing was scheduled and all status conferences were held via telephone. From his invoices, it also appears that Mr. Moxley teleconferenced or e-mailed with his client, respondent’s counsel, and Dr. Bennett, the expert retained in the case. *See generally* Pet’r’s Ex. 37. Thus, Mr. Moxley performed the bulk, if not all, of the work in Cheyenne, Wyoming. The next step is to determine the reasonable attorneys’ rates prevailing in the forum and in Cheyenne, Wyoming.

2. Determination of the Forum Rate

A reasonable hourly rate is “the prevailing market rate” defined as the rate “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Avera*, 515 F.3d at 1348 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). The applicant has the burden to establish what constitutes a reasonable hourly rate. *Rupert ex rel. Rupert v. Sec’y of HHS*, 52 Fed. Cl. 684, 686 (Fed. Cl. 2002) (*Rupert II*) (citing *Blum*, 465 U.S. at 895–96 n.11). To establish the prevailing market rate, the parties typically provide the court with objective evidence¹⁰ of market rates for lawyers of differing skill levels; the court then determines the attorney’s rate within that range based on his or her performance in the case. *Id.* at 688. When the parties do not provide reliable evidence, the court can look to other evidence to establish a reasonable hourly rate. *Id.* at 688–89.

¹⁰ The court in *Rupert II* gave examples of the types of proof used to establish prevailing market rates:

- (1) affidavits of other attorneys or experts; (2) citations to prior precedents showing reasonable rate adjudications for the fee applicant, for comparable attorneys, or for comparable cases; (3) references to fee award studies showing reasonable rates charged or awarded in the relevant community; (4) testimony of experts or of other attorneys in the relevant community; (5) discovery of rates charged by the opposing party; (6) reliance on [the] court’s own expertise to recognize applicable prevailing rates.

Rupert ex rel. Rupert v. Sec’y of HHS, 52 Fed. Cl. 684, 688 (Fed. Cl. 2002) (*Rupert II*).

Petitioner seeks forum rates for his counsel, Mr. Moxley, in the range of \$405 to \$495. See Pet'r's Ex. 37; Pet'r's Ex. 44; Pet'r's Ex. 45; Pet'r's Ex. 55. At the beginning of the fees litigation in this case and before the Federal Circuit decided *Masias*, petitioner based the forum rate on the Laffey Matrix. See Fee App. 8, 15. Toward the end of the litigation, and after the Federal Circuit issued *Masias*, petitioner asserted that Laffey Matrix rates fairly approximate the enhanced fees his counsel is entitled to under *Perdue*. See Pet'r's Ex. 55, at 1 n.1.

Likewise, most of the evidence submitted¹¹ relating to hourly rates is devoted to showing that Mr. Moxley is entitled to Laffey Matrix rates. For example, many attorneys, including Mr. Moxley, declared that Vaccine Program practice is a specialty practice on a par with the demands of complex federal litigation. See, e.g., Pet'r's Ex. 33.2 ¶¶ 10–11, 15; Pet'r's Ex. 33.3 ¶¶ 5, 10; Pet'r's Ex. 34.1 ¶ 5; Pet'r's Ex. 34.2 ¶ 7; Pet'r's Ex. 35 ¶¶ 9–12; Pet'r's Ex. 38 ¶¶ 21, 30–31, 36–37; Pet'r's Ex. 41 ¶ 8. Petitioner submitted this evidence, of course, before the Federal Circuit issued its decisions in *Masias* and *Rodriguez*. The Federal Circuit found these arguments unpersuasive. See *Masias*, 634 F.3d 1283 (reviewing the attorney affidavits and affirming the special master's finding that petitioner “did not establish that the services Mr. Moxley provided were ‘similar services’ to those provided by the attorneys in *Laffey*”); *Rodriguez*, 632 F.3d at 1385 (approving the special master's reasoning that “Vaccine Act litigation, while potentially involving complicated medical issues and requiring highly skilled counsel, is not analogous to ‘complex federal litigation’”).

Petitioner submitted additional affidavits, previously filed in *Amar v. Sec'y of HHS*, No. 06-221V, which attempt to establish that fees awarded in the Vaccine Program based on local rates are an insufficient incentive for counsel to take new Vaccine Act cases. See generally Pet'r's Ex. 46; Pet'r's Ex. 47; Pet'r's Ex. 48; Pet'r's Ex. 49; Pet'r's Ex. 50; Pet'r's Ex. 51.¹² These declarations are not relevant to the question whether Vaccine Act litigation is similar to complex federal litigation, and, thus, whether petitioner's counsel is entitled to Laffey Matrix rates.

The fact remains that Vaccine Act cases are litigated in an alternative forum before special masters, rather than juries, who are familiar with the frequently recurring issues presented in vaccine injury claims. The Federal Rules of Evidence do not apply. The procedural rules are eased and the proceedings informal, designed for the streamlined adjudication of these cases. Most significantly, vaccine attorneys are paid whether or not they prevail on the merits. See *Rodriguez*, 632 F.3d at 1385 (“Vaccine Act attorneys are practically assured of compensation of every case, regardless of whether they win or lose and of the skill with which they have

¹¹ As previously acknowledged in *supra* note 2, many of the affidavits submitted by petitioner were the same affidavits submitted in *Avera*, and *Masias*, cases in which Mr. Moxley was also petitioners' counsel.

¹² Petitioner also offers this evidence to support the argument that counsel in Vaccine Act cases should be paid at Laffey Matrix rates because they cannot continue to take Vaccine Act cases and maintain a successful practice if special masters award local rates. Put differently, petitioner argues that awards based on local rates rather than forum rates are not adequate to attract competent counsel to represent petitioners under the Vaccine Act. The undersigned does not find this argument, which petitioner's counsel has presented before, persuasive. See Special Master Moran's discussion of this argument and the evidence submitted in support of it in *Masias v. Sec'y of HHS*, No. 99-697V, 2009 WL 1838979, at *26–30 (Fed. Cl. Spec. Mstr. June 12, 2009).

presented their clients' cases.”). All that is required is good faith and a reasonable basis to proceed. 42 U.S.C. § 300aa-15(e)(1). This is a fundamental difference between section 15(e) of the Vaccine Act and other federal fee-shifting statutes. Vaccine Act attorneys do not have to account for the same litigation risk when setting a rate of compensation as attorneys who must prevail in order to recover fees and costs under a statute. *See id.* at 1385–86 (“If this were not true, Vaccine Act attorneys would be more favorably compensated than attorneys who take cases under fee-shifting statutes and are only paid by the opposing side if their clients’ claims are meritorious and they skillfully prosecute those claims.”).

Petitioner has not demonstrated that Vaccine Act litigation is similar to complex federal litigation and deserving of Laffey Matrix rates, nor has he refuted the conclusions that other special masters and the Federal Circuit have reached. Thus, he has not established that Laffey Matrix rates represent the prevailing market rate for Mr. Moxley’s services in the forum. The undersigned must look to other evidence to determine the forum rate.

Petitioner has submitted numerous affidavits from attorneys, an economist, Michael Kavanaugh, and two public policy advocates, about the economic and financial aspects of Program practice. Unfortunately, these affidavits offer no guidance on the prevailing market rate in the forum beyond their assertions of the complexity of Vaccine Act practice. Without reliable evidence offered by the parties, the best indication of what hourly rate Mr. Moxley would receive if he practiced in the forum is previous decisions of special masters addressing this question.

In *Rodriguez*, the special master concluded that the forum rate for an attorney with 20 years of experience in Vaccine Act cases or comparable litigation is in the range of \$275 to \$360 depending on the year the work was performed. *Rodriguez v Sec’y of HHS*, No. 06-559V, 2009 WL 2568468, at *15 (Fed. Cl. Spec. Mstr. July 27, 2009), *aff’d*, 632 F.3d 1381 (Fed. Cir. 2011). Accordingly, the special master calculated the fee award based on the rate of \$310 per hour for work performed in 2006, \$320 per hour for work performed in 2007, \$330 per hour for work performed in 2008, and \$335 per hour for work performed in 2009. *Id.* at *23. In *Masias*, the special master found that Mr. Moxley specifically would receive \$350 per hour if he practiced in Washington, DC. *Masias v. Sec’y of HHS*, No. 99-697V, 2009 WL 1838979, at *25 (Fed. Cl. Spec. Mstr. June 12, 2009), *aff’d*, 634 F.3d 1283 (Fed. Cir. 2011). In *Hall*, the special master found the forum hourly rate for Mr. Richard Gage, another experienced Vaccine Act practitioner in Cheyenne, WY, to be \$350. *Hall v. Sec’y of HHS*, No. 02-1052V, 2009 WL 3423036, at *20–21 (Fed. Cl. Spec. Mstr. Oct. 6, 2009), *aff’d*, 640 F.3d 1351 (Fed. Cir. 2011).

Based on the reasoned determinations by other special masters, affirmed on appeal, the reasonable hourly rate for an attorney with considerable experience in Vaccine Act litigation practicing in DC would be \$310 to \$350 per hour for work performed between 2006 and 2009. The undersigned finds the special master’s forum rate in *Masias* and *Hall* most persuasive because the special master specifically addressed what Mr. Moxley and Mr. Gage would receive if they practiced in the forum, i.e., Washington, DC. The forum hourly rate of \$350, however, does not correlate with a year. The undersigned assumes that \$350 per hour was the forum rate for 2009, the year in which the decisions were issued. Using the percent changes used in the

Laffey Matrix¹³ to extrapolate the years before and after 2009, the undersigned arrives at the following amounts for forum rates:

Table 1			
Year (From June 1 to May 31)	Laffey Matrix Rate for Attorney with 20+ Years Experience	Percent Change	Forum Rate for Vaccine Act Litigation
2005-2006	\$405		\$305
2006-2007	\$425	+ 4.93 %	\$320
2007-2008	\$440	+ 3.5 %	\$330
2008-2009	\$465	+ 5.68 %	\$350
2009-2010	\$465	0 %	\$350
2010-2011	\$475	+ 2.15%	\$360
2011-2012	\$495	+ 4.21%	\$375

This range effectively captures Mr. Moxley’s experience with Vaccine Act cases, the nature of Vaccine Act litigation, and the skill with which he pursues his clients’ petitions.

3. Determination of the Local Rate

As for the determination of the prevailing market rate in Cheyenne, WY, petitioner puts forth some evidence on what constitutes the local hourly rate. First, petitioner submitted the affidavit of Mr. Richard Gage, a Vaccine Act practitioner since 1990 and Mr. Moxley’s former partner of 14 years. *See* Gage Aff. ¶ 2, Pet’r’s Ex. 52. Mr. Gage declared that \$300 per hour is a reasonable rate for Mr. Moxley in Cheyenne. *Id.* ¶ 3. Additionally, Mr. Gage states that in two hourly cases he worked on in recent years in Wyoming, he was paid at a rate at \$300 per hour. *Id.* ¶ 4. As for Mr. Gage’s assessment of Mr. Moxley’s local rate, he gives no reasons why this is his opinion. Similarly, regarding Mr. Gage’s hourly rate in other cases, he does not say what types of cases these are, specifically whether the cases are similar to Vaccine Act litigation. Additionally, Mr. Gage suffers as a witness from being an interested witness. Mr. Gage concentrates his practice in Vaccine Act litigation, and his own fee application is before the undersigned in *Stewart v. Sec’y of HHS*, No. 06-287V, in which he too argues for \$300 per hour as the local hourly rate. While Mr. Gage’s opinion on Mr. Moxley’s hourly rate has some relevance to the determination of the local hourly rate, his opinion is not very persuasive given its conclusory nature and his interest in the outcome of petitioner’s fees litigation.

Petitioner filed the affidavit of Stephen Kline, a solo practitioner in Cheyenne since 1981 with a practice that includes personal injury litigation, labor litigation, and commercial litigation. *See* Kline Aff. ¶ 3, Pet’r’s Ex. 52.1. Mr. Kline states that he represented a client in a Fair Labor

¹³ The Laffey Matrix of hourly rates as it is used by the U.S. Attorney’s Office of the District of Columbia for the years 2003-2012 is available at http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf. Petitioner also provided these rates throughout his four fee invoices. *See* Pet’r’s Ex. 37; Pet’r’s Ex. 44; Pet’r’s Ex. 45; Pet’r’s Ex. 55. To be clear, the undersigned does not conclude that forum rates are equivalent to Laffey Matrix rates. As reasoned above, the undersigned does not find the argument that Vaccine Act litigation is similar to complex federal litigation, and thus deserving of Laffey Matrix rates, to be persuasive. The Laffey Matrix does provide, however, a reliable indicator of how rates change according to the Consumer Price Index. Accordingly, the undersigned begins with the \$350 forum hourly rate for 2009-2010 and adjusts the rate using the same percent change as the Laffey Matrix. Some numbers have been rounded up or down for administrative convenience.

Standards Act (“FLSA”) case, in which Mr. Gage was plaintiffs’ counsel. *Id.* ¶¶ 4–5. The defendant in that case paid Mr. Gage’s fees at a rate of \$300 per hour under the statutory fee-shifting provision. *Id.* ¶ 7. Mr. Kline did not state, however, whether litigation under the FLSA is similar to litigation under the Vaccine Act. In fact, a party must prevail under the FLSA to recover fees. *See* 29 U.S.C. § 216(b); *e.g.*, *Garcia v. R.J.B. Props.*, 756 F. Supp. 2d 911 (N.D. Ill. 2010). Mr. Gage’s hourly rate likely accounted for the risk that he might not recover fees if his client did not prevail in the case. Thus, Mr. Gage’s rate of \$300 per hour in a FLSA case at best suggests that the local hourly rate for attorneys providing similar services to Vaccine Act litigation is something less than \$300 per hour.

Petitioner’s next piece of evidence is the affidavit of Roberta Ashkin, a solo practitioner in New York. *See* Ashkin Aff. ¶ 3, Pet’r’s Ex. 52.2. Ms. Ashkin declares that in a wrongful death case she defended in Wyoming, Mr. Gage was retained as local counsel to represent her client and was paid \$300 per hour. *Id.* ¶¶ 4–6. Neither Ms. Ashkin nor petitioner explains whether defending a wrongful death case involves similar services as Vaccine Act litigation. A wrongful death case presumably was brought in state court with the anticipation that the case would go before a jury. State rules of evidence and procedure likely applied. Without more explanation by the affiant or petitioner, the undersigned can only guess how Mr. Gage’s hourly rate in this case aids in the determination of the local hourly rate for attorneys providing similar services in Cheyenne. At best, the evidence suggests that the local hourly rate would be something less than \$300 per hour.

Petitioner filed the affidavit of Donald I. Schultz, an attorney practicing for roughly 30 years in Wyoming in the area of complex federal litigation, concentrating in commercial, construction, and energy litigation. *See* Schultz Aff. ¶¶ 3–5, Pet’r’s Ex. 22. Mr. Schultz declares that he has personal knowledge of hourly rates in the range of \$375 to \$405 paid by private clients in Cheyenne and Jackson, Wyoming. *Id.* ¶ 8. He explains that the litigation attorneys charging these rates have experience akin to Mr. Moxley and bill for their services in complex litigation matters pending in the District of Wyoming. *Id.* While this is evidence of a local hourly rate in Cheyenne, Wyoming, according to Mr. Schultz’s statements, this is the Cheyenne rate for complex litigation before the federal district court. Vaccine Act litigation is not analogous to complex federal litigation, whether the complex litigation takes place in the District for the District of Columbia or the District of Wyoming. Thus, Mr. Schultz’s statements indicate only that the local hourly rate for legal services similar to Vaccine Act litigation is something considerably less than \$375 to \$405 per hour, the rate Cheyenne attorneys charge for complex federal litigation.

Petitioner also filed a supplemental affidavit of his counsel, Mr. Moxley. Moxley Supp. Aff., Pet’r’s Ex. 54. In his declaration, Mr. Moxley states that he currently collects \$300 per hour from clients in Cheyenne. *Id.* ¶ 6. He states that these fees are charged for every sort of practice, but predominantly criminal defense. *Id.* Mr. Moxley also declares that Mr. Gage provides “similar services” as a Vaccine Act practitioner and receives \$300 per hour in his private practice. *Id.* ¶ 7. Mr. Moxley claims that he can “amplify . . . in details too numerous to set forth in written form that [vaccine] practice involves ‘similar services’ to those [he] render[s] to Wyoming clients” but chooses not to, reserving this explanation for a hearing, if he is afforded one. *Id.* ¶ 6. Unfortunately, this leaves only the self-serving, vague statement that Mr. Moxley

provides services to clients in Cheyenne for “every sort” of practice, but predominantly criminal defense, for \$300 per hour to assist the court in its determination of a local hourly rate.

In sum, these various statements amount to what Mr. Gage and Mr. Moxley charge some local clients in some cases without reference to the year or explanation of the similarity to the services they render in Vaccine Act cases. This evidence provides little guidance on the reasonable hourly rate for Cheyenne, WY attorneys. Accordingly, as was the case for the forum rate determination, the undersigned looks to previous decisions of special masters addressing these questions.

In *Avera*, the Federal Circuit affirmed the special master’s fee award to Mr. Moxley based on the hourly rate of \$200. 515 F.3d at 1346, 1350. This was the rate Mr. Moxley originally requested before he filed an amended fee application asking for Laffey Matrix rates. *Id.* at 1346.

In *Masias*, Special Master Moran conducted a detailed analysis of the evidence presented by Mr. Moxley on behalf of Mr. Masias, decisions setting hourly rates within the Vaccine Program from Mr. Moxley and Mr. Gage, and cases outside the Vaccine Program in Wyoming courts. 2009 WL 1838979, at *5–13. Significantly, the special master noted that Mr. Moxley had not been awarded more than \$250 per hour for either his Vaccine Act work or non-Vaccine Act litigation. *Id.* at *7. The special master awarded \$205 to \$220 for work performed from 2005 to 2009. *Id.* at * 45. This rate was affirmed on appeal to the Federal Circuit as reasonable and within the special master’s discretion. *Masias*, 634 F.3d at 1293. Special Master Moran used the same hourly rates, between \$205 and \$215, to calculate an interim award for Mr. Moxley in *Pestka v. Sec’y of HHS*, 2011 WL 4433634, at *7.¹⁴

Hall involved Mr. Gage, Mr. Moxley’s former partner and a fellow Vaccine Act practitioner in Cheyenne. In that case, Special Master Moran again issued a very detailed analysis of Mr. Gage’s local hourly rate based on affidavits submitted by Mr. Gage, on behalf of Ms. Hall, cases within the Vaccine Program, and decisions by courts in Wyoming on hourly rates. *Hall*, 2009 WL 3423036, at *4–8. The special master found that cases in the Vaccine Program and elsewhere indicate that a reasonable hourly rate for attorneys practicing in Cheyenne is between \$200 and \$250. *Id.* at *7. Ultimately, the special master based Mr. Gage’s fees on the hourly rates between \$220 and \$240 for work performed between 2006 and 2009. *Id.* at *32. The Federal Circuit affirmed this award on appeal. *Hall*, 640 F.3d at 1353–54, 1357.

In *Avila*, the special master, after finding the *Davis County* exception applies, calculated a fee award for Mr. Moxley using the hourly rate of \$200 for work performed between 2004 and 2006, and \$250 for work performed between 2006 and 2008. *Avila v. Sec’y of HHS*, No. 05-685V, 2009 WL 2033063, at *4 (Fed. Cl. Spec. Mstr. June 26, 2009), *aff’d*, 90 Fed. Cl. 590 (2009).

Based on these decisions, a reasonable rate for an experienced Vaccine Act practitioner working in Cheyenne, Wyoming is \$200 to \$205 for work performed from 2005 to 2006; \$200 to \$250 for work performed from 2006 to 2007; \$215 to \$250 for work performed from 2007 to

¹⁴ The decision on the case-in-chief in *Pestka* has not yet been issued.

2008; and \$220 to \$250 for work performed from 2008 to 2009.

In this case, the undersigned believes that Mr. Moxley should be awarded fees between the median and the higher end of these ranges. Although Mr. Moxley took three years to file a complete set of medical records, he secured a favorable outcome for his client. Petitioner’s case was a difficult one. He alleged that an MMR vaccination caused his arthritis, myalgias, and arthralgias. Respondent was prepared to go to hearing on the theory that petitioner suffered from osteoarthritis, which is not a vaccine-related injury. Nonetheless, before the case was scheduled to go to hearing, Mr. Moxley settled the case and his client obtained a damages award. During the litigation over entitlement and damages, Mr. Moxley proved to be an effective attorney, deserving between the median and higher end of the ranges of local hourly rates.

Thus, the undersigned finds the local rate for an attorney of Mr. Moxley’s skill and reputation as follows. The increases in the local rates roughly match the increases in the forum rates, determined above.

Year (From June 1 to May 31)	Local Hourly Rate for Vaccine Act Litigation
2005-2006	\$210
2006-2007	\$220
2007-2008	\$225
2008-2009	\$240
2009-2010	\$240
2010-2011	\$245
2011-2012	\$250

4. Whether There Is a Very Significant Difference

The final step in determining whether the *Davis County* exception applies is to assess whether there is a “very significant difference” between the local rate and the forum rate. *Avera*, 515 F.3d at 1349. If there is a very significant difference, then local rates are used to calculate an award. *Id.* Past decisions have affirmed a finding of a very significant difference at a difference as high as 59 percent, *Masias*, 634 F.3d at 1287, 1293, and as low as 46 percent, *Sabella v. Sec’y of HHS*, No. 02-1627V, 2008 WL 4426040, at *5 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *rev’d on other grounds*, 86 Fed. Cl. 201 (2009).

Using the forum rates and local rates found above yields the following differences in percentages:

Year (From June 1 to May 31)	Forum Rates	Local Rates	Percent Difference
2005-2006	\$305	\$210	45%
2006-2007	\$320	\$220	45%

2007-2008	\$330	\$225	47%
2008-2009	\$350	\$240	46%
2009-2010	\$350	\$240	46%
2010-2011	\$360	\$245	47%
2011-2012	\$375	\$250	50%

The percent differences between the forum rates and local rates are within the range previously affirmed as a “very significant difference.” Thus, the *Davis County* exception applies; a reasonable hourly rate in this case is the local rate.

5. Enhancement under *Perdue*

The Supreme Court decided *Perdue v. Kenny A.* on April 21, 2010, holding that a fee calculation, under federal fee-shifting statutes, based on the lodestar approach may be increased for superior performance and results in rare and extraordinary circumstances. 130 S. Ct. at 1669. In his brief addressing the application of *Perdue* to the instant case, petitioner makes several arguments. First, petitioner contends that *Perdue*’s description of “rare and exceptional” circumstances captures the “Vaccine Program in its everyday essence.” *Perdue* Supp. Br. 5–6. Petitioner also argues that *Perdue* endorses “current rates” as a “standard measure used to prevent depreciation of earned fees.” *Id.* at 7, 10 (“*Perdue* contemplates that all hours must be paid at ‘current rates.’”). Furthermore, petitioner maintains that Vaccine Program practice is financially infeasible or economically unrealistic for his attorney Mr. Moxley, which is exactly relevant to *Perdue*’s allowance for an enhancement when the lodestar fee is not adequate to attract competent counsel. *Id.* at 8. Additionally, petitioner reads *Perdue*’s approval of the objectivity of the lodestar approach to mean an end to “the sort of adjudication that is commonplace, even universal, in the Program . . . [and] the improper ‘precedents’ and outright misinterpretation of the law, in Vaccine Program fees jurisprudence.” *Id.* at 4.

Respondent, in her response to petitioner’s brief filed on July 15, 2011, asserted that this case is not rare or exceptional justifying an enhancement under *Perdue*. *Perdue* Resp. 4–6. Respondent also argues that an increase in a fee award is not available under the Vaccine Act to compensate for delay because it would amount to paying interest on attorneys’ fees and costs, which cannot be recovered against the United States. *Perdue* Resp. 7.

The undersigned interprets petitioner’s arguments to be twofold: 1) current rates should be used to calculate the lodestar fee as compensation for delay and *Perdue* endorses this result, and 2) under the factors outlined in *Perdue*, petitioner’s counsel should be awarded an enhancement to the lodestar fee for his superior performance. The first argument relates to the reasonable hourly rate used to calculate a fee award; the second argument pertains to an enhancement after the lodestar amount is calculated to award an attorney for hypothetically superior performance and results. The undersigned addresses both arguments here, within the hourly rate discussion, for convenience.

a. Summary of *Perdue*

Perdue v. Kenny A. concerned the award of enhanced attorneys’ fees under 42 U.S.C. § 1988 for a successful civil rights class action on behalf of children in the Georgia foster-care

system and their next friends. *Id.* at 1669. The federal district court awarded enhanced fees of 75 percent beyond the lodestar because the lodestar did not account for the fact that counsel for the class advanced case expenses of \$1.7 million over a three-year period, that they were not being paid on an ongoing basis, and that their only ability to recover fees and expenses depended on their success in this civil rights action. *Id.* at 1670. Furthermore, the district court was impressed with class counsel's skills, commitment, dedication, and professionalism. *Id.* The district judge also noted that the results that class counsel obtained were extraordinary and that, after 58 years as a practicing attorney and federal judge, the court had never seen another case in which a plaintiff class had achieved such a favorable result on such a comprehensive scale. *Id.* (quotation and citation omitted). The fee enhancement added \$4.5 million to the fee award. *Id.* The Eleventh Circuit affirmed. The Supreme Court reversed and remanded.

Justice Alito, on behalf of the majority, stated that the lodestar method is generally the favored approach to awarding attorneys' fees and costs. *Id.* at 1673. In fact, there is a "strong presumption" that the lodestar method produces a fee that is reasonable. *Id.* The Court noted that although it has never sustained an enhancement of a lodestar amount for performance, it has repeatedly held that enhancements may be awarded in rare and exceptional circumstances. *Id.* Novelty and complexity, however, may not be used as a basis for enhancement because those factors would be fully reflected in the number of billable hours. *Id.* Additionally, the court stated that attorneys who claim that an enhancement to the lodestar is appropriate must specifically prove that the lodestar fee would not be adequate to attract competent counsel. *Id.* at 1674.

The Court gave three rare circumstances which, if counsel provided specific proof, might justify an enhancement. First, an enhancement might be appropriate if the lodestar calculation did not adequately measure the attorney's true market value. This might occur if the hourly rate were determined by a formula taking into account only one factor such as the year of admission to the bar, or perhaps only a few similar factors. Counsel would have to provide specific proof linking the attorney's ability to a prevailing market rate that the lodestar did not reflect. *Id.* Secondly, an enhancement might be appropriate if the attorney spent an "extraordinary" amount of money in costs and the litigation were "exceptionally protracted." *Id.* Thirdly, an enhancement might be appropriate if there were exceptional delay in the payment of fees. An attorney in a section 1988 action understands that his or her fees will not come until the end of the action, if at all. An enhancement may be appropriate when an attorney assumes costs "in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense." *Id.* at 1675.

The Court concluded that the district judge did not provide proper justification for the large enhancement the judge awarded, calling the 75 percent figure arbitrary. The enhancement amounted to an hourly rate for counsel of more than \$866 per hour without an indication of what an appropriate figure for the relevant market was. *Id.* at 1675-76. The district judge also did not indicate that the delay in the case was outside the normal range expected in a section 1988 action. *Id.* at 1676. Finally, the judge made the award on a subjective basis, i.e., the impression of the judge that unnamed prior cases did not have counsel of such high caliber, in contradistinction to the objective approach of the lodestar method, and thus the judge's decision eliminated any meaningful appellate review. *Id.* at 1676.

b. Current Rates Argument

As summarized above, petitioner interprets *Perdue* as announcing a general rule that in cases where payment comes at the end of the case, current rates or adjusted historical rates must be used to compensate for the delay. *Perdue* Supp. Br. 7, 10 (citing *Perdue*, 130 S. Ct. at 1675).

There are several problems with petitioner's view. First, *Perdue* cannot reasonably be read as announcing a "general rule." The decision is replete with cautionary language that enhancements of attorneys' fees, including enhancements for delay, are "rare," "exceptional," and "extraordinary." *Perdue*, 130 S.Ct. at 1673–74. Second, petitioner equates payment at the end of a case with delay. However, payment usually comes at the end of the case, especially if a party must first prevail on the merits to recover attorneys' fees under the statute. If payment at the end of the case represents the typical course of litigation, then it is not an example of "delay."

Most importantly, petitioner fails to persuade the undersigned that awarding current rates to compensate for delay is not tantamount to awarding interest on fees. *Perdue* involved a judgment against a state under section 1988; the respondent in Vaccine Act litigation is an agency of the United States government. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the Court held that an award of reasonable attorneys' fees under Title VII could not be increased to compensate for delay, unless Congress waived its immunity from interest. The Federal Circuit came to the same conclusion in *Chiu v. United States*, 948 F.2d 711 (Fed. Cir. 1991), when it reviewed a fee application under the Equal Access to Justice Act. The court concluded that "the post-performance adjustment to the attorney fee rate constitute[d] payment for the time value of money and, thus, the no-interest rule bars the award unless expressly and unambiguously authorized in the EAJA." *Id.* at 719. As Special Master Moran indicated in *Pestka* when he considered this argument, "[w]hether *Perdue* requires the Federal Circuit to revise its holding in *Chiu* that attorneys are compensated using historical (not current) rates when seeking attorneys' fees from the United States is a question for the Federal Circuit." 2011 WL 4433634, at *5.

Pursuant to the case law of the Supreme Court and the Federal Circuit, the undersigned does not award petitioner's counsel current rates as compensation for purported delay.

c. Enhancement Based on the *Perdue* Factors

The second argument based on *Perdue* is that petitioner's counsel is entitled to enhancement of the lodestar fee, that is, an enhancement is appropriate because the rare and exceptional circumstances described in *Perdue* are present in the instant case.¹⁵

¹⁵ This is a generous characterization of petitioner's argument. While *Perdue* gave arguably four bases for enhancing a lodestar fee, petitioner in his supplemental brief did not coherently address any of them. Petitioner recognized three situations in which an enhancement may be appropriate, *see Perdue* Supp. Br. 3–4, yet failed to use the facts of this case, rather than the Vaccine Program generally, and analyze why an enhancement might be appropriate. Respondent is therefore correct when she writes "petitioner does not argue that counsel is entitled to an enhancement under *Perdue* based on the specific circumstances of this case. Rather, petitioner's argument merely reiterates his counsel's general dissatisfaction with the hourly rates he has consistently been awarded in Program cases to date." *Perdue* Resp. 5.

As summarized above, the Court listed three rare and exceptional situations where an enhancement may be appropriate: 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. *Perdue*, 130 S. Ct. at 1674–75. Additionally, the Court mentioned an additional rare and exceptional circumstance in which an enhancement above the lodestar calculation might be appropriate: where there is superior attorney performance that the lodestar fee does not adequately take into account. *Id.* at 1674.

i. When the Method Used to Determine the Hourly Rate Does Not Adequately Measure the Attorney's Market Value

The Court in *Perdue* reasoned that an enhancement might be appropriate if the “method used to determine the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value.” *Id.* at 1674. It then gave as an example if an hourly rate is determined using a formula that accounts only for a single factor, such as years of experience in practice. *Id.*

In the instant case, the undersigned did not use a mechanistic formula to determine counsel's hourly rate, nor did she rely on one single factor. Petitioner had every opportunity to file evidence and memoranda in support of a prevailing market rate for Mr. Moxley's legal services. Ultimately, the undersigned did not find much of this evidence persuasive and looked to other Vaccine Act cases for guidance on hourly rates. Petitioner's counsel clearly is dissatisfied with the rates he has been awarded in past cases. Petitioner, however, has not demonstrated that the method used in this case fails to consider all factors that are relevant to determining the market value of Mr. Moxley's services.

ii. If There Is An Extraordinary Outlay of Expenses and the Litigation Is Exceptionally Protracted

The Court reasoned that an enhancement might be appropriate if the “attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted.” *Id.* The Court continued, stating that an attorney representing a civil rights plaintiff “presumably understands that no reimbursement is likely to be received until the successful resolution of the case, and therefore enhancement to compensate for delay in reimbursement of expenses must be reserved for unusual cases.” *Id.*

Petitioner argues that all cases in the Vaccine Program involve an extraordinary outlay of expenses by practitioners. *Perdue* Supp. Br. 6. This argument ignores the very language the Court uses. The Court specifically says that attorneys who represent plaintiffs bringing suit under statutes with fee-shifting provisions expect that “no reimbursement is likely to be received until the successful resolution of the case . . . [T]herefore enhancement to compensate for delay . . . must be reserved for *unusual* cases. *Perdue*, 130 S.Ct. at 1674 (emphasis added). Thus, the fact that attorneys representing petitioners in Vaccine Act cases wait for reimbursement of attorneys' fees and costs until the end of the case does not make a Vaccine Act case “unusual.”

Furthermore, petitioner has not alleged that there was anything unusual about the instant case suggesting that the litigation was protracted. Petitioner filed his petition on June 27, 2005. Petitioner's counsel did not finish filing petitioner's medical records until three years later on June 6, 2008. On February 17, 2009, the undersigned issued an order cancelling the hearing scheduled for February 27, 2009 because the parties had agreed to settle the case. On July 16, 2009, the undersigned issued an order directing the parties to file a joint stipulation by July 24, 2009. The parties, however, did not file the joint stipulation until October 28, 2009. On the same day, the undersigned issued a damages decision based on the stipulation. Because the parties did not file a notice not to seek review, it took a full 30 days before the Clerk of the Court could enter judgment in the case. Judgment entered on December 3, 2009, and on the same day, the undersigned issued an order giving petitioner until August 30, 2010 to file a fee application. Petitioner waited until August 30, 2010, 264 days later, to file his initial fee application. The subsequent procedural history relates entirely to the litigation of attorneys' fees.

While it took four-and-a-half years to complete the entitlement and damages phases of the case, most of that time was spent collecting and filing medical records and submitting initial and supplemental expert reports. Once the medical records and expert reports were complete, the parties wavered between attempting a settlement, pursuing mediation, and proceeding to an entitlement hearing. This took some time as the parties considered demands and counteroffers, then mulled over going for neutral mediation, before respondent ultimately indicated that she wanted to go to hearing on December 1, 2008. The hearing was scheduled for February 27, 2009, and later cancelled because the parties settled. This is not an unusual course for a Vaccine Act case. Accordingly, the rare and exceptional circumstance of "exceptionally protracted litigation" is not present in this case.

Furthermore, petitioner has not demonstrated that there was an extraordinary outlay of expenses in the instant case. According to petitioner's initial fee application, petitioner paid out-of-pocket costs totaling \$8,476.75. Mr. Moxley incurred \$295.33 in costs pursuing the petition, and his former firm Gage & Moxley incurred \$505.71 in costs. Fee. App. 16. These figures total \$9,277.79. This is not an "extraordinary outlay of expenses" as the Court intended it. The attorneys in *Perdue* spent \$1.7 million in litigation expenses over three years. Plainly, petitioner's costs herein are not "extraordinary" within the meaning of *Perdue*.

iii. If There Is Exceptional Delay In the Payment of Fees

As a third possibility justifying enhancement of the lodestar calculation, the Court stated that "there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees" such as when delay "is unjustifiably caused by the defense." *Id.* at 1675.

There have been two delays in the payment of attorneys' fees and cost in this case: first, in the period after the parties arrived at an irreducible minimum, and second, during the briefing of the application of *Perdue*. As for the first delay, respondent provided an irreducible minimum of \$25,000 in her status report filed on December 27, 2010. Rather than issue an interim award based on the irreducible minimum then, the undersigned, using her discretion, chose to wait until the Federal Circuit issued *Rodriguez*, *Masias*, and *Hall* in February, March, and April 2011,

respectively, to evaluate the case at hand.¹⁶ The decisions had direct bearing on the heavily litigated issues in the instant case, particularly the issue of Laffey Matrix rates. As for the second delay, Mr. Moxley stated in a status conference that he was going to seek appeals of attorneys' fees awards based on *Perdue*. It was more prudent to obtain the views of both parties and address the applicability of *Perdue* in this decision rather than wait for an appeal and a remand to consider the issue at that point.

If there has been any delay in the payment of fees, it is because Mr. Moxley refuses to accept the Federal Circuit's decision in *Avera* and insists on re-litigating the issues. Of the 25 affidavits filed in this case, the overwhelming majority attempt to show the Federal Circuit's imprudence in adopting the *Davis County* exception. Likewise, the overwhelming majority of the affidavits express the view that Laffey Matrix rates should be used to determine the forum rate. Two panels of judges on the Federal Circuit disagreed with the latter assertion, and in the three years since *Avera*, numerous special masters and judges have accepted *Avera* and its adoption of the *Davis County* exception as the law. It no longer serves Mr. Moxley or his clients to debate the wisdom of these decisions.

iv. Superior Attorney Performance

Justice Alito, in *Perdue*, mentioned an additional rare and exceptional circumstance in which an enhancement above the lodestar calculation might be available: where there is superior attorney performance that the lodestar fee does not adequately take into account. 130 S. Ct. at 1674. To obtain this enhancement, the Court requires that an attorney provide "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'" *Id.* (quoting *Blum*, 465 U.S. at 897).

Petitioner devotes most of his arguments and evidence to showing that the hourly rates used to calculate fee awards in special masters' decisions are not adequate to attract competent counsel to take on Vaccine Act cases. *Perdue* Supp. Br. 16, 18; see Pet'r's Ex. 46; Pet'r's Ex. 47; Pet'r's Ex. 48; Pet'r's Ex. 49; Pet'r's Ex. 50; Pet'r's Ex. 51. Although Mr. Moxley has considerable experience in the Vaccine Program and can obtain favorable outcomes for his clients, he is not unique as a vaccine attorney and his services are not indispensable. To date, there are 29 pages of attorneys listing their availability to try Vaccine Act cases on the court's website, www.uscfc.uscourts.gov. The availability of Vaccine Act attorneys willing to represent petitioners is, in fact, expanding. See *Hall*, 2009 WL 3423036, *24; *Masias*, 2009 WL 1838979, at *28–30. Awards based on historical, local rates appear to be sufficient in attracting competent counsel.

Because petitioner does not satisfy any of the three criteria (or the "superior attorney performance" exception) of *Perdue* for the rare and exceptional circumstances in which there may an enhancement of the lodestar calculation, the undersigned does not award an enhancement of fees.

6. Hourly Rates of Mr. Moxley's Associates

¹⁶Mr. Moxley, on behalf of petitioner, also requested a stay of the case pending the *Masias* appeal in his motion for interim fees. Fee App. 6–8.

Petitioner requests reimbursement for work performed on his case by two of Mr. Moxley's associates: Ms. Julie Hernandez, working as a law clerk and later as an attorney, and Ms. Carol Gollobith, a paralegal. Ms. Hernandez billed at an hourly rate of \$100 as a law clerk and \$130 as an attorney after she was admitted to the Wyoming bar. Fee. App. 15. Ms. Hernandez's rates are reasonable and equal to rates she has been awarded in the past. *See Masias v. Sec'y of HHS*, No. 99-697V, 2009 WL 899703, at *5 (Fed. Cl. Spec. Mster. June 12, 2009) (interim fees decision). Ms. Gollobith billed at the hourly rate of \$100 for the duration of the litigation. Ms. Gollobith's rate is also reasonable and equal to rates she has been awarded in past decisions. *See id.* The work performed by Mr. Moxley's associates will be reimbursed at the rates requested.

C. Number of Hours Expended

The lodestar approach requires that the reasonable hourly rate, here the local rate, be multiplied by the number of hours "reasonably expended on the litigation." *Avera*, 515 F.3d at 1347-48 (quotation and citation omitted). Thus, the undersigned now evaluates the hours petitioner submitted and assesses their reasonableness. The undersigned, however, addresses two points of contention between the parties first.

In his supplemental brief filed on December 29, 2010, petitioner argues that "[i]t is not up to the master to raise objections not raised by the government, in opposition of fully supported claims for fees and costs." Supp. Br. 6. According to petitioner's view, once he submits sufficiently detailed invoices, his burden is satisfied. Supp. Br. 7. The burden then shifts to the government to state objections with particularity and clarity. Supp. Br. 7-8. While petitioner is correct that respondent should state particular objections to hours expended, giving clear reasoning for each objection, petitioner mischaracterizes the special master's role in reviewing a fee application. Respondent may object to the reasonableness of some hours, but the determination of reasonableness remains with the special master, who must consider whether any hours billed are "excessive, redundant, or otherwise unnecessary." *Saxton*, 3 F.3d at 1521 (quotation and citation omitted). The special master "has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent's critique." *Savin ex rel. Savin v. Sec'y of HHS*, 85 Fed. Cl. 313, 318 (2008) (quotation and citation omitted).

Second, respondent, in her response filed on September 30, 2010, objects to "all time entries related to the task of briefing the forum rates, and other fee related charges." Resp. 8. Respondent then states that these entries amount to charging "'fees for fees,' a practice highly disfavored in Program proceedings." Resp. 9 (citing *Friedman v. Sec'y of HHS*, 94 Fed. Cl. 323 (2010)).

In *Friedman*, Judge Damich merely deferred to the special master's decision to deny compensation for certain hours expended during the fees litigation phase. *See Friedman*, 94 Fed. Cl. at 335. Special Master Moran, using his discretion, decided not to award fees for hours expended by Mr. Moxley after the motion for reconsideration because the application for supplemental fees was untimely. *Friedman v. Sec'y of HHS*, No. 02-1467V, 2009 WL 4975267,

at *12–13 (Fed. Cl. Spec. Mstr. Dec. 4, 2009). This is not authority for the proposition that charging fees for fees is a “highly disfavored” practice. Special masters frequently award fees for hours expended on fees applications and subsequent litigation. *See, e.g., Broekelschen v. Sec’y of HHS*, No. 07-137V, 2011 WL 2531199, at *10–11 (Fed. Cl. Spec. Mstr. June 3, 2011); *Masias v Sec’y of HHS*, No. 99-697V, 2010 WL 1783542 (Fed. Cl. Spec. Mstr. Apr. 14, 2010). These hours, like all other hours expended on the litigation, are compensable as long as they are reasonable.

As for the hours included in Mr. Moxley’s invoices, respondent objects to two entries other than hours billed for work on fees: .5 hour spent consulting with Curtis Webb on August 15, 2008 and two hours for “settlement offer transmitted” on September 26, 2008. Resp. 8 n.1. Mr. Webb is another Vaccine Act practitioner. It is not unreasonable for petitioner’s counsel to consult with Mr. Webb about issues in the instant case with which he may have experience. This time is compensable. Concerning the two hours billed on September 26, 2008 for “settlement offer transmitted,” it is unclear why it took two hours to send a settlement offer. Moreover, this is work that can be performed by Mr. Moxley’s paralegal. Accordingly, two hours will be subtracted from Mr. Moxley’s total hours and one hour will be added to Ms. Gollobith’s hours.

Regarding the hours billed for preparing petitioner’s initial fee application, the undersigned does not view these entries as unreasonable. Respondent objects to all time entries briefing forum rates. Resp. 8. Mr. Moxley, however, did not charge fees for many of these entries. Pet’r’s Ex. 37 at 18, 21 (\$0 amount for entries on 9/15/2008; 9/17/2008; 9/22/2008; 9/29/2008; 8/24/2009; 10/26/2009; and 11/11/2009). For the hours Mr. Moxley does bill for preparing petitioner’s fee application, the undersigned considers the amounts to be reasonable.

Some other entries cause concern, however. Mr. Moxley billed a total of 8.7 hours for researching and drafting the reply filed on November 5, 2010. Pet’r’s Ex. 44. Petitioner’s reply, however, included more rhetoric than legal argument.¹⁷ *See generally* Reply. Mr. Moxley has been advised in other cases and opinions that this type of writing is irrelevant to the pertinent legal issues. *See, e.g., Avila*, 90 Fed. Cl. at 599 (“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.”). 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. Of the legal arguments that are present in the reply, some are simply incorrect. *See, e.g.,* Reply 12 (“The guidance of the new Supreme Court case, *Perdue v. Kenny A.*, must be properly seen to trump every resort to ‘precedent’ in the entire Program fees doctrine”). Billing 8.7 hours for this work is unreasonable. Accordingly, the undersigned reduces the hours billed for the reply by 2.7 hours, roughly one-third.

Mr. Moxley submitted a final invoice on September 1, 2011, for hours expended briefing

¹⁷ Some excerpts from petitioner’s reply include: “counsel has been involved . . . in appellate efforts to reform the oppressive and erroneous ‘local rates’ doctrine,” Reply 1; “The government denigrates the incredible effort it takes to cogently demonstrate two decades of not only legal error, but also of economic oppression,” *id.* at 7; “The Program must be dragged, kicking and screaming, if need be, into the realm of proper and equitable fee-shifting,” *id.* at 14.

the application of *Perdue* to this case. Mr. Moxley billed approximately 19 hours for his work on this brief. As discussed in *supra* section III.B.5 and note 13, petitioner's *Perdue* brief suffered from the same problems as his reply. Mr. Moxley took the opportunity to address his complaints about the Vaccine Program generally and ignored the facts of petitioner's case. *See generally Perdue* Supp. Br.; Pet'r's Ex. 54. This was a peculiar tactic because the Court in *Perdue* emphasized the need for "specific evidence" to support an enhancement. 130 S. Ct. at 1673–74. Billing 19 hours for this brief is unreasonable. Thus, the undersigned reduces the hours billed drafting the *Perdue* brief by four hours, roughly one-quarter.

The undersigned finds all other hours billed by Mr. Moxley and his associates to be reasonable and compensable.

D. Expert Fees

Petitioner seeks reimbursement for his out-of-pocket costs incurred retaining an expert, Dr. Bennett. Petitioner spent \$8,385.00 on Dr. Bennett's fees through February 18, 2009. Pet'r's Ex. 40. Respondent objects to the costs related to the expert services, claiming the amount is excessive given that the case did not go to hearing. Resp. 9. Respondent also contends that Dr. Bennett's rate is "per se excessive" but does not give any reasons or authority supporting why the rate is excessive. Petitioner argues that the term "reasonable" in the statute does not qualify the word "costs," only attorneys' fees. Fee. App. 12. According to petitioner's view, the statute mandates reimbursement of these costs. Fee. App. 13; Reply 7. Petitioner also submits evidence in the form of an affidavit from Steven Krafchick, an attorney with medical litigation experience, Pet'r's Ex. 42, and a quote from the American Medical Forensic Specialists, Inc. ("AMFS"), Pet'r's Ex. 43, to substantiate Dr. Bennett's rate.

Contrary to petitioner's view, both fees and costs must be reasonable. *See Perreira*, 27 Fed. Cl. at 34 ("The conjunction 'and' conjoins both 'attorneys' fees' and 'other costs' and the word 'reasonable' necessarily modifies both. Not only must any request for reimbursement of attorneys' fees be reasonable, so also must any request for reimbursement of costs."). It is incorrect to say that the Vaccine Act mandates reimbursement of costs.

Respondent contends that the hours are excessive because the case did not go to hearing. Dr. Bennett performed the bulk of his work, however, in 2006 and 2007 when the case was on track to go to hearing. Pet'r's Ex. 40. Discussions about a realistic possibility of settlement occurred during a status conference on March 21, 2008. After this date, Dr. Bennett billed only 1.5 hours for preparation and participation in a teleconference on January 16, 2009. *Id.* These hours too are reasonable at that point in the litigation; petitioner and his counsel would want to discuss the advantages and disadvantages of settlement with their expert.

As for Dr. Bennett's hourly rate, Dr. Bennett charged \$400 per hour for work performed in 2006 and 2007. *Id.* Dr. Bennett's hourly rate increased to \$550 per hour for work performed in 2009. *Id.* A quote from AMFS indicates that a rheumatology expert retained in 2005 would charge \$500 per hour for in-office work. Pet'r's Ex. 43. In his affidavit, attorney Steven Krafchick states that Dr. Bennett is a highly qualified rheumatologist and that Mr. Krafchick works with rheumatologists that charge between \$500 and \$600 per hour. Pet'r's Ex. 42 at 2. In past

cases, Mr. Krafchick has paid Dr. Bennett \$450 an hour. *Id.* at 3.

This evidence indicates that the rates Dr. Bennett charged in the instant case are below or within the range routinely charged by rheumatology experts. He charged \$400 per hour for work performed through 2007, a rate below that quoted by AMFS for 2005. While his rate for work performed in 2009 jumped considerably, it is still within the range suggested as reasonable by Mr. Krafchik. Based on the evidence submitted, Dr. Bennett’s rates are reasonable; petitioner is reimbursed fully for these costs.

IV. Conclusion: Final Award

Subtracting 2 hours, 2.7 hours, and 4 hours from Mr. Moxley’s billed hours, and adding 1 hour to Ms. Gollobith’s billed hours, the fees for Mr. Moxley and his associates are as follows:

Table 4			
Mr. Moxley’s Fees			
Dates	Local Rates	Number of Hours	Totals
5/24/2005-5/31/2006	\$210	36	\$7,560.00
6/01/2006-5/31/2007	\$220	29.4	\$6,468.00
6/01/2007-5/31/2008	\$225	39.5	\$8,887.50
6/01/2008-5/31/2009	\$240	11	\$2,640.00
6/01/2009-5/31/2010	\$240	17.2	\$4,128.00
6/01/2010-5/31/2011	\$245	39.2	\$9,604.00
6/01/2011-9/01/2011	\$250	1	\$250.00
			\$39,537.50

Table 5			
Ms. Hernandez’s Fees			
Dates	Rates	Number of Hours	Totals
5/24/2005-10/26/2005	\$100	41.9	\$4,190.00
10/31/2005-12/6/2005	\$130	4.1	\$533.00
			\$4,723.50

Table 6			
Ms. Gollobith's Fees			
Dates	Rate	Number of Hours	Total
2/2/2006-8/27/2010	\$100	22.7	\$2,270.00

Table 7	
Total Fees and Costs	
Mr. Moxley's Fees	\$39,537.50
Ms. Hernandez's Fees	\$4,723.50
Ms. Gollobith's Fees	\$2,270.00
Gage & Moxley Costs	\$505.71
Robert T. Moxley Costs	\$295.33
Total Fees and Costs	\$47,332.04

Moreover, petitioner incurred \$8,476.75 in costs to pursue his petition. Pet'r's Ex. 40. According to these amounts, the court awards:

- a. A lump sum of **\$47,332.04**, representing final reimbursement for attorneys' fees and costs to Robert T. Moxley, P.C. The award shall be in the form of a check made jointly payable to petitioner and the law firm Robert T. Moxley, P.C., in the amount of **\$47,332.04**.
- b. A lump sum of **\$8,476.75**, representing reimbursement for costs incurred by petitioner. The award shall be in the form of a check made solely payable to petitioner in the amount of **\$8,476.75**.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment.¹⁸

IT IS SO ORDERED.

Dated: October 14, 2011

/s/ Laura D. Millman
 Laura D. Millman
 Special Master

¹⁸ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.