IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

ESTHER HALL,	*	
	*	No. 02-1052V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: October 6, 2009
	*	
SECRETARY OF HEALTH	*	attorneys' fees and costs,
AND HUMAN SERVICES,	*	Laffey matrix rates, compensating
	*	multiple experts, reasonable number
Respondent.	*	of hours for attorney

Richard S. Gage, Esq., Richard S. Gage, P.C., Cheyenne, Wyoming, for Petitioner;
Melonie J. McCall, Esq., U.S. Dep't of Justice, Washington, D.C., for Respondent.

PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS[*]

The petitioner, Esther Hall, established that a hepatitis B vaccination caused an injury to her shoulder. Ruling, filed Sept. 12, 2007. She was awarded compensation. Decision, filed Dec. 4, 2008. She sought an award of attorneys' fees and costs.

Ms. Hall's request for attorneys' fees and costs was divided into two parts, depending upon whether the requested item could be disputed reasonably. The amount of attorneys' fees that could not be reasonably disputed is $51,854.55. The amount of costs that could not be

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[*] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before 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 delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

reasonably disputed is $12,633.59. These amounts were awarded on July 28, 2009. Interim Fees Decision.

This decision resolves the disputed items. After Ms. Hall's request and respondent's objections are considered, **Ms. Hall is awarded an additional $22,018.00 in attorneys' fees and $3,675 in costs.**

I. Procedural History of Request for Attorneys' Fees and Costs

By way of background, this decision follows a series of recent decisions about attorneys' fees and costs. In 2008, the Federal Circuit issued Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). In Avera, the petitioner, who was represented by Mr. Robert Moxley, sought attorneys' fees and costs on an interim basis and also sought compensation pursuant to the hourly rate prevailing in the forum. (Mr. Moxley was once partners with Mr. Gage, who represents Ms. Hall in this case.) The Federal Circuit indicated, in dicta, that attorneys' fees and costs are available on an interim basis.[1] The Federal Circuit also established a two-part test for determining whether attorneys are entitled to be compensated at forum rates. The Federal Circuit expressly declined to determine whether the Laffey matrix, which is discussed below, established the forum rate. Avera, 515 F.3d at 1350.

While Avera was pending, another petitioner, who was also represented by Mr. Moxley, also sought an award of attorneys' fees including compensation at hourly rates set by the Laffey matrix. The undersigned eventually found that Mr. Moxley was not entitled to those rates. Masias v. Sec'y of Health & Human Servs., No . 99-697V, 2009 WL 1838979, at *31 (Fed. Cl. Spec. Mstr. June 12, 2009). Mr. Masias filed a motion for review, which remains pending at the Court of Federal Claims. Regardless of the outcome before the Court of Federal Claims, an appeal to the Federal Circuit seems likely.

On April 17, 2009, Ms. Hall, through her counsel, Richard Gage, filed her fee petition. In her fee petition, Ms. Hall requested a total award of $83,400.34. Fee Petition at 1. This fee petition included a request that Mr. Gage be compensated at a rate of $360 to $410 per hour, which, according to Ms. Hall, is the rate appropriate for attorneys practicing in Washington, D.C. Fee Appl'n, tab C, at pdf 26-35. Ms. Hall argued that Mr. Gage is entitled to the rate for attorneys practicing in Washington, D.C., even though Mr. Gage's practice is in Cheyenne, Wyoming, because the forum where this case is pending, the United States Court of Federal Claims, is located in Washington, D.C. See Avera, 515 F.3d 1343. Ms. Hall supported this application by filing a declaration from Mr. Gage, an affidavit from attorney Donald I. Schultz, and an affidavit from attorney A. Leroy Toliver. Fee Appl'n, tab F, at pdf 100-05.

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[1] The comments about when interim fees are available are dicta because the actual holding of Avera was to affirm the denial of attorneys' fees and costs on interim basis. See Franklin v. Sec'y of Health & Human Servs., No. 99-855V, 2009 WL 2524492, at *9 n. 17 (Fed. Cl. Spec. Mstr. July 28, 2009).

Respondent opposed Ms. Hall's fee application, in part. Most significantly, respondent challenged whether Mr. Gage was entitled to a forum rate. See Resp't Resp., filed May 19, 2009, at 5-6. Respondent referenced arguments she made in opposition to a request for forum rates in Masias v. Sec'y of Health & Human Servs., 99-697V, which was pending before the undersigned at the time. In addition to the challenge to Mr. Gage's hourly rate, respondent raised other objections with less significance, including an objection to the amount of time sought by Mr. Gage and an objection to an award for work performed by Dr. Kinsbourne.

Ms. Hall filed a reply on May 28, 2009. Respondent filed another brief on June 17, 2009, and petitioner made a final submission on June 18, 2009. Collectively, these briefs largely ignored whether Mr. Gage was entitled to compensation pursuant to the Laffey matrix.

On July 28, 2009, Ms. Hall was provided an interim award of a portion of her attorneys' fees and some costs. Interim Fees Decision. The interim fee decision awarded, in attorneys' fees, an amount that could not be disputed reasonably. The decision also awarded costs that were not disputed, leaving until this decision two more contentious issues. These disputed issues - the appropriate hourly rate for Mr. Gage and the compensation for Dr. Kinsbourne - are now ripe for decision.

II. Attorneys' Fees

A. Introduction

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

When a party seeks an award of attorneys' fees, the fee-applicant bears the burden of showing the reasonableness of the request. "The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero. In the process and especially in the end result, [trial] courts must continue to be accorded wide latitude." Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986).[2]

Reasonable attorneys' fees are determined using a two-part process. The initial determination uses the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera, 515 F.3d at 1347-48 (quoting Blum v.

[2] Although Mares did not interpret the attorneys' fee provision of the Vaccine Act, fee-shifting statutes are interpreted similarly. Avera, 515 F.3d at 1348.

Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upward or downward. Id. at 1348.

In this case, the two variables of the lodestar method are disputed. The primary dispute for attorneys' fees concerns whether Ms. Hall's counsel, Mr. Gage, should be reimbursed at an hourly rate based on the Laffey matrix rates endorsed by the United States Court of Appeals for the District of Columbia. For the reasons that follow, in section II.B.1, below, Mr. Gage is not entitled to these hourly rates. Instead, Mr. Gage is compensated at a rate of $220-$240 per hour.

The other variable in the lodestar method is the reasonable number of hours. Respondent has objected to the number of hours sought by Mr. Gage. Respondent's objections are well-supported. Thus, some hours are deducted. See section II.B.2.

B. Part One: Determining the Lodestar

1. Reasonable Hourly Rate for Mr. Gage

In the lodestar analysis, "a reasonable hourly rate is 'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348 (quoting Blum, 465 U.S. at 896 n.11). In Avera, the Federal Circuit indicated an award of attorneys' fees based upon the prevailing rate in the forum could be appropriate. Counsel for petitioners are entitled to Washington, D.C. rates except "'where the bulk of [an attorney's] work is done outside the jurisdiction of the court and where there is a *very significant* difference in compensation favoring D.C.'" Avera, 515 F.3d at 1349 (quoting Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 755, 758 (D.C. Cir. 1999)) (emphasis in Davis).

After Avera, the determination of an attorney's hourly rate of compensation in the Vaccine Program contains three steps. First, the hourly rate in the attorneys' local area must be established. Second, the hourly rate for attorneys in Washington, D.C. must be established. Third, these two rates must be compared to determine whether there is a very significant difference in compensation. See Avera, 515 F.3d at 1353 (Rader, J., concurring).

a. Determination of the Reasonable Local Hourly Rate for Mr. Gage

(1) Standards for Establishing Hourly Rate

The 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 at 1348 (quoting Blum, 465 U.S. at 896 n. 11).

Determining the reasonable hourly rate can be difficult because there is relatively little guidance about how to determine what the prevailing market rate is for similar services. See Information Sciences Corp. v. United States, 86 Fed. Cl. 269, 291 (2009) (noting that although the Supreme Court held that paralegal fees are to be awarded at "prevailing market rates," the Supreme Court "did not provide trial courts with guidance in how to determine 'the prevailing market rate'"). A determination about the prevailing market rate "cannot be made with the same certainty as ascertaining the value of a futures contract for pork bellies or wheat on a given day." Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1300 (11th Cir. 1988). Furthermore, what are "similar services" is disputed. There appears to be only one appellate case determining what work is similar to the work performed by attorneys representing petitioners in the Vaccine Program, Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293, 304 (2003) (Rupert IV). Rupert IV is not binding upon special masters, except as an order on remand. Although not binding authority, Rupert IV is entitled to consideration. See Barber v. Sec'y of Health & Human Servs., No. 99-434V, 2008 WL 4145653 *5-11 (Fed. Cl. Spec. Mstr. Aug. 21, 2008), citing Rupert IV. Section II.B.1.b. sets forth additional information about the standards to be followed in determining the reasonable hourly rate.

The information about the reasonableness of hourly rates for attorneys in Cheyenne, Wyoming is somewhat sparse. The information includes Mr. Gage's own description of his billing practices, statements from two attorneys, and statements of reasonable rates for attorneys in Wyoming from decisions both inside and outside of the Vaccine Program. An analysis of this information reveals that a reasonable hourly rate for attorneys in Wyoming was $220 per hour in 2008.

(2) Ms. Hall's Evidence (Affidavits)

Ms. Hall presented relatively little information about the reasonable hourly rate for attorneys in Cheyenne, Wyoming. The evidence that Ms. Hall presented consisted of affidavits.

Ms. Hall filed an affidavit from Mr. Gage in which Mr. Gage stated a defendant in a personal injury case involving asbestos exposure is paying him $300 per hour. Fee Appl'n, tab F, at pdf page 100.

Ms. Hall also filed an affidavit from Donald I. Schultz, Esq., who is a principal of the Cheyenne, Wyoming law firm of Schultz & Belcher LLP, specializing primarily in "complex federal litigation, concentrating in commercial, construction and energy litigation." See Fee Appl'n, tab F, at pdf page 101. Mr. Schultz asserted that he is familiar with the hourly rates of attorneys who litigate complex cases before federal court in Wyoming. Mr. Schultz did not indicate whether he has been admitted to the Court of Federal Claims bar or practiced in the Vaccine Program. Mr. Schultz averred that, he has "personal knowledge" that attorneys in

Cheyenne, Wyoming, who practice in the area of complex litigation, receive $375 to $405 per hour. Mr. Schultz concluded that it is appropriate to pay Mr. Gage $325 per hour.[3]

(3) Decisions Setting Reasonable Hourly Rates for Attorneys in Wyoming

Mr. Gage has practiced in the Vaccine Program for more than 15 years. Thus, special masters have determined the reasonableness of his hourly rate (or the hourly rate of other attorneys from Cheyenne, Wyoming with whom he practiced) in a series of decisions over the years. As set forth below, the most recent decisions have determined that the reasonable hourly rate for attorneys practicing in Cheyenne, Wyoming falls between $200-$250 per hour.

In addition to cases from within the Vaccine Program, other decisions have set the reasonable hourly rate for attorneys in Wyoming. These decisions, which were made by either federal judges or state judges, have the advantage of being made by courts in the relevant forum. They suggest that the reasonable hourly rate for an attorney in Wyoming is between $165 and $200 per hour.

(a) Cases within the Vaccine Program

Table 1, found in the appendix to this decision, provides a list of attorneys' fees decisions for cases in the Vaccine Program from 1991 through 2009 for attorneys in Cheyenne, Wyoming. The hourly rates have increased from $160 in 1999 to $200 in 2004.

In 1999, Mr. Gage, "request[ed] compensation at an hourly rate ranging from $110 to $160." The range of rates reflected two changes in Mr. Gage's billing rates while the case was pending. Barnes v. Sec'y of Health & Human Servs., No. 90-1101V, 1999 WL 797468, at *2 (Fed. Cl. Spec. Mstr. Sept. 17, 1999). The special master, despite respondent's objection, awarded Mr. Gage $160 per hour for work performed after October 1, 1998. Id. at 3.

In 2004, Mr. Gage sought compensation for attorneys' fees and costs for himself and two other attorneys at $175 - $200 per hour. The special master found that $200 per hour was a reasonable hourly rate for Mr. Gage for work performed in 2003 and 2004. The special master based his decision on a combination of evidence including affidavits from attorneys who specified the rates their firms charged and a 2003 bar survey of attorney rates. Hart v. Sec'y of Health & Human Servs., No. 01-357V, 2004 WL 3049766, at *2-3 (Fed. Cl. Spec. Mstr. Dec. 17, 2004).

Additional information that is relevant to determining a reasonable hourly rate for attorneys in Cheyenne, Wyoming comes from cases involving Mr. Moxley. These cases are

[3] Actually, Mr. Gage seeks $360 to $410 per hour.

relevant because Mr. Moxley, like Mr. Gage, practices in Cheyenne, and because Mr. Moxley and Mr. Gage have represented petitioners in the Vaccine Program for more than 15 years.

After originally seeking $200 per hour in attorneys fees in the Avera case, Mr. Moxley revised his fee application, and requested an hourly rate of $598 for his services. Avera, 515 F.3d at 1350. The special master denied Mr. Moxley's revised request and awarded Mr. Moxley $200 per hour. Id. at 1351. On review, the Court of Appeals for the Federal Circuit upheld the special master's original award of $200 per hour for Mr. Moxley. See generally, Avera, 515 F.3d 1343.

Two recent decisions also addressed attorneys' fees for Mr. Moxley. In Masias, the undersigned found that a reasonable hourly rate for Mr. Moxley's work performed in 2007 was $210 or $215. A different special master found that a reasonable hourly rate for Mr. Moxley's work from 2004-2006 was $200 per hour and for Mr. Moxley's work after 2006 was $250 per hour. Avila v. Sec'y of Health & Human Servs., No. 05-685V, 2009 WL 2033063, at *4 (Fed. Cl. Spec. Mstr. June 26, 2009). A motion for review has been filed in Avila.

(b) Cases outside the Vaccine Program

Other cases discussing the reasonableness of Wyoming attorneys' hourly rates have advantages and disadvantages. When the case is decided by a judicial officer from Wyoming, the decision benefits from that judicial official's knowledge about what is happening in his (or her) local legal community. It is difficult for special masters, who are based in Washington, D.C., to develop this same sense.

On the other hand, these decisions about the reasonableness of hourly rates for attorneys from Wyoming cannot consider circumstances about litigation in the Vaccine Program. Further, the decisions provide relatively little information about the attorneys whose hourly rate is being established.

These weaknesses do not eliminate all value to considering these cases from outside the Vaccine Program. The information is summarized in table 2, which appears in the appendix. These cases show that courts in Wyoming have awarded attorneys' fees from $125 per hour in 1997 to $200 per hour in 2008.

(4) Analysis of Evidence

The evidence submitted by Ms. Hall is not persuasive to establish that an appropriate local rate in Cheyenne, Wyoming is $300 per hour. Mr. Schultz compares the Vaccine Program

to complex federal litigation, which, according to him, warrants a payment of $375 - $405 per hour.[4]

Ms. Hall has not established that Mr. Schultz's rates are a valid basis for comparison. Mr. Schultz appears not to have any experience in Vaccine Program litigation. Fee Appl'n, tab F, at pdf 101-03. In addition, the rates used by Mr. Schultz appear to come from his experience in a national firm with multiple offices. Mr. Gage practices in a small firm (perhaps as a solo practitioner) with a single location. Rates from a much larger firm, with a different type of practice are not useful in determining the appropriate rate for a solo practitioner in Cheyenne. See Avila, 2009 WL 2033063, at *3 (stating that the affidavit of Mr. Schultz "suffers from serious deficiencies.").

Ms. Hall submitted a minimal amount of information about Mr. Gage's own billing history. According to Mr. Gage's statement, he is charging a defendant in a personal injury case $300 per hour. Fee Appl'n, tab F, at pdf 100.

This information has some relevance, but does not control the outcome. First, the information provided lacks any detail. For example, Mr. Gage did not submit a copy of the retainer agreement – a document that is not usually protected by the attorney client privilege. This retainer could have explained the details of the relationship. Mr. Gage provided no information to determine whether the skills used in representing this client are at all similar to the skills used to represent Ms. Hall.

The Tenth Circuit has explained why the process of determining a reasonable hourly rate should consider whether the skills involved are similar.

> [J]ust as lawyers are not fungible, so too legal services are not fungible. It will be recalled that the legal standard for fee awards is a prevailing market value test. And for that purpose the relevant market value is not the price that the particular lawyer chosen may be paid by willing purchasers of his or her services, but rather the price that is customarily paid in the community for services like those involved in the case at hand.
>
> Only a moment's thought is need[ed] to see why that is so in the context of fee awards against an adversary. There are of course different markets for different areas of lawyer's work. Lawyers who handle home closings do not bill or receive payment at the same hourly rate as lawyers who handle major corporate mergers and acquisitions-even though each may be handling a "purchase."

[4] Whether litigation in the Vaccine Program constitutes complex litigation is discussed in section II.B.1.b(3)(b)ii) below.

> If the home buyer chooses to retain a merger specialist because the buyer wants to take advantage of the latter's demonstrated negotiating skills, the buyer of course is free to do so and to pay the higher tariff. But if and when it comes down to fee shifting - to imposing on the other side an obligation to pay the lawyer's fee for a legally sufficient reason - the higher cost of the merger specialist cannot properly be thrust on someone who did not, after all, make the uneconomic choice of counsel.

Beard v. Teska, 31 F.3d 942, 956 (10th Cir. 1994).

Furthermore, most (but not necessarily all) defendants in actions seeking compensation for personal injuries are indemnified by insurance companies. If Mr. Gage has been retained by an insurance company, then his work is not comparable to work in the Vaccine Program. Rupert IV, 55 Fed. Cl. at 304 (finding that hourly rates for defense attorneys in cases seeking compensation for personal injuries should not be included in the process of determining a reasonable hourly rate).

A final reason for discounting Mr. Gage's statement about his billing is that it appears that this client represents a very small portion of Mr. Gage's practice. (Mr. Gage has stated in status conferences that most of his work is representing people seeking compensation for personal injuries for which he is paid based on a contingency fee agreement. See Hart, 2004 WL 3049766, at *3 (stating that Mr. Gage has no clients who pay him on an hourly basis). Although the experience with a single client paying him an hourly wage has some relevance to determining the prevailing market rate because that client is part of the market, the rate paid by an individual client may be an aberration – either higher than the market or lower than the market. See People Who Care v. Rockford Bd. of Educ., School Dist. No. 205, 90 F.3d 1307, 1313 (7th Cir. 1996) (stating "reduced-rate hours should be considered only in proportion to the percentage of the attorney's practice they represent."); Barber v. Sec'y of Health & Human Servs., No. 99-434V, 2008 WL 4145653 , at *10 (Fed. Cl. Spec. Mstr. Aug. 21, 2008) (citing People Who Care to discount evidence that petitioner's attorney was entitled to an hourly rate lower than the requested hourly rate). For these reasons, Mr. Gage's receipt of $300 per hour from one client does not translate, automatically, into a finding that the reasonable rate is $300 per hour.

Ultimately, Mr. Gage has not been awarded $300 or more per hour for either his vaccine-related or non-vaccine related litigation. Cases in the Vaccine Program and other cases from Wyoming related to setting hourly rates conclusively indicate that the reasonable hourly rate for attorneys practicing in Cheyenne, Wyoming is between $200 and $250 per hour.

The hourly rates awarded by special masters in the Vaccine Program to attorneys located in Wyoming fit within the general range of hourly rates awarded by judicial officials in Wyoming. Table 3, which appears in the appendix, combines information in Table 1 and Table

2. This table shows that special masters have been consistent with other judicial officials in setting hourly rates for attorneys in Wyoming.

The most interesting observation is that in Hart, which was decided in December 2004, the special master awarded $200 per hour to Mr. Gage. Almost exactly two years later, the Wyoming Supreme Court determined that $200 per hour was the limit of reasonable compensation for attorneys outside of Casper, Wyoming. Morrison v. Clay, 2006 WY 161, ¶ 19, 149 P.3d 696, 702 (Wyo. 2006). The results in these two cases suggest that special masters have been more generous than judicial officials in Wyoming.

Although the attorneys whose rates were determined in Morrison worked in Casper, Wyoming, their rates provide some information about the reasonable rate for attorneys in Cheyenne, Wyoming. First, both cities are municipalities in Wyoming. Whatever rules govern the practice of law in Wyoming, such as any requirement to attend continuing legal education, apply to lawyers in Casper and Cheyenne equally. Second, the cost of living in Casper is about the same as the cost of living in Cheyenne. Masias, 2009 WL 1838979, at *8.

In both Barnes and Hart, the special masters awarded Mr. Gage the hourly rates that were requested. This equality between the rates requested and the rates awarded certainly suggests that special masters have responded to Mr. Gage's requests. Therefore, the historical rates continue to have some relevance in determining the current reasonable hourly rates.

Another way to approach the question of what is a reasonable hourly rate for attorneys in Cheyenne is to borrow the method used in connection with the Laffey matrix, that is, start with some established rate and then increase that rate each year for inflation using the Consumer Price Index. The special masters' determination of the appropriate hourly rate in Barnes and in Hart, provide the starting point.

These calculations appear in table 4. These calculations show that increase in the hourly rate from 1999 ($160) to the hourly rate from 2004 ($200) was relatively close to the increase predicted by inflation in Wyoming. Actually, the special master's 2004 determination awarded Mr. Gage slightly more than inflation rates. Nevertheless, the relative closeness of the two numbers suggests that indexing for inflation assists in establishing a reasonable range.

When this same approach is used to bring Mr. Gage's rates to 2008, there is a much bigger difference. When the 2004 rate is the base, the result is $238.66 per hour. However, Mr. Gage requests $410 per hour.

The change in rate from Hart in 2004 ($200 per hour) to Mr. Schultz's affidavit in 2008 ($375 per hour) is significant. The proposed increase is $150 per hour in only four years. In terms of percentage, the rates increased 75 percent (($350-$200) / $200). Mr. Schultz's affidavit would be more persuasive if it explained any reason for this increase.

For work performed in 2004, Mr. Gage will be compensated at $200 per hour, which is the rate awarded to him in Hart. For years between 2004 and 2008, Mr. Gage's rate will increase with inflation. See table 4 and table 5. These determinations complete the first step of the analysis under Avera, which is to determine the local rate.

b. Determination of the Forum rate

The second step in the process of determining the reasonable hourly rate for Mr. Gage is to evaluate the reasonable hourly rate for attorneys in Washington, D.C. As the party seeking attorneys' fees, Ms. Hall bears the burden of producing evidence about the reasonableness of the hourly rate. Ms. Hall has largely failed to produce persuasive evidence.

In support of her position, Ms. Hall filed one affidavit from an attorney and a copy of the updated Laffey matrix published on the website of the United States Attorney's Office for the District of Columbia. Fee Appl'n, tab F, pdf 104-04 (affidavit of Mr. Toliver); Fee Appl'n, tab G, pdf 107 (Laffey matrix chart).[5]

(1) *Laffey* And Its Progeny

Because Ms. Hall contends that Mr. Gage is entitled to rates based upon the Laffey matrix, a review of that decision, and how that decision has been viewed, is appropriate.[6]

In Laffey, the plaintiffs, who were female flight attendants, claimed that the defendant, Northwest Airlines, Inc., violated Title VII, which prohibits gender discrimination in employment, and the Equal Pay Act. After 13 years of litigation, the trial court awarded more than 3,000 flight attendants approximately $52 million in backpay. Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 359 & 359 n.1 (D.D.C. 1983). The ensuing fee application was "the most extensive fee petition this Court has ever received." Id. at 360.

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[5] Mr. Gage did not seek compensation at rates from the "adjusted Laffey matrix." The adjusted Laffey matrix was developed by Michael Kavanaugh, who submitted an affidavit in Masias. The difference between the two matrices is that the official Laffey matrix is adjusted by the Consumer Price Index, for the Washington, D.C. metropolitan area, while the adjusted Laffey matrix uses the legal services component of the nationwide consumer price index. Woodland v. Viacom, Inc., 255 F.R.D. 278, 279 (D.D.C. 2008).

[6] Although Ms. Hall advanced the Laffey matrix, Ms. Hall did not brief this issue extensively. The most extensive discussion is found in Ms. Hall's initial brief. See Pet'r Memorandum, filed April 19, 2009, at 2-3. Although Masias was issued while Ms. Hall's motion for attorneys' fees was pending, Ms. Hall did not request an opportunity to file an additional brief.

The plaintiffs' fee application included 36 affidavits. Some of the affidavits set forth the "actual rates charged by lawyers at some of the most prestigious law firms in Washington, D.C." Id. at 367 & n. 24, & 371-72. The plaintiffs proposed a matrix of different hourly rates for different attorneys, depending upon the attorney's experience. Id. at 371. The defendant did "not challenge Plaintiffs' proposed matrix as an accurate description of the prevailing market rate for lawyers of comparable skill and ability who represent defendants in complex Title VII cases." Id. at 372. The thrust of at least this portion of the parties' dispute was that the defendant argued that the plaintiffs' attorneys could not seek an hourly rate that exceeded the hourly rate paid by their fee-paying clients. Id. The district court rejected this argument. The district court, therefore, accepted the proposed hourly rates as within the range of reasonableness, although the rates were "generous." Id. at 374. After discussing other issues, the district court awarded plaintiffs attorneys' fees and costs of approximately $3.5 million.

The district court's order was appealed. One of the appellate issues was whether the district court was correct in using the hourly rate common in the marketplace, rather than the hourly rate typically charged by the plaintiff's attorneys. Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 11 (D.C. Cir. 1984). A majority of the panel determined that the district court had erred in this regard. Id. at 21-25. The majority held that the district court should have relied on the plaintiffs' attorneys' established billing rates in setting compensation, rather than on rates prevailing in the community. One judge dissented. Id. at 31. The majority discussed the matrix only in passing. Id. at 19 n.98.

The appellate court's determination, itself, was challenged in Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (en banc). The en banc Court of Appeals for the D.C. Circuit overruled the panel's decision in Laffey. Id. at 1524. Cumberland Mountains approved the matrix developed by the district court in Laffey. Id. at 1525.

After Laffey, the United States' Attorney's Office for the District of Columbia adopted the matrix used by the district court in Laffey. The United States Attorney's Office also updated the matrix by increasing it, annually, to reflect changes in the Consumer Price Index. Covington v. District of Columbia, 839 F. Supp. 894, 900 (D.D.C. 1993). In the litigation underlying Covington, the plaintiffs' attorneys submitted the updated Laffey matrix as support for their request for attorneys' fees. The district court determined that the reasonable hourly rate for these attorneys was reflected in the updated Laffey matrix. Id. at 898-900.

The district court's award was appealed. A majority of the panel found that the trial judge did not abuse his discretion in setting the hourly rates. Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995). In reaching this decision, the panel majority stated that the Laffey matrix is "a useful starting point." Id. at 1109. One judge dissented. Id. at 1112. According to the dissent, the D.C. Circuit has "not considered whether the broad Laffey matrix constitutes 'specific evidence' of rates charged for 'similar' work performed irrespective of the nature of the litigation." Id. at 1113 (footnote omitted).

District court judges and magistrate judges in the United States District Court for the District of Columbia have awarded attorneys' fees based on the Laffey matrix in a variety of different cases. "In the ensuing twenty-five years [after the district court's opinion in Laffey], this scheme, the Laffey matrix, has achieved broad acceptance in this Circuit and has served as a guide in nearly every conceivable type of case." Miller v. Holzmann, 575 F. Supp. 2d 2, 14 (D.D.C. 2008) (citing cases). The Circuit Court's opinion in Covington is actually a consolidated appeal of three cases involving the rights of prisoners, the First Amendment, and disability discrimination. Covington, 57 F.3d at 1103. Other examples include: Falica v. Advance Tenant Svcs., 384 F. Supp. 2d 75, 78-79 (D.D.C. 2005); Salazar v. Dist. of Columbia, 123 F. Supp. 2d 8, 13 (D.D.C. 2000); Blackman v. District of Columbia, 59 F. Supp. 2d 37, 43 (D.D.C. 1999); Jefferson v. Milvets System Technology, Inc., 986 F. Supp. 6, 11 (D.D.C. 1997); Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin., 985 F. Supp. 1, 9-10 n.3 (D.D.C. 1997); Martini v. Fed. Nat'l Mtg Ass'n, 977 F. Supp. 482, 485 n.2 (D.D.C. 1997); Park v. Howard University, 881 F. Supp. 653, 654 (D.D.C. 1995); see also Bd. of Trustees of Hotel and Rest. Employees Local 25 v. JPR, Inc., 136 F.3d 794, 806-07 (D.C.Cir. 1998)

The widespread acceptance of the Laffey matrix is not universal. In some cases, judges have not awarded attorneys' fees in accord with the Laffey matrix.

In a "relatively simple and straightforward" case brought pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), the attorneys representing plaintiffs were not awarded Laffey matrix rates. Agapito v. District of Columbia, 525 F. Supp. 2d 150, 155 (2007), appeal dismissed No. Cir. 08-7004, 2008 WL 1868311 (D.C. Cir. Apr. 18, 2008). The district court, instead, found the reasonable hourly rate to be consistent with a matrix developed by the District of Columbia Public Schools for setting rates for attorneys in IDEIA cases. Id.

The Laffey matrix rates were used as a starting point, and then discounted, in Muldrow v. Re-Direct, Inc., 397 F. Supp. 2d 1 (D.D.C. 2005). The district court judge characterized the action as "a relatively straightforward negligence suit." Id. at 4. More specifically, the plaintiff established that Re-Direct's failure to care for her son, Kenneth, while he was in Re-Direct's care pursuant to a contract with the District of Columbia Youth Services Administration caused his death. Id. at 2.

For their work, the plaintiff's attorneys sought compensation at an hourly rate of $596 per hour for one attorney, and $305 per hour for another attorney. Id. at 3. The court declined to award those rates. The district court reduced the rates by 25 percent because, in part, the attorneys' work was not comparable to the complex litigation that underlies litigation for which Laffey matrix rates are appropriate. Id. at 4-5.

Agapito and Muldrow demonstrate that even within the District Court for the District of Columbia, the Laffey matrix does not determine an attorney's reasonable hourly rate absolutely. Instead, further analysis is required.

(2) Relevant Legal Community

In the lodestar analysis, "a reasonable hourly rate is 'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348 (quoting Blum, 465 U.S. at 896 n.11.). As the person applying for fees, Ms. Hall bears the burden "to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Rupert v. Sec'y of Health & Human Servs., 52 Fed. Cl. 684, 687 (2002), citing Blum.

In the decision underlying Rupert IV, the special master determined the prevailing market rate based upon the testimony of three attorneys who "represent plaintiffs and defendants in a variety of matters." Rupert v. Sec'y of Health & Human Servs., No. 99-774V, 2002 WL 31441211, at *4 (Fed. Cl. Spec. Mstr. Aug. 26, 2002) (Rupert III) (citing transcript). On appeal, respondent argued that the special master's determination was in error because the special master "failed to establish the manner in which complex litigation is comparable to the services provided by an attorney in a Vaccine Act case." Rupert IV, 55 Fed. Cl. at 299. The judge of the United States Court of Federal Claims observed that respondent's criticism was "correct." Nevertheless, Rupert IV continued, stating "The record on review, however, supports a finding that certain types of civil matters are comparable to Vaccine Act practice." Id. at 300; accord id at 304 (stating "The record supports a finding that the most comparable practice to Vaccine Act work is complex civil matters, not plaintiff's personal injury, medical malpractice, and personal liability work"). This determination was based upon the judge's review of the record in Rupert, which included testimony from at least seven witnesses and two days of hearing. That record is much more extensive than the record developed in this case. Rupert IV did not explain why "complex civil matters" are comparable to work pursuant to the Vaccine Act, although the witnesses whose testimony was reviewed probably provided that basis.

Rupert IV holds that the record may support (and in Rupert did support) a finding that "certain types of civil matters are comparable to Vaccine Act practice." This holding, however, provides little direction because the "certain types of civil matters" are not defined. A close reading of Rupert IV indicates that the attorneys whose testimony was credited practice in the fields of "civil rights, commercial litigation, shareholder derivative actions, and for providing the service of 'good counsel.'" Rupert IV, 55 Fed. Cl. at 299. Beyond providing these examples, Rupert IV did reject some fields. Rupert IV stated that "[t]he court's own review of the record confirms that respondent failed to mount an adequate case for including in the lodestar analysis rates paid to defense attorneys in the personal injury, products liability, and medical malpractice

fields." Rupert IV, 55 Fed. Cl. at 304.[7] These factors from Rupert IV are the basis for the analysis of the evidence presented in this case.

(3) Transferrability of *Laffey* Matrix Rates to Vaccine Program

(a) Required Elements

As discussed above, the market rate for attorneys must be based upon "the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348 (quoting Blum, 465 U.S. at 896 n.11.) (emphasis added). Thus, a fundamental question is whether the lawyers who are being compared provide "similar services." See Beard, 31 F.3d at 956 (quoted at page 9 above). If the answer to this question is "no," then the comparison is inapt.[8] The burden of establishing the similarity in services is on the fee-applicant. Rupert II., 52 Fed. Cl. at 687, citing Blum.

Respondent incorporated her arguments from Masias. In Masias, respondent argued that Laffey rates are not appropriate because attorneys in the Vaccine Program do not provide similar services. See Masias 2009 WL 1838979, at *17, citing Resp't Resp., filed Mar. 24, 2008, at 8-9.

There appears to be some tension between, on the one hand, judges within the District Court for the District of Columbia and, on the other hand, the only appellate decision discussing how special masters should establish the hourly rate for attorneys in the Vaccine Program. The D.C. District Court has generally relied upon the Laffey matrix.[9]

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[7] Rupert IV appears to have rejected the comparison between work pursuant to the Vaccine Act and work performed by attorneys defending insurance companies because of the testimony of the witnesses. Rupert IV, 55 Fed. Cl. at 304. This ruling appears to leave open the question that a more persuasive factual presentation by respondent could lead to a different result. Even if that were possible, respondent has not presented any evidence in this case.

[8] An extreme example is that no one suggests that an attorney who counsels large corporations about the anticipated response to a proposed merger of two competitors would provide a useful frame of reference for determining the hourly rate for an attorney in the Vaccine Program, even if the anti-trust attorney worked in the relevant community and had graduated from law school in approximately the same time as the attorney in the Vaccine Program. The differences between anti-trust work and Vaccine Program litigation would be too great.

[9] In Laffey itself, the District Court judge stated one factor to consider in setting the reasonable hourly rates is the "type of work involved" meaning "the substantive legal issues raised in the case." Laffey, 572 F.Supp. at 371 n.30 (citing Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 59 (D.C. Cir. 1982)).

Miller demonstrates the approach taken in most cases by the District Court for the District of Columbia. Mr. Miller prevailed in his claim, as a relator, pursuant to the False Claims Act. The defendants were ordered to pay $90 million and Mr. Miller sought an additional $20 million in attorneys' fees and costs. Miller, 572 F. Supp. 2d at 4. Mr. Miller's attorneys sought compensation at the hourly rate they normally billed. Id. at 12-13. These hourly rates were approximately 40% higher than the rates in the updated Laffey matrix. Id. at 15.

The defendants opposed the proposed hourly rates. Their argument resembles the argument made by respondent in this case. "Whereas relator appears to define 'similar services' in terms of complex, federal-court civil litigation, defendants insist 'similar' must be construed more narrowly. . . . In their view, the hourly rates typically charged by FCA relators' counsel are the benchmark against which this Court should evaluate relator's requested rates." Id. at 14 (citation omitted).

The district court rejected the defendants' argument. The decision states "case law in this Circuit does not support the Balkanized approach to fee calculation that defendants advocate. . . . The generic matrix's use in such a diverse range of cases cuts against defendants' argument that reasonable rates can be derived from data peculiar to a case's legal specialty area." Id. The district court, therefore, compensated the attorneys, who had submitted information about their established billing rates, at those rates. Id. at 17. The district court, ultimately, awarded more than $7 million in attorneys' fees. Id. at 59.

The Vaccine Program has only one appellate case explaining how to determine the relevant comparison for attorneys within the Vaccine Program, Rupert IV. Rupert IV followed a different approach. In Rupert IV, a judge at the Court of Federal Claims determined that the evidence from some attorneys about the reasonable hourly rate was not relevant because those attorneys practiced in areas not comparable to work in the Vaccine Program.

Rupert IV explains "The record on review, however, supports a finding that certain types of civil matters are comparable to Vaccine Act practice." Id. at 300; accord id. at 304 (stating "The record supports a finding that the most comparable practice to Vaccine Act work is complex civil matters, not plaintiff's personal injury, medical malpractice, and personal liability work").

Therefore, it appears that Rupert IV does require finding some similarity in the services provided by the attorney whose rates are known and the Vaccine Program attorney whose rates are being determined. Although Rupert IV is not binding precedent in this case, Rupert IV is persuasive and will be followed for three reasons.

First, Rupert IV follows the Supreme Court's statement in Blum that the hourly rate should be based upon the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum, 465 U.S. at 896 n.11. Although decisions from the D.C. District Court also cite Blum when they follow the Laffey matrix, these

decisions have relatively little analysis as to why the particular attorney's work was similar to the attorneys' work in Laffey. See Covington, 57 F.3d at 1113 (Henderson, J., dissenting) (noting that the D.C. Circuit has "not considered whether the broad Laffey matrix constitutes 'specific evidence' of rates charged for 'similar' work performed irrespective of the nature of the litigation.") (footnote omitted). Although all the cases seem to involve litigation of one type or another, litigation requires different skills. To the undersigned, the dissenting judge's point that the type of litigation affects the reasonable hourly rate is persuasive.

Second, Rupert IV also appears consistent with Blanchard v. Bergeron, 489 U.S. 87, 95 (1989). In Blanchard, the Supreme Court quoted the legislative history of one of the commonly used fee-shifting statutes as stating that "Congress 'intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation.'" Id., quoting S. Rep. No. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913. The reference to "equally complex Federal litigation" suggests that some types of Federal litigation are not as complex as other federal litigation.

Third, Agapito and Muldrow demonstrate that even within the District Court for the District of Columbia, the Laffey matrix is not the final word on the topic of hourly rates.

For these reasons, Ms. Hall is required to demonstrate that the attorneys whose rates are being compared provide similar services. This determination, while against the general trend of decisions from the District Court for the District of Columbia, is in line with the more specific guidance provided by Rupert IV and the limited views expressed by the Supreme Court in Blum and Blanchard.

(b) Evidence that Skill Sets Are Similar

i) *Laffey*

Ms. Hall has not established that the services performed by Mr. Gage are comparable to the services performed by attorneys under the Laffey matrix. The information about Laffey itself shows significant contrasts with Ms. Hall's case. Both were litigated cases, but that appears to be about the only similarity. Laffey was a relatively early case in Title VII litigation that prompted two appellate decisions regarding the underlying litigation. It was "an important one which furthered the goals of both Title VII and the Equal Pay Act." Laffey, 572 F. Supp. at 377. The plaintiffs were represented by "one of the 'premier' employment discrimination firms in the country." Id. at 372; accord id. at 374. The case ultimately generated more than $52 million in backpay for more than 3,000 people. The district court, therefore, used its discretion to set the hourly rates in its now well-known matrix at a "generous" rate. Id. at 374.

Ms. Hall's case is much different. To resolve the merits phase of her case, no appellate review was required. Her case did not present any novel issues of law. The case concerned only Ms. Hall, not a thousand other people. The litigation was simpler in Ms. Hall's case.

The Laffey rates were based upon "a barrage of data, including twenty-five attorney affidavits." Laffey, 572 F. Supp. at 371. Although the practice area of the 25 affiants was not provided, the defendant did "not challenge Plaintiffs' proposed matrix as an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases." Id. at 372 (emphasis added). Because the original Laffey matrix rates seem to correspond to, if not actually derive from, the rates paid to defense counsel, it appears that the original Laffey matrix rates did not have a contingency or risk factor built into them.

Successive updates of the Laffey matrix have not injected a contingency factor into the matrix. The updates are done by indexing the rates to the Consumer Price Index, which ensures that inflation does not erode the value. Fee Appl'n, tab F, at pdf 107. Because this updating is purely mathematical, the ultimate basis for the Laffey matrix remains based on the "barrage of data" submitted to the District Court in Laffey, 572 F. Supp. at 371.

On the whole, Ms. Hall has failed to establish the similarity between the skills of the attorneys in Laffey and the skills of attorneys in a Vaccine Program case. The differences, which are also discussed in the next section, are too great.

ii) Affidavits in Support of Vaccine Litigation as Complex Litigation

Ms. Hall argued from a premise that Laffey matrix rates have been used in various types of "complex federal litigation." This premise is well-supported. See section II.B.2.b.(1) above describing cases that have awarded hourly rates based upon the Laffey matrix. From this point, Ms. Hall argued that the Vaccine Program is just another type of complex federal litigation. See Pet'r Memorandum, filed April 17, 2009, at 4. Thus, Laffey matrix rates can be used in the Vaccine Program, just as they have been in cases brought pursuant to Title VII, or the Clean Air Act.

Ms. Hall filed an affidavit from A. Leroy Toliver to support an assertion that litigation in the Vaccine Program is comparable to complex federal litigation. Fee Appl'n, tab F, at pdf 104-05. Information from the Clerk's Office indicates that Mr. Toliver represented eight petitioners in Vaccine Program cases filed in 1992 or earlier. Mr. Toliver also represented one petitioner in a case filed in 1999, and which closed in 2000. Mr. Toliver appears not to have represented any petitioner in the Vaccine Program after 2000.

Mr. Toliver's assertion that the Vaccine Program is complex is conclusory. He provides little, if any, reasoning that underlies his conclusion that the Vaccine Program is complex.

Determining whether litigation in the Vaccine Program is "complex" is difficult because the meaning of the term "complex litigation" is not especially clear. Comparing litigation in the Vaccine Program to other forms of litigation does not illuminate the matter. For example, is tax

litigation simple or complex? Some cases involving an individual's tax return present one or two issues. E.g., Gluck v. United States, 84 Fed. Cl. 609 (2008). Other cases involving a corporation's tax return require lengthy analysis. E.g., Exxon Corp. v. United States, 45 Fed. Cl. 581 (1999), aff'd in part and rev'd in part, 244 F.3d 1341 (Fed. Cir. 2001). Similarly, decisions involving "government contracts" can be simple or involve a lengthy analysis. This variability in tax litigation or government contracts litigation reduces the usefulness in comparing litigation in the Vaccine Program to those forms of litigation.

To some degree, all litigation involves two different components. First, there is the subject matter of the litigation. In the Vaccine Program, the subject is how a human being responded to a vaccine. Knowledge about this topic is founded on the science of medicine as well as other related disciplines. The second component is the set of skills that an attorney learns in law school. These include obtaining information, presenting a case in an organized and persuasive manner, and advocating for a result.

On the first aspect, the Vaccine Program appears to be complex. "Complex" means "marked by an involvement of many parts, aspects, details, notions, and necessitating an earnest study or examination to understand or cope with." Webster's Third New Internat'l Dictionary 465 (2002). Medical science does not have perfect knowledge about how human beings respond to vaccines. Sometimes, a doctor's idea about what happened to a person rests on (educated) opinions, rather than universally-accepted data. The gap between what medical science "knows" and what is happening to the person specifically creates uncertainty. Moreover, as medical science continues to advance, ideas that are generally accepted are subject to revision. Thus, the medicine is very complex.

Almost every off-Table case requires the testimony of a doctor. Usually, the witness has more training than merely medical school. The typical doctor has specialized in a particular field and is usually board-certified in one or more disciplines. Most doctors have practiced medicine for more than ten years. Many doctors have taught medical students and have published articles in peer-reviewed journals. Yet, despite years of training and experience, often two experts do not agree on the primary factual question – did the vaccine cause the petitioner any harm?

Developing some knowledge about medicine assists special masters in weighing the persuasiveness of the testimony. Lampe v. Sec'y of Health & Human Servs., 219 F.3d 1357, 1362 (Fed. Cir. 2000) (deferring to special master's expertise in weighing persuasiveness of experts' theories); Sword v. United States, 44 Fed. Cl. 183, 188 (1999) ("even more than ordinary fact-finders, this Court has recognized the unique ability of Special Masters to adjudge cases in the light of their own acquired specialized knowledge and expertise"). What is good for the bench is also good for the bar. The attorneys who represent petitioners or who represent respondent usually advocate for their client more effectively when the attorneys have some familiarity with medical concepts.

This familiarity, in turn, diminishes the apparent complexity of cases in the Vaccine Program. An attorney handling his or her first case in the Vaccine Program may well believe that the medicine is complex. However, causation-in-fact in Vaccine Program cases often present recurring issues. For example, "molecular mimicry" is often asserted as the theory to explain how a vaccine can cause a particular illness. "Molecular mimicry" may appear "complex" the first time that an expert attempts to describe it. But, when "molecular mimicry" appears in a third or fourth (or tenth) case, the theory is not as bewildering. Because petitioners are not required to establish precisely how the vaccine caused the injury, Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 549 (Fed. Cir. 1994); the medicine in Vaccine Act cases is not as complex as it might appear.

While understanding the underlying medicine – which may or may not be "complex" – is one part of the attorney's duty, the attorney has other responsibilities. One of the attorney's responsibilities is to translate the underlying medical information into a legal framework. Here, the Vaccine Program lessens the litigating attorneys' burden. The Vaccine Program was intended to be a less litigious, less adversarial form of adjudication. Although reasonable people may differ as to whether the Vaccine Program has achieved this goal, some aspects of Vaccine Program litigation are much simpler. For example, Ms. Hall was not required to establish any culpability on the part of respondent, that is, Ms. Hall was not required to show any negligence, design defect, or failure to warn that would have been required if Ms. Hall pursued one or more common law torts. In practice, Ms. Hall did not have to obtain information from the vaccine manufacturer's files and, therefore, avoided the challenges of using various discovery devices to obtain this information.

The relative ease of litigation in the Vaccine Program is illustrated by comparing Ms. Hall's burden of proof in her litigation here with Ms. Hall's burden of proof if she pursued an analogous action in state court. In the Vaccine Program, Ms. Hall's burden was to establish, by a preponderance of the evidence, that the hepatitis B vaccine caused an injury to her shoulder. Althen v. Sec'y of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). If Ms. Hall were to have pursued an action in Colorado state court for either products liability or medical malpractice, she would have been required to establish causation plus some culpability on the part of the defendant. See Palmer v. A.H. Robins Co., 684 P.2d 187, 209 (Colo. 1984); see also Redden v. SCI Colo. Funeral Servs., 38 P.3d 75, 81 (Colo. Ct. App. 2001).

The legal elements are not the only way that litigation in the Vaccine Program differs from litigation in other fora. At several stages, litigation in the Vaccine Program deviates from the typical path of litigation in district courts.

The first point of departure may be the filing of the petition. The Vaccine Act states that petitions "shall contain" medical records, 42 U.S.C. § 300aa–11(c). Here, Ms. Hall filed her first set of medical records with the petition. However, this statute has not prevented petitioners from filing petitions without medical records. See Stewart v. Sec'y of Health & Human Servs., No. 02–819V, 2002 WL 31965743 *3-7 (Fed. Cl. Spec. Mstr. Dec. 30, 2002) (denying motion to

dismiss a petition filed without medical records). Ms. Hall filed the report of her expert, Dr. Ralph Round, on May 9, 2003. Exhibit 17.

A second difference between litigation in the Vaccine Program and traditional litigation in state courts is that there is no discovery by right in the Vaccine Program. Petitioners and their experts are not subject to deposition before a hearing. Although each party usually submits a report from the expert, the respondent cannot question petitioner's expert until the hearing. Respondent has little opportunity to explore the basis for the petitioner's expert's opinion.

After both sides have filed expert reports, the next stage of a case is a hearing. A hearing in the Vaccine Program simplifies the petitioner's burden in at least two respects. First, the factual findings are made by a special master, not a jury. Due to the special master's background, petitioners are not required to explain basic medical concepts. The special master can also assist petitioners, to some degree, because the special master, sua sponte, can present evidence that supports an award of compensation. 42 U.S.C. § 300aa–12(d)(3)(B); Munn v. Sec'y of Health & Human Servs., 21 Cl. Ct. 345, 349 (1990), aff'd, 970 F.2d 863 (Fed. Cir. 1992).

Another factor that makes petitioner's burden in the Vaccine Program relatively less than in a traditional tort system concerns the admission of evidence. The Vaccine Program does not require evidence to be admitted pursuant to the Federal Rules of Evidence. 42 U.S.C. § 300aa-12(d)(2)(B), (E); Vaccine Rule 8. In practice, the relaxed standards for admitting evidence means that there are fewer objections to the introduction of evidence. Because petitioners bear the burden of proving their cases with evidence, the lack of formal rules of evidence helps petitioners.

All of these distinctions should be considered in evaluating whether litigation in the Vaccine Program constitutes "complex" litigation. The affidavit presented by Ms. Hall does not address these differences. Instead, Mr. Toliver's affidavits assert without much reasoning that the Vaccine Program is complex litigation. Fee Appl'n, tab F, at pdf 104-05. If future affiants explain the basis for why they conclude that the legal work in the Vaccine Program is "complex," then this issue may be resolved with a more developed record.

Similarly, arguments from Ms. Hall's brief miss the mark. Ms. Hall focuses on the complexity of the underlying subject matter. Pet'r Memorandum, filed April 17, 2009, at 4-5. But, this focus overlooks any discussion as to whether the attorney needs specialized skills. In the experience of the undersigned, attorneys who are representing a petitioner in the Vaccine Program for the first time represent their clients competently. Some of these new attorneys achieve results that are comparable to the results achieved by attorneys who have represented hundreds of petitioners. These examples demonstrate that the Vaccine Program is not so complex that decades of experience are necessary.

In short, Ms. Hall's argument that cases in the Vaccine Program are examples of complex Federal litigation is not persuasive. Cf. Arnesen v. Principi, 300 F.3d 1353 (Fed. Cir. 2002)

(determining whether an appeal of a denial of veterans' benefits is simple or complex is a factual question).

(4) Other Evidence of Forum Rates

Respondent did not file any evidence about the forum rate directly into the record of this case. However, respondent did reference materials she submitted into the record in Masias. Resp't Opp'n, filed May 19, 2009, at 6.

In Masias, the undersigned found that a reasonable rate for experienced attorneys from Washington, D.C. who represent petitioners in the Vaccine Program was $250 to $375. Masias, No. 99-697V 2009 WL 1838979, at *25.

Another special master found essentially the same rate in Rodriguez v. Sec'y of Health & Human Servs., No. 06-559V, 2009 WL 2568468 (Fed. Cl. Spec. Mstr. July 27, 2009). After analyzing a wide scope of evidence, some of which was the same as information presented in Masias and some of which differed, the special master in Rodriguez found that a reasonable hourly rate for attorneys with more than 20 years of experience and with considerable experience in the Vaccine Program was $275-$360 per hour, depending on the year the work was performed. Id. at 15.

(5) Analysis of Evidence

As set forth in Avera, the forum for Vaccine Program cases is the city of Washington, D.C. Avera, 515 F.3d at 1348. Importantly however, the Federal Circuit has not determined that Laffey matrix rates should "play any role in the determination of fees under the Vaccine Act where forum rates are utilized." Avera, 515 F.3d at 1350.

Although the standards used to determine an attorney's reasonable hourly rate are set forth in section II.B.1.a.(1) above, a summary of these standards is: "In the typical lodestar analysis, the parties present a range of market rates for lawyers of differing skill levels, and the court interpolates the prevailing market rate by assessing and applying the skill demonstrated in the instant case to that range." Rupert II, 52 Fed. Cl. at 687.

First, evidence from the Laffey matrix is not relevant. As explained above, litigation in the Vaccine Program is simpler than the "complex federal litigation" that has been the subject of awards using the Laffey matrix by the District Court for the District of Columbia. Ms. Hall has not met her burden of establishing that attorneys under the Laffey matrix provide "similar services." Masias made this distinction, Masias, No. 99-697V, 2009 WL 1838979, *17; and the undersigned's decision was cited with approval by a judge of the United States Court of Federal Claims. First Fed. Savings & Loan Ass'n of Rochester v. United States, ___ Fed. Cl. ___, 2009 WL 2430666, at *9 (Aug. 6, 2009). Ms. Hall has not offered any arguments addressing the undersigned's decision in Masias.

Second, the analysis in Rodriguez is persuasive. Although judges from the Court of Federal Claims have yet to rule upon the recently filed motions for review, Masias and Rodriguez were decided after lengthy analysis. The fact that another special master independently arrived at the approximately the same conclusion as the undersigned did in Masias reinforces the reasonableness of the decisions.

Based upon this information, a reasonable range for attorneys with ten or more years of experience providing services in the Vaccine Program in Washington, D.C. is $250 to $375 per hour. Within this range, Mr. Gage would be compensated toward, but not at the very top. If some room is left, then the reasonable rate for Mr. Gage, if he practiced in Washington, D.C., is $350 per hour.

c. Comparison of Local Rate to Forum Rate

Avera states that "forum rates" should be used to determine an attorney's hourly rate, except when two factors identified in Davis County are met. In the present case, these two factors are present**.** The first factor is fulfilled when "'the bulk of [an attorney's] work is done outside the jurisdiction of the court." Here, the relevant geographic area is Washington, D.C., where the United States Court of Federal Claims is located. Avera, 515 F.3d at 1348.

There is no evidence to indicate that Mr. Gage or any of his associates performed any work within the District of Columbia. Although several status conferences were held, all appear to have been telephonic. (Status conferences in which the attorneys appear by telephone happen very frequently in the Vaccine Program. The contrast – in-person status conferences – is sufficiently rare that they would be noted in the docket of the case.) The November 19, 2003 hearing was held in Denver, Colorado.

The second factor is whether "there is a very significant difference in compensation favoring D.C." What constitutes a "very significant difference" is not defined. Avera, itself, indicates that a very significant difference exists when the local rate is $200 and the petitioner claims that the Washington, D.C. rate is $598. Avera, 515 F.3d at 1349-50. Avera also cited with approval the finding in Davis County that local rates were appropriate when rates in Washington, D.C. were 70 percent higher.

A few cases have determined whether a difference between proposed rates for the forum and local rates are "very significant." Three cases have arisen within the Vaccine Program. In Sabella, (a decision by the undersigned) the local rate for the petitioner's attorney, Mr. Shoemaker, was $300 per hour. Sabella also assumed that the forum rate was $440 per hour, which was the lowest rate advanced by Mr. Shoemaker. The resulting difference in rates (46 percent) was found to be a "very significant difference." Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040, at *5 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), rev'd on non-relevant ground, 86 Fed. Cl. 201 (2009).

On appeal to a judge of the Court of Federal Claims, this determination was mentioned. Sabella, 86 Fed. Cl. at 207. However, it appears that Mr. Sabella did not challenge the finding that a 46 percent difference in rates constituted a "very significant difference" because the appellate decision did not analyze this conclusion.

In Masias, the undersigned found the local rate was $220 per hour and the forum rate was $350. The difference (59 percent) was found to be "very significant." Masias, 2009 WL 1838979, at *26.

Rodriguez presented an unusual situation in that the local rate for the attorney, who worked in New York City, exceeded the forum rate. The attorney's geographic rate was $450 per hour.[10] The local rate was $275 per hour. The special master found that the difference between these rates, which was more than 60%, was very significant. Rodriguez, 2009 WL 2568468, at *16.

Outside of the Vaccine Program, in a case brought pursuant to the Clean Air Act, an attorney for the prevailing plaintiff proposed that the forum rate for Washington, D.C. was approximately $360 per hour. The Court determined that the comparable rate in Kentucky was approximately $225 per hour. The Court ruled that this difference was significant and awarded compensation at $225 hour. Rocky Mountain Clean Air Action v. Johnson, D. D.C. Civil Action 06-1992, 2008 WL 1885333, at *1-3 (Jan. 28, 2008). The difference between the proposed rates in Rocky Mountain is 60 percent ($360/$225 minus 1).

Here, the difference between the appropriate local rate, which is $220 per hour, and the appropriate forum rate, which is $350, per hour, is 59 percent.[11] (The similarity to the figures in Masias stems from the fact that both Mr. Gage and Mr. Moxley practice in Cheyenne, Wyoming.)

The determination that a difference of 59 percent is a "very significant difference" is informed by the policy behind fee-shifting statutes. Fee-shifting statutes are "not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986). Rather, fee-shifting statutes "enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." Id. As stated by Avera, the exception found in Davis County is warranted because it "prevents a result that

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[10] The attorney's geographic rate came from his work in transportation law. Work in this area may or may not be comparable to cases brought pursuant to the Vaccine Act. Rodriguez, 2009 WL 2568468, at *4 n.16.

[11] If Ms. Hall had established that the appropriate rate for the forum was the Laffey matrix rate, then the difference between the local rate and the forum rate would be even greater.

'would produce windfalls inconsistent with congressional intent.'" Avera, 515 F.3d at 1349 (quoting Davis County, 169 F.3d at 759-60).

Here, increasing Mr. Gage's rate from $220 per hour to $375 per hour merely because he filed a petition in the Court of Federal Claims, which happens to be located in Washington, D.C. would constitute "a form of economic relief to improve the financial lot of attorneys" or a "windfall[] inconsistent with congressional intent." A judge at the Court of Federal Claims reached essentially this conclusion, albeit under different reasoning. Avera v. Sec'y of Health & Human Servs., 75 Fed. Cl. 400, 403 (2007), aff'd in relevant part under different grounds, 515 F.3d at 1348-50.

Undoubtedly, hourly rates for attorneys must be set at a rate that attracts qualified, competent attorneys to represent petitioners. See Delaware Valley, 478 U.S. at 565. This purpose, however, is not exclusive. (If attracting counsel were the only focus, attorneys could be paid two, three or four times the forum rate.) Attorneys are entitled only to "reasonable attorneys' fees." 42 U.S.C. § 300aa–15(e). Limiting attorneys to only a reasonable hourly rate recognizes that the source of payment is the "Vaccine Injury Compensation Trust Fund." 42 U.S.C. § 300aa–15(I). Payments to attorneys necessarily deplete the Trust Fund. By using the term "reasonable," Congress has charged special masters (and the judges who review decisions of special masters) to balance the competing concerns.

Ms. Hall presented one, and possibly two arguments, regarding whether a payment to Mr. Gage at rates paid to attorneys in Washington, D.C. would constitute a windfall. First, Ms. Hall argued that the Federal Circuit "is highly unlikely . . . [to] persist" in using the Davis County exception due to the Supreme Court's decision in Richlin Sec. Service Co. v. Chertoff, __ U.S. ___, 128 S.Ct. 2007 (2008). Pet'r Memorandum, filed April 17, 2009, at 7.

With regard to whether paying forum rates is "appropriate," the Federal Circuit has already determined this issue. For work performed outside of Washington, D.C., forum rates are appropriate when there is not "a very significant difference in compensation favoring D.C." Avera, 515 F.3d 1349. If Richlin is inconsistent with Avera, the Federal Circuit – and not a special master – should make that decision. Until the Federal Circuit instructs special masters not to consider whether an award would constitute a windfall, special masters must continue to follow Avera.

Additionally, the affidavit of Mr. Toliver could be interpreted to suggest that paying Mr. Gage at $325 per hour, which is $35 to $85 less than the amount requested by Mr. Gage, would not produce a windfall. Mr. Toliver asserts "Paying petitioner's counsel forum rates, (Washington, D.C. rates), would be appropriate. Doing so would also attract more attorneys to this program and would lower the number of pro se petitioners." Fee Appl'n, tab F, at pdf page 105. This argument is misdirected in the sense that Avera indicates that special masters should consider whether an award produces a windfall, not whether an award is likely to attract more

attorneys to the Vaccine Program. In addition, Mr. Toliver's point is not persuasive for at least three reasons.

First, an analysis of Mr. Toliver's policy-based argument (it is good to attract more attorneys to the Vaccine Program) must consider the advocate of this argument. Mr. Toliver's requests for attorneys' fees in his own cases (especially if Mr. Toliver resumed practicing in the Vaccine Program) could be increased if Mr. Gage were awarded higher rates. This self-interest does not mean that Mr. Toliver is untruthful or that the policy-based argument is wrong. An awareness of Mr. Toliver's self-interest means that his preferences must be evaluated with a grain of salt. A panel of the Eleventh Circuit expressed this point so persuasively that it warrants a lengthy quotation:

> Aside from the need to support those who support them, the lawyers who signed the affidavits have a financial interest in keeping the fee award in this case and every case like it as high as possible. The higher this fee award is the more useful it will be as precedent for the lawyer signing the affidavit when he seeks a high fee award in his own cases. The affiants are anything but "disinterested."
>
> The lodestar amount will never suffice for attorneys who practice in this area. They will always believe, in all sincerity, that they deserve more and that the justice system will function better if they are paid more. Lawyers who handle these kinds of cases cannot be disinterested witnesses because they are financially interested. To state this is not to slam lawyers in general or plaintiffs' lawyers in particular. It simply recognizes that because self-interest is hard-wired into human circuitry, no group is disinterested when it comes to the question of what members of the group are to be paid. Cf. H.L. Mencken, A Little Book in C Major 22 (John Lane Co. 1916) ("It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.").

Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209, 1231-32, reh'g en banc denied, 547 F.3d 1319 (11th Cir. 2008), cert. granted, __ U.S. __, 2009 WL 229762, 77 USLW 3442, 77 USLW 3553, 77 USLW 3557 (U.S. Apr 06, 2009) (No. 08-970).

Second, Mr. Toliver appears to be operating under outdated and mistaken beliefs. Mr. Toliver was counsel of record in cases from the early 1990's, and in one case a few years later. When Mr. Toliver was active in the Vaccine Program, the Vaccine Act restricted awards of attorneys' fees and costs. First, the Act imposed a $30,000 cap for all expenses related to lost earnings, pain and suffering and reasonable attorneys' fees and costs related to any vaccine-related injury that occurred before October 1, 1988. 42 U.S.C. § 300aa-15(b) (2000). Cases that

sought compensation for an injured petitioner caused by a vaccination before February 1, 1991, are referred to as "pre-Act cases." See Massard v. Sec'y of Health and Human Servs., 25 Cl. Ct. 421, 423 (1992). In these pre-Act cases, Section 15(b) of the Act limited the award of lost wages, pain and suffering and "reasonable attorneys' fees and costs" to $30,000 or less. 42 U.S.C. § 300aa-15(b). The Federal Circuit enforced this statutory cap in Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991). Awards of attorneys' fees and costs in cases that involved vaccination that occurred after the effective date of the Act are governed by section 15(e) of the Act, which imposes only a "reasonable" limit on the amount of attorneys' fees.

In addition, prior to 1999, special masters generally considered $175 per hour to be a premium hourly rate, reserved only for experienced attorneys. Corder v. Sec'y of Health & Human Servs., No. 97-125V, 1999 WL 1427753, at *5 (Fed. Cl. Spec. Mstr. Dec. 22, 1999). This $175 cap was developed from a series of cases in 1992, and was removed by the end of 1999. See Corder, 1999 WL 1427753, at *5; see also Mandel v. Sec'y of Health and Human Servs., No. 92-260V, 1998 WL 211914, at *1 (Fed. Cl. Spec. Mstr. April 02, 1998); McKenney v. Sec'y of Health and Human Servs., No. 90-3951V, 1998 WL 409377, at *1 (Fed. Cl. Spec. Mstr. June 08, 1998).

This history in which attorneys' fees were limited is the background for evaluation of Mr. Toliver's affidavit. A. Leroy Toliver is listed as the attorney of record in ten Program cases, filed from 1990 through 1999. Seven of Mr. Toliver's cases were filed during 1990, and the remaining three cases were filed in 1992, 1995 and 1999, respectively. His final case in the Program closed in March 2000. Mr. Toliver litigated the majority of his Program cases before 1999, during a period when the court rarely awarded attorneys fees at an hourly rate more than $175.

After 2000, substantive changes in the Vaccine Program reduced or eliminated the limitations on compensation for attorneys' fees under which Mr. Toliver operated in the 1990s. In the 2008 Avera decision, the Federal Circuit allowed attorneys to seek interim awards of attorneys' fees and costs. In addition to these changes, hourly rates awarded to petitioners' attorneys have increased when attorneys have provided the requisite support for increasing their rates.

The method of awarding attorneys' fees and costs has changed dramatically since Mr. Toliver litigated his last case. Therefore, the undersigned finds that the experience of Mr. Toliver is outdated and not representative of the experience of Program attorneys and gives his affidavit little weight in this decision.

Third, Mr. Toliver appears to assume that few attorneys are willing to represent petitioners in this Program. Fee Appl'n, tab F, at pdf page 105. Of course, an individual's statement that he or she, personally, is not willing to represent petitioners will be accurate. But, the information about the petitioner's bar as a whole available from the Clerk's Office shows that this sentiment is not widely held.

In fact, the evidence available from the Clerk's Office indicates that the number of attorneys participating in the Program is expanding. (The following information excludes cases in which attorneys represent petitioners who alleged that a vaccine caused autism.) In 1996-97, six attorneys filed more than three petitions each. In 2006-07, five of these attorneys were still participating in the Program. The sixth attorney does not represent individual clients any longer. If the hourly rates were truly too low to attract attorneys, then presumably these firms would have stopped participating in the Program and would have found a better source of income. The continued involvement of these attorneys (as opposed to their arguments) suggests that the amount of compensation has been reasonable.

By 2006-07, an additional ten attorneys filed more than three petitions in a year. This increase in the number of attorneys who regularly represent petitioners also suggests that the compensation is reasonable. If these attorneys believed that the historical rates of compensation were not adequate, then these attorneys, presumably, would not have agreed to represent petitioners in the Program. See U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 722-26 (1990) (rejecting argument that fee structure in Black Lung program deprived claimants of property without due process).

These reasons counter the general thrust of Mr. Toliver's affidavit, which argued that Mr. Gage should be compensated at a high rate of compensation to attract more attorneys to the Vaccine Program. As discussed, Mr. Toliver's point seems to rest on several factual assertions that are at least questionable. But, more significantly, the legal test differs from what Mr. Toliver discussed. The Federal Circuit has determined that attorneys in the Vaccine Program are entitled to seek rates at the forum amount. Special masters should award forum rates except when the case falls into the two-part exception created by Davis County. Avera, 515 F.3d at 1348-49. This is the law that special masters must follow.

In indicating that forum rates are available, Avera cited one case from four courts of appeals that discuss the forum rate. One reason for adopting the forum rate is given in the earliest of these four cases, Donnell v. United States, 682 F.2d 240, 251 (D.C. Cir. 1982).

In Donnell, the plaintiffs sought a declaratory judgment from the United States District Court in the District of Columbia that a redistricting plan adopted for Warren County, Mississippi violated the Voting Rights Act. Seven people intervened as defendants. After the district court ruled against the plaintiffs, the intervening defendants sought their attorneys' fees. Some attorneys representing these defendants worked in Mississippi; other attorneys worked in Washington, D.C. Id. at 243-44.

As relevant to the discussion in Ms. Hall's case, the parties disputed whether the attorneys' fees should be calculated on the basis of where the attorney worked or where the lawsuit was filed. The D.C. Circuit explained:

> We recognize the logic on both sides of the argument, but hold that the proper rule is that the relevant community is the one in which the district court sits. This is a simple rule to follow. It requires the district court normally to determine only the prevailing market rate within its jurisdiction, an inquiry about which it should develop expertise. Moreover, it is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them. High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated. Although there may be cases, such as this one, where much of the work must be performed away from the district court's community, we do not believe that this alone provides a sufficient reason for deviating from the general rule. This position is consistent with that of other federal courts.

Donnell, 682 F.2d at 251-52.

The suggestion in Donnell that trial courts develop expertise about the fees within their jurisdiction is probably easier for the district courts than for the Office of Special Masters. The Office of Special Masters decides only one type of case, cases brought pursuant to the Vaccine Act. On the other hand, these cases arise throughout the country. Thus, although special masters have developed an expertise in evaluating the reasonableness of hourly rates for attorneys in the Vaccine Program across the country, special masters have relatively little experience in determining the reasonableness of hourly rates in the forum of the Office of Special Masters, which is Washington, D.C.[12]

Furthermore, after Donnell, the Supreme Court has restricted, to some degree, the size of awards of attorneys' fees. See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-66 (1986) (rejecting most enhancements to lodestar calculation because fee-

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[12] Judges at the Court of Federal Claims appear to face similar issues in the sense that they resolve cases within particular subjects that may arise in any location across this country. Some (but not all) of the statutes provide for attorneys' fees. But, the hourly rate for attorneys appearing before judges at the Court of Federal Claims is usually (but not always) set in the Equal Access to Justice Act.

However, a judge of the Court of Federal Claims awarded attorneys' fees at a maximum requested rate of $315 per hour for work performed in a Winstar-type litigation by a law firm in Washington, D.C. First Federal Sav. and Loan Assn'n of Rochester v. United States, __ Fed. Cl. __, 2009 WL 2430666, at *9 (Aug. 6, 2009). The work in that case was performed from 1995 until 2008.

shifting statutes "are not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client").

As applied in Ms. Hall's case, the forum rule (or, more precisely, the Davis County exception to the forum rule) does not increase the hourly rate of compensation for Mr. Gage.

d. Determination of a reasonable hourly rate for Mr. Gage

After Mr. Gage began working at Richard Gage, PC., he increased his hourly rates. In February 2004, Mr. Gage billed at a rate of $200 per hour. Fee Appl'n, tab E, at pdf 95. This rate was consistent with the rate eventually awarded to him in Hart. The earlier Interim Fees Decision compensated Mr. Gage at this rate.

In February 2006, Mr. Gage billed $360 per hour. Fee Appl'n, tab D, at pdf 27. In two years, Mr. Gage's hourly rate increased 44 percent ($360 - $200 / $360). After February 2006, Mr. Gage periodically increased his rate. In June 2008, Mr. Gage was charging $410 per hour. Fee Appl'n, tab D, at pdf 35. From February 2006 to June 2008, Mr. Gage's rate increased by 12 percent ($410 - $360 / $410). The primary issue in this decision is whether Mr. Gage is entitled to be compensated at these rates.

The earlier portions of this decision explain why Mr. Gage, an attorney working in Cheyenne, Wyoming, should not be compensated at the rate used to compensate attorneys working in Washington, D.C. In short, the evidence does not support an award of forum rates to Mr. Gage. The Davis County exception removes this case from the forum rule established by Avera. Therefore, in this case, for work performed after January 2006, Mr. Gage will receive an hourly rate of $220-$240 per hour.

The time periods for Mr. Gage's rate changes appear in the chart presented as table 5 in the appendix.

2. Determination of the Reasonable Number of Hours for Mr. Gage

The second factor in the lodestar formula is the reasonable number of hours. Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

> The [trial forum] also should exclude from this initial fee calculation hours that were not "reasonably expended.". . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important

> component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority."

Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). One reason a trial court possesses discretion to reduce the number of hours is that a trial court "is somewhat of an expert in the time that is required to conduct litigation." Case v. Unified School Dist. No. 233, Johnson County, Kansas, 157 F.3d 1243, 1256 (10th Cir. 1998).

A decision by a special master to reduce the number of hours is entitled to deference because special masters are familiar with the litigation. Saxton, 3 F.3d at 1521 (reversing decision of a judge of the Court of Federal Claims ruling that the special master acted arbitrarily in reducing number of hours); Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997).

Special masters are permitted to reduce the claimed number of hours to a reasonable number of hours by means of a bulk reduction. Special masters are not required to assess fee petitions line-by-line. Saxton, 3 F.3d at 1521 (approving special master's elimination of 50 percent of the hours claimed); see also Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming special master's reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec'y of Health & Human Servs., 32 Fed. Cl. 505 (1994) (affirming special master's awarding only 58 percent of the numbers of hours for which compensation was sought). When the trial court uses a percentage reduction, the trial court should provide a "'concise but clear' explanation of its fee reduction." Internat'l Rectifier Corp. v. Samsung Electronics, Co., 424 F.3d 1235, 1239 (Fed. Cir. 2005) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1993) and following Ninth Circuit law). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares, 801 F.2d at 1202-03 (10th Cir. 1986) (affirming district court's reduction in the number of hours claimed for pre-trial preparation by 77 percent).

In other contexts, judges at the Court of Federal Claims have reduced the number of hours in requests for attorneys' fees by percentages. See, e.g., Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 489 (2003) (reduction of 30% for supplemental fee petition); Presault v. United States, 52 Fed. Cl. 667, 681 (2002) (reduction of 20%).

Respondent objected to several time entries and argued that some of the time entries "consolidated multiple tasks into blocks of time without clearly delineating the time spent on any given task." Resp't Opp'n, filed May 19, 2009, at 7.

Respondent's argument has merit. Mr. Gage has not described his activities to allow a review of the reasonableness of the amount of time. Examples include several entries simply

described as "file review" in which the amount of time exceeded 30 minutes. Mr. Gage could easily have provided additional information about what he was reviewing, such as exhibits 3-4, respondent's report, the transcript, etc. See Turpin v. Sec'y of Health & Human Servs., No. 99-535V, 2008 WL 5747914, at *5 (Fed. Cl. Spec. Mstr. Dec. 23, 2008) (crediting petitioner's attorney for reviewing the records of specific doctors). The description need not be elaborate but the time entry must convey something more specific than the general description "file review." See Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir. 1995) (affirming trial court's decision to reduce number of compensable hours by 35 percent because the time records included, among other deficiencies, "unspecified or inadequately specified 'review' time"). The purpose of the additional three or four or five words is to allow respondent and the court to evaluate the reasonableness of the activity.

The time actually expended is not automatically the time reasonably expended. Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984); Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201, 210 (stating a special master "is not required to award fees and costs for every hour claimed, he need only award fees and costs that are reasonable"); Melbourne v. Sec'y of Health & Human Servs., No. 99-694V, 2007 WL 2020084, at *6 (Fed. Cl. Spec. Mstr. June 25, 2007) (citing Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)).

Most of these vague entries are for activities listed in 2007. Therefore approximately ten percent of the time entries for that year (or approximately six hours) are deducted from 2007.

2. Calculation of Mr. Gage's Lodestar Value

The lodestar calculation is the product of multiplying the reasonable hourly rate by the reasonable number of hours. This calculation is presented in the following table.

Year	Hours Requested	Hours Awarded	Hourly Rate (from table 5)	Subtotal
Jan 2006 - May 2006	4.1	4.1	$220.00	$902.00
June 2006 - Dec 2006	11.1	11.1	$220.00	$2,442.00
Jan 2007 - May 2007	43.6	39.3	$230.00	$9,039.00
June 2007 - Dec 2007	14.7	13.3	$230.00	$3,059.00
Jan 2008 - May 2008	10.6	10.6	$240.00	$2,544.00
June 2008 - Dec. 2008	9.5	9.5	$240.00	$2,280.00
Jan 2009 - April 2009	7.3	7.3	$240.00	$1,752.00
TOTAL	100.9	95.2		$22,018.00

C. Part Two: Adjustments to the Lodestar

After the lodestar amount is determined, the trial forum may adjust the lodestar upward or downward. Avera, 515 F.3d 1348. Because Mr. Gage is being compensated at rates from $220-$240, an adjustment to the lodestar is not required.

D. Summary for Attorneys' Fees

Ms. Hall is awarded $22,018 in attorneys' fees for work performed by Richard Gage, P.C. This amount is in addition to the amount of attorneys' fee ($42,065.50) that was awarded in the interim fee decision.

III. Costs

Ms. Hall also seeks an award for the costs incurred in prosecuting her action. The Interim Fee Decision resolved all but one issue relating to these costs. The one remaining item, which is decided now, is whether Ms. Hall is entitled to compensation for retaining Dr. Marcel Kinsbourne.

A. Standards for Adjudication

Ms. Hall is entitled to an award for the reasonable costs incurred by her attorneys. 42 U.S.C. § 300aa–15(e). The reasonable amount of an expert's compensation is determined using the same lodestar method used to determine the reasonable amount of compensation for an attorney. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at * 1; (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

"Reasonableness" may be evaluated from a paying client's perspective. The United States Supreme Court stated that "[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." Hensley, 461 U.S. at 433-34 (emphasis in original). If a hypothetical yet reasonable client would be willing to pay for an expert's report, then it is appropriate to award compensation for that expert's report. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 184 (2d Cir. 2008) (stating a trial court "must act later to ensure that the attorney does not recoup fees that the market would not otherwise bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively"); Goos v. National Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995) (phrasing the question as "would a private attorney being paid by a client reasonably have engaged in similar time expenditures"); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (recognizing that "in the private sector the economically rational person engages in some cost benefit analysis."); Presault v. United States, 52 Fed. Cl. 667, 680

(2002). The client must be pictured hypothetically because individual attributes of Ms. Hall (for example, her wealth or poverty) should not determine whether the cost is reasonable. Furthermore, it must be assumed that the client would have to pay for the expert because the client's self-interest would lessen the likelihood that the client would invest money in the expert needlessly.

One aspect of the general rule that costs must be reasonable to be compensable is that costs are not awarded for work that is not necessary. Duplicative work is presumptively unnecessary. Attorneys are not entitled to compensation for performing work that is not necessary. Hensley, 461 U.S. at 434. The same principle restricts experts. Kantor, 2007 WL 1032378, at *4-8.

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault, 52 Fed. Cl. at 670. When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970). On the other hand, special masters have also compensated experts when the petitioner failed to submit information about the expert's hourly rate. See, e.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805, at *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006). These principles are the basis for evaluating whether the cost of retaining Dr. Kinsbourne as requested by Ms. Hall is reasonable.

B. Dr. Kinsbourne

A brief review of the procedural history of this case is necessary to understand why the parties disagree about the reasonableness of retaining Dr. Marcel Kinsbourne.

To support her claim that she was entitled to compensation, Ms. Hall submitted a report from one of her treating doctors, Ralph Round. Exhibit 16. Dr. Round specializes in neurology. Exhibit 18. He testified at a hearing, which was held on November 19, 2003. At the time, Ms. Hall was represented by Kirk Morgan, an attorney who worked for Moxley & Gage, P.C. in 2003.

Following the hearing, the special master to whom the case was assigned encouraged the parties to consider resolving the case based upon the costs and risks of continued litigation. Order, filed June 8, 2005. These efforts were not successful. For reasons not entirely clear from the record, the case remained unresolved.

In 2006, the case was assigned to the undersigned. Based upon the undersigned's review of the documentary evidence and transcript, the undersigned also encouraged the parties to consider settling the case. The undersigned also permitted Ms. Hall to consider obtaining an opinion from another expert. Order, filed April 17, 2006; order, filed April 23, 2007.

In March 2007, Dr. Kinsbourne began reviewing Ms. Hall's medical records.[13] Between March 2007 and March 2008, Dr. Kinsbourne spent 16 hours on this case. For reviewing medical records, Dr. Kinsbourne spent 6.75 hours and charged $500 per hour. The remainder of Dr. Kinsbourne's time was spent on teleconferences for which Dr. Kinsbourne charged $300 per hour. Dr. Kinsbourne did not produce an expert report. Dr. Kinsbourne's invoice totals $6,150.00.

Respondent objected "to all of the time billed by Dr. Kinsbourne [as] unreasonable and unsubstantiated." Respondent argued that Dr. Kinsbourne's participation appeared unnecessary because Ms. Hall had already retained Dr. Byers to review her case. Resp't Opp'n, filed May 19, 2009, at 11. In a later brief, respondent noted that Dr. Kinsbourne's advanced training is as a pediatric neurologist and that Ms. Hall was nearly 60 years old when she was vaccinated. Respondent also noted that Dr. Kinsbourne did not explain what tasks he was performing, other than when he reviewed the medical records, hearing transcript and medical literature. Resp't Resp., filed June 17, 2009, at 3.

Ms. Hall did not file a reply brief to address respondent's concerns about Dr. Kinsbourne. It would appear that this failure constitutes a waiver of any argument. See Vaccine Rule 8(f).

Ms. Hall's decision to consult Dr. Kinsbourne in 2007 is reasonable. Although Dr. Round had already testified for Ms. Hall, his participation was in 2004. It is likely that if Ms. Hall had attempted to consult Dr. Round, then Dr. Round would have spent some time reviewing Ms. Hall's medical records because more than two years had elapsed since he last acted in the case. Dr. Round also worked with Mr. Morgan, who was representing Ms. Hall at the time. It appears that Dr. Round did not have a relationship with Mr. Gage, such that Dr. Round was likely to have responded to Mr. Gage's inquiries automatically. Thus, Mr. Gage could reasonably seek advice from a different expert.[14]

Furthermore, the decision to seek guidance from a pediatric neurologist, as opposed to a neurologist specializing in adults, is not unreasonable per se. Dr. Kinsbourne has some qualifications as a neurologist. A doctor with a different specialty may have been better

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[13] An entry created by Dr. Vera Byers, another doctor retained by Ms. Hall, indicates that in January 2007, she participated in a teleconference with Dr. Kinsbourne. Fee Appl'n, tab D, at pdf 54.

[14] A change in counsel does not automatically entitle new counsel to change experts. In this case, Dr. Round's work concluded years earlier.

qualified. However, the fact that someone else may have better qualifications does not mean that Dr. Kinsbourne was entirely unqualified.

Consequently, Ms. Hall's decision to consult Dr. Kinsbourne and Dr. Kinsbourne's initial review of materials is reasonable. As mentioned previously, in March 2007, Dr. Kinsbourne spent 6.75 hours reviewing medical records, the hearing transcript, and medical articles. Dr. Kinsbourne will be compensated at the rate requested, which is $500 per hour. See Simon v. Sec'y of Health & Human Servs., No.05 -941V, 2008 WL 623833, at *8 (Fed. Cl. Spec. Mstr. Feb. 21, 2008) (awarding Dr. Kinsbourne $500 per hour). The award for this activity is $3,375.00.

It seems reasonable to assume that Dr. Kinsbourne communicated the results of his review of materials to Mr. Gage. (Otherwise, there would be no purpose for Dr. Kinsbourne's work.) One hour is an adequate amount of time to communicate the results to Mr. Gage. Therefore, Dr. Kinsbourne is awarded an additional $300.

However, Ms. Hall has not established the reasonableness of additional work performed by Dr. Kinsbourne. Dr. Kinsbourne's invoice showed that he spent 9.25 hours on "teleconferences." Dr. Kinsbourne provided no details about these conferences. Dr. Kinsbourne did not identify the person with whom he was speaking. Dr. Kinsbourne also did not note the topic of the conversation. Thus, Dr. Kinsbourne's entries are too vague to allow meaningful review. Bishop v. Gainer, 272 F.3d 1009, 1020 (7th Cir. 2001); Michigan v. U.S. E.P.A., 254 F.3d 1087, 094-95 (D.C. Cir. 2001).

Ms. Hall has not demonstrated why Dr. Kinsbourne participated in teleconferences in August, September, November, December 2007, or January and March 2008. (Mr. Gage's time entries do not record any conversations with Dr. Kinsbourne during these months. See Fee Appl'n, tab D, pdf 32-33.) The burden to establish the reasonableness of the activity falls on Ms. Hall. Presault, 52 Fed. Cl. at 670; Gardner-Cook, 2005 WL 6122520, at *4. Ms. Hall has failed to carry her burden with regard to other activities for Dr. Kinsbourne.

For Dr. Kinsbourne's work, Ms. Hall is awarded $3,675 ($3,375 + $300). Because Ms. Hall personally paid a retainer to Dr. Kinsbourne, the award shall be made out to Ms. Hall and Richard Gage, P.C., jointly. This amount is in addition to the amount ($12,633.59) of costs that were awarded in the Interim Fee Decision.

IV. Total Award Summary

Previously the undersigned issued an interim fee decision that awarded Ms. Hall an amount of litigation costs and an amount of attorneys' fees that could not be disputed reasonably. Determining the remaining litigation costs and attorneys' fees, which were in dispute, was deferred until this final decision.

As discussed in the sections above, this decision awards $22,018.00 Ms. Hall in attorneys' fees. This amount is in addition to the amount Ms. Hall previously received in attorneys' fees. Similarly, this decision awards Ms. Hall a total of $3,675 in costs. This amount is in addition to the previous award.

IT IS SO ORDERED.

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

Appendices

Table 1: Special Master's Determinations of Hourly Rates in Wyoming				
Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
Estabrook v. HHS	No. 90-752V, 1991 WL 225096	10/16/1991	$100 per hour to Mr. Gage	
Walker v. HHS	No. 92-814V, 1992 WL 92243	12/17/1997	$100 per hour to Mr. Gage	
Barnes v. HHS	No. 90-1101V, 1999 WL 797468	9/17/1999	$110 to $160 per hour to Mr. Gage	
Gallagher v. HHS	No. 95-191V, 2002 WL 1488759	5/22/2002	$175 per hour for Robert Moxley (Mr. Gage was listed as previous counsel).	
Hart v. HHS	No. 01-357V, 2004 WL 3049766	12/17/2004	$200 per hour for Richard Gage and Robert Moxley	Amount awarded matched amount requested.
Avera v. HHS	No. 04-1385V, 515 F.3d 1343 (Fed.Cir. 2008)	4/15/2008	$200 per hour for Mr. Moxley	Affirmed the original award of $200 from the special master.
Avera v. HHS	No. 04-1385, Order Amending Judgment, Avera v. HHS,	6/24/08	$250 per hour for Mr. Moxley	Unpublished order.
Masias v. HHS	No. 99-697V, 2009 WL 1838979	6/12/09	$200-$220 per hour for Mr. Moxley from 2004 to 2009	On appeal
Avila v. HHS	No. 05-685V, 2009 WL 2033063	6/26/09	$200 per hour for Mr. Moxley from 2004 to 2006; $250 per hour after 2006	On appeal

Table 2: Decisions Setting Attorneys' Hourly Rates in Wyoming				
Case Name	**Citation**	**Date of decision**	**Hourly amount & Location**	**Notes**
Smith	129 F.3d 1408	12/3/97	$125 in Casper, Wyoming	The trial court found that $125 per hour was in the top ten percent of rates charged in Wyoming. Context was employment discrimination.
In re Copley	1 F. Supp. 2d 1407	4/30/98	$200 in Cheyenne with multiplier	$200 per hour is higher than normally awarded for Cheyenne attorneys. Pg. 1414 n.3. The fees were set in a class action litigation.
In re Albrecht	245 B.R. 666	3/7/00	$295 (in 1997) was too much	Bankruptcy Appellate Panel affirmed bankruptcy judge's rejection of law firm from Los Angeles.
Burd	97 P.3d 802	9/15/04	$90 per hour was requested for attorney in Casper, Wyoming	Wyoming Supreme Court affirmed Workers' Compensation commissioner's decision to reduce the amount request from $6,030 to $2,500
Morrison	149 P.3d 696	12/28/06	$200 was limit for attorneys outside of Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in action over value of corporation.
Mueller	173 P.3d 361	12/11/07	$150 in Riverton, Wyoming	The parties agreed this rate was reasonable. It was accepted by the courts.
City of Gillette	196 P.3d 184	11/14/08	$165 - $180, Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in dispute over construction contract.

Table 3: Summary of Court Decisions				
Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
Estabrook v. HHS	No. 90-752V, 1991 WL 225096	10/16/1991	$100 per hour to Mr. Gage	The court found this rate reasonable.
Smith	129 F.3d 1408	12/3/97	$125 in Casper, Wyoming	The trial court found that $125 per hour was in the top ten percent of rates charged in Wyoming. Context was employment discrimination.
Walker v. HHS	No, 92-814V, 1992 WL 92243	12/17/1997	$100 per hour to Mr. Gage	The court found this rate reasonable.
In re Copley	1 F. Supp. 2d 1407	4/30/98	$200 in Cheyenne with multiplier	$200 per hour is higher than normally awarded for Cheyenne attorneys. Pg. 1414 n.3. The fees were set in a class action litigation.
Barnes v. HHS	No. 90-1101V, 1999 WL 797468	9/17/1999	$110 to $160 per hour to Mr. Gage	This represented an increase in an hourly rate that the special master found reasonable.
In re Albrecht	245 B.R. 666	3/7/00	$295 (in 1997) was too much	Bankruptcy Appellate Panel

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Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
				affirmed bankruptcy judge's rejection of law firm from Los Angeles.
Gallagher v. HHS	No. 95-191V, 2002 WL 1488759	5/22/2002	$175 per hour	
Burd	97 P.3d 802	9/15/04	$90 per hour was requested for attorney in Casper, Wyoming	Wyoming Supreme Court affirmed Workers' Compensation commissioner's decision to reduce the amount request from $6,030 to $2,500
Hart v. HHS	No. 01-357, 2004 WL 3049766	12/17/2004	$200 per hour for Richard Gage and Robert Gage	Amount was reasonable.
Morrison	149 P.3d 696	12/28/06	$200 was limit for attorneys outside of Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in action over value of corporation.
Mueller	173 P.3d 361	12/11/07	$150 in Riverton, Wyoming	The parties agreed this rate was reasonable. It was accepted by the courts.
Avera v. HHS	515 F.3d 1343	4/15/2008	$200 per hour for	Affirmed the

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Case Name	**Docket No. and citation**	**Date of decision**	**Hourly amount**	**Notes**
	(Fed.Cir. 2008) No. 04-1385V		Mr. Moxley	original award of $200 from the special master.
Avera v. HHS	Order Amending Judgment, Avera v. HHS, No. 04-1385	6/24/08	$250 per hour for Mr. Moxley	This amount was calculated by Mr. Moxley based upon the total award.
City of Gillette	196 P.3d 184	11/14/08	$165 - $180, Casper, Wyoming	Wyoming Supreme Court affirmed district court's finding in dispute over construction contract.
Masias v. HHS	No. 99-697V, 2009 WL 1838979	6/12/09	$200-$220 per hour for Mr. Moxley from 2004 to 2009	On appeal
Avila v. HHS	No. 05-685V, 2009 WL 2033063	6/26/09	$200 per hour for Mr. Moxley from 2004 to 2006; $250 per hour after 2006	On appeal

Table 4: Adjusting Rates to Account for Inflation (Wyoming)				
Year	Wy CPI	Barnes	Hart	Hall (proposed)
1999	3.1	$160.00		
2000	3.2	$165.12		
2001	3.5	$170.90		
2002	3.7	$177.22		
2003	3.6	$183.60		
2004	4.3	$191.50	$200.00	
2005	5.0	$201.07	$210.00	$360.00
2006	4.4	$209.92	$219.24	$375.00
2007	6.1	$222.72	$232.61	$390.00
2008	2.6	$228.52	$238.66	$410.00
2009	0.0	$228.52	$238.66	$410.00

This table is taken from table 4A in Masias, 2009 WL 183897, at *44-45.

Table 5: Determination of Mr. Gage's Reasonable Rate (source of data for first two columns is Fee Appl'n, tab D)		
Time Period	**Hourly Rate Requested**	**Hourly Rate Awarded**
6/01/2006 to 5/31/2006	$360	$220
6/1/2006 to 12/27/2006	$375	$220
1/4/2007 to 5/29/2007	$375	$230
6/4/2007 to 12/11/2007	$390	$230
1/1/2008 to 5/30/2008	$390	$240
6/1/2008 to 12/10/2008	$410	$240
1/24/2009 to 4/15/2009	$410	$240