

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

\*\*\*\*\*

DONALD R. MASIAS,

Petitioner,

v.

SECRETARY OF HEALTH  
AND HUMAN SERVICES,

Respondent.

\*\*\*\*\*

\* No. 99-697V  
\* Senior Judge Robert H. Hodges, Jr.  
\* Special Master Christian J. Moran  
\*

\* Filed: January 31, 2013  
\*

\* Attorneys' fees for appellate  
\* litigation; determination on  
\* remand  
\*

Robert T. Moxley, Esq., Robert T. Moxley, P.C., Cheyenne, Wyoming, for Petitioner;  
Catharine Reeves, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

### **REMAND DECISION ON SECOND SUPPLEMENTAL APPLICATION FOR ATTORNEYS' FEES AND COSTS\***

The litigation over attorneys' fees, which started in March 2008, continues. The present decision is a result of an October 5, 2012 Opinion and Order that remanded the question of the amount of attorneys' fees and costs for unsuccessful appellate litigation regarding attorneys' fees. The Court instructed the undersigned to determine the reasonable amount of attorneys' fees. For the reasons explained below, petitioner is awarded \$69,828.80 in attorneys' fees and \$2,837.46 in attorneys' costs.

### **PROCEDURAL HISTORY**

The litigation over attorneys' fees has taken many twists and turns. While some steps are not in a direct line with the present decision, they remain relevant for showing the fees payments Mr. Moxley has already received.

---

\* The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

The direct progression of this motion began on March 10, 2008, when Mr. Masias filed an application for attorneys' fees and costs. He requested that his attorney, Mr. Robert Moxley, be compensated at a rate of \$290 to \$440 per hour. Mr. Moxley derived this figure from a chart setting the hourly rate for attorneys practicing in the District Court for the District of Columbia, familiarly known as the Laffey matrix. The Secretary opposed this request because, among other reasons, Mr. Moxley practices law in Cheyenne, Wyoming, and had not been compensated at the rate he was seeking.

After extensive briefing, the request to import the Laffey matrix into the Vaccine Program was rejected. Mr. Moxley was compensated at rates that were reasonable for attorneys in Cheyenne. Final Fees Decision, 2009 WL 1838979 (Fed. Cl. Spec. Mstr. June 12, 2009).

Mr. Masias filed a motion for review of the Final Fees Decision. Mr. Masias's primary argument was the availability of Laffey rates. In an unpublished order issued on December 10, 2009, the Court of Federal Claims denied the motion for review. The Clerk's Office entered judgment in the amount of \$33,908.57 on December 15, 2009, representing \$19,035.25 in attorneys' fees and \$14,873.32 in costs.<sup>1</sup>

Mr. Masias appealed the December 15, 2009 judgment to the Federal Circuit. Mr. Masias's pending supplemental request for attorneys' fees seeks compensation for Mr. Moxley's efforts to persuade the Federal Circuit to increase the amount of his fees. The Federal Circuit was not persuaded. It affirmed the judgment, 634 F.3d 1283 (Fed. Cir. 2011), and denied a request for rehearing en banc.

Mr. Masias filed a petition for certiorari. The pending supplemental fee request also includes compensation for Mr. Moxley's work before the Supreme Court. The Supreme Court, however, did not accept the case. Masias v. Sebelius, 132 S.Ct. 815 (2011).

On February 29, 2012, Mr. Masias filed the pending supplemental request for attorneys' fees and costs. He seeks approximately \$85,000.00 for Mr. Moxley's appellate work at the Federal Circuit and the Supreme Court. See exhibits 95 and 96. The Secretary opposed this request.

A June 7, 2012 decision ("Second Supplemental Fees Decision") denied Mr. Masias's request entirely. The Second Supplemental Fees Decision relied upon the Federal Circuit's decision in Wagner v. Shinseki, 640 F.3d 1255 (Fed. Cir. 2011), a case

---

<sup>1</sup> The amounts awarded Mr. Masias in the Final Fees Decision, as well as in the Interim Fees and First Supplemental Fees Decisions (discussed below) have since been adjusted. See Decision Correcting Clerical Errors, issued January 30, 2013. Unless otherwise noted, the amounts referenced herein are taken from the original decisions.

that interpreted the Equal Access to Justice Act, and the Federal Circuit’s non-precedential order issued in Rodriguez v. Secretary of Health & Human Services, No. 2010-5013 (Fed. Cir. Feb. 17, 2012), a case from the Vaccine Program. The June 7, 2012 decision reasoned that because Mr. Masias did not succeed in increasing the amount of attorneys’ fees awarded to Mr. Moxley through the appellate litigation, Mr. Moxley could not be compensated for those unfruitful labors. Second Supplemental Fees Decision, 2012 WL 2581403.

On July 6, 2012, Mr. Masias filed a motion for review of the Second Supplemental Fees Decision in the Court of Federal Claims. In an Opinion and Order issued October 5, 2012, the Court of Federal Claims granted the motion and vacated the decision. The Court stated that “[t]he Wagner rule cannot be applied to Mr. Masias’ case absent a broader statement of petitioners’ entitlement to attorneys’ fees from the Federal Circuit.” Opinion and Order, 106 Fed. Cl. 700, 704 (2012). The Court, therefore, remanded for “reconsideration of a fee award to petitioner based on reasonableness.” Id. This Opinion and Order makes the matter ready for resolution.

The analysis below mentions two other fee adjudications, which are ancillary to the direct sequence of filings leading to the present decision. First, on March 12, 2009, Mr. Masias was awarded \$42,065.50 in attorneys’ fees for nearly all the time Mr. Moxley spent in the underlying case. Interim Fees Decision, 2009 WL 899703 (Fed. Cl. Spec. Mstr.). Second, on April 14, 2010, Mr. Masias was awarded \$25,851.40 in attorneys’ fees (including \$250 for his paralegal) for the 2010 motion for review. First Supplemental Fees Decision, 2010 WL 1783542 (Fed. Cl. Spec. Mstr.). These decisions contribute to the Secretary’s arguments regarding the reasonableness of attorneys’ fees in the appellate litigation.

## **DISCUSSION**

There are two separate issues. First, whether Mr. Masias is eligible for any additional attorneys’ fees. Second, if eligibility is determined, what is a reasonable amount of those additional attorneys’ fees.

### **I. Entitlement to Attorneys’ Fees**

The relevant statutory provision provides:

(e) Attorneys’ fees

(1) In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court shall also award as part of such compensation an amount to cover —

(A) reasonable attorneys’ fees, and

(B) other costs,

incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

42 U.S.C. § 300aa-15(e)(1). The Court of Federal Claims's interpretation of this provision requires an award of attorneys' fees, although one sentence could be construed as not mandating this award.

The mandatory aspect of the Opinion and Order follows the Court's recitation of the statutory standard for awarding attorneys' fees. In this context, the Court stated that "[b]ecause Mr. Masias was awarded compensation pursuant to a mediated settlement, his award for attorneys' fees and costs arising from the settlement is mandatory." Opinion and Order, 106 Fed. Cl. at 702. Although, arguably, the phrase "attorneys' fees and costs arising from the settlement" could limit the mandatory award of attorneys' fees to only the entitlement proceedings, the Opinion and Order is not so restricted.<sup>2</sup> The Opinion and Order continues, "[c]onsiderations of good faith and reasonable basis do not apply where a petitioner is successful. The special master must award reasonable attorneys' fees and may not reduce reasonable fees for lack of good faith or reasonable basis." Id. (footnote omitted). The Court's statement that the "special master must award reasonable attorneys' fees" would require such an award, absent any unusual circumstances.<sup>3</sup> The Court of Federal Claims did not, however, mandate any award. Id. at 704 ("This ruling does not direct award of attorneys' fees or any amount of fees.").

## **II. Reasonable Amount of Attorneys' Fees**

The Federal Circuit reviewed how to determine a reasonable amount of attorneys' fees in Avera v. Secretary of Health & Human Services, 515 F.3d 1343 (Fed. Cir. 2008), where it endorsed the lodestar method. Pursuant to this approach, "a court first determines an initial estimate of a reasonable attorneys' fee by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." After this

---

<sup>2</sup> If attorneys' fees for the entitlement proceedings were the only fees that were mandatory, then the Interim Fees Decision satisfied that requirement.

<sup>3</sup> As is the practice in the realm of statutory interpretation, the Court's words are given their "ordinary, contemporary, common meaning." See Xianli Zhang v. United States, 640 F.3d 1358, 1364 (Fed. Cir. 2011) (quoting Williams v. Taylor, 529 U.S. 420, 431 (2000) ("we give the words 'their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some difference import")).

preliminary determination, the court “may then make an upward or downward departure to the fee award based on other specific findings.” Id. at 1347-48 (quotation marks and citation omitted).

## **A. Lodestar Determination**

### **1. Reasonable Hourly Rate**

Pursuant to Avera, the determination of a reasonable hourly rate involves several steps. The first step is to determine the reasonable hourly rate in the forum where the case is pending. For Vaccine Act cases, the forum is Washington, D.C. The second step is to examine where the bulk of the work was performed to determine whether the Davis County exception to the forum rate applies.<sup>4</sup> If the bulk of the work was performed in the forum, the forum rate is awarded. If the bulk of the work was performed outside the forum, then the hourly rate where the work was performed (i.e., local rate) is determined and compared with the forum rate. If the forum rate is very significantly higher than the local rate, the local rate is awarded. See Avera, 515 F.3d at 1347-49.

The Final Fees Decision contains a lengthy analysis of each of those steps and ultimately concluded that a reasonable hourly rate for Mr. Moxley was \$236 per hour in 2008. 2009 WL 1838979, at \*4-30.<sup>5</sup> The Federal Circuit found that this analysis was not arbitrary. 634 F.3d at 1291-93. Each of these steps will likewise be followed here.

#### **a. Forum Rate: Washington, D.C.**

The Final Fees Decision found the forum rate—a reasonable rate for an attorney with skills comparable to Mr. Moxley, performing similar work—to be \$350 per hour in 2008. 2009 WL 1838979, at \*25. It is not necessary to repeat this analysis. It is only necessary to increase the rate for inflation. This rate in 2009, adjusted for inflation using the Consumer Price Index for the Washington-Baltimore area, is \$354 per hour ( $\$350 \times 1.010 = \$353.50$ ).<sup>6</sup> This rate in 2010 and 2011, likewise adjusted for inflation, is

---

<sup>4</sup> The Davis County exception is meant to prevent windfalls to attorneys who practice in less expensive legal markets. See Avera, 515 F.3d at 1349 (citing Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 755 (D.C. Cir. 1999)).

<sup>5</sup> This hourly rate is the corrected rate. See footnote 1, above.

<sup>6</sup> The inflation rates are taken from the Consumer Price Index, Washington-Baltimore (CPI-U), Table A (January, 12-month percentage changes), produced by the U.S. Department of Labor, Bureau of Labor Statistics. Available at <http://www.bls.gov/ro3/cpiwb.pdf> (last visited Jan. 9, 2013).

respectively, \$363 per hour ( $\$354 \times 1.026 = \$363.20$ ), and \$371 per hour ( $\$363 \times 1.023 = \$371.35$ ). Accordingly, the forum rate is \$354 per hour in 2009, \$363 per hour in 2010, and \$371 per hour in 2011.

### **b. Location where the Bulk of Work was Performed**

Mr. Masias does not argue that Mr. Moxley performed any of the work in Washington, D.C. Mr. Moxley appears to have written the appellate briefs from his office in Cheyenne, Wyoming. With the exception of the time spent at the oral argument in Denver, Colorado, as detailed by Mr. Moxley's invoice, all of the work during this phase of litigation was performed in Cheyenne, Wyoming. See exhibit 95 at 8. Thus, the bulk of the work occurred outside the forum. Consequently, pursuant to Avera's endorsement of the Davis County exception, the next steps are to determine a reasonable hourly rate for where the work was performed and to determine whether there is a significant difference between the two rates.

### **c. Local Rate: Cheyenne, Wyo.**

The next step requires that the local rate be determined. In his supplemental fees application, Mr. Masias requests that Mr. Moxley be compensated at a rate of \$300 per hour. Exhibit 95 (invoice for period from 12/16/2009 to 11/9/2010) and exhibit 96 (invoice for period from 3/16/2011 to 12/30/2011). Mr. Moxley's affidavit avers that his "current hourly billing rate for general practice in Cheyenne, Wyoming, is \$300 per hour, and that rate is paid by my clients for every sort of legal services." Exhibit 92 ¶ 4. Mr. Moxley suggests that an appeal to the Federal Circuit constitutes "complex" legal work, justifying a higher hourly rate. Id. ¶ 5.<sup>7</sup>

In opposition, the Secretary concludes that "the reasonable hourly rate adjudicated in this case for the most recent work performed by Mr. Moxley (\$220.00) would be appropriate for the appellate work he performed, perhaps with a modest adjustment for inflation." Resp't Resp. at 18.<sup>8</sup> The Secretary provides two reasons for this conclusion. First, the evidence submitted by Mr. Masias regarding the hourly rate prevailing in Cheyenne, Wyoming (Mr. Moxley's affidavit) is legally insufficient. Second, Mr. Masias has not established that Mr. Moxley's appellate work deserves a premium because the appellate work is based on work performed in front of the special master.

---

<sup>7</sup> Mr. Moxley also insists that ordinary practice in the Vaccine Program remains "exceedingly complex."

<sup>8</sup> This rate has since been corrected to \$236 per hour in 2008. See footnote 1, above.

For this decision, the local rates will be based upon the analysis contained in the Final Fees Decision, which the Federal Circuit affirmed. Although Mr. Masias has submitted additional evidence in support of the February 29, 2012 fee application,<sup>9</sup> this re-arguing over what has been decided previously will (further) transform this case into a “second major litigation” that the Supreme Court decried. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Although, arguably, extending the litigation could produce a higher hourly rate, trial courts are bound “to do rough justice, not to achieve auditing perfection.” Fox v. Vice, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2205, 2216 (2011).

Consequently, the reasonable local rate in Cheyenne, Wyoming for an attorney of Mr. Moxley’s tenure, performing similar work in 2009, is \$240 per hour. This rate is derived from the rates previously awarded to Mr. Masias in the Final Fees Decision (and subsequently corrected in the Decision Correcting Clerical Errors), adjusted for inflation using the Wyoming Consumer Price Index.<sup>10</sup> The rates for work in 2010 and 2011 are \$247 per hour and \$257 per hour, respectively. See Appendix, table 1; see also Decision Correcting Clerical Errors, filed January 30, 2013, section IV.A (describing the method used to calculate the corrected hourly rates awarded for Mr. Moxley’s work in this matter).

**d. Comparison between Forum Rate and Local Rate**

The final step requires comparing the forum rate with the local rate. If there is a very significant difference between those rates, then the local rate should be used in the lodestar formula.

Comparison between Forum Rate and Local Rate			
Year	Forum Rate	Local Rate	Percent Difference
2009	\$354	\$240	47.5
2010	\$363	\$247	46.96
2011	\$371	\$257	44.36

These differences are very significant. See Hall v. Sec’y of Health & Human Servs., 640 F.3d 1351, 1357 (Fed. Cir. 2011) (ruling that the special master did not abuse his discretion in finding 59 percent was a very significant difference). Accordingly, Mr.

---

<sup>9</sup> The declarations from Gilbert Gaynor, Michael T. Kirkpatrick and Deborah Drooz, are not helpful to determining a reasonable hourly rate for attorneys’ in Cheyenne.

<sup>10</sup> The inflation rates are taken from the Wyoming Cost of Living Index, Table 2 (4th Quarter), which is produced by the State of Wyoming’s Department of Administration and Information. Available at <http://eadiv.state.wy.us/wcli/Inflation.pdf> (last visited Jan. 9, 2013).

Moxley will be paid at an hourly rate of \$240 per hour for his work in 2009, \$247 per hour for his work in 2010, and \$257 per hour for his work in 2011.

## 2. Reasonable Number of Hours

The second variable in the lodestar formula is the reasonable number of hours. Quoting a decision by the Supreme Court, the Federal Circuit has explained some of the limits on 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, 461 U.S. at 433-34).

Mr. Masias seeks compensation for Mr. Moxley’s work in three different phases, the Federal Circuit appeal (120.1 hours), the Federal Circuit combined petition for panel rehearing and rehearing en banc (25.5 hours), and the Supreme Court petition for certiorari (130.3 hours). For each of these stages, the Secretary argues that the number of hours was excessive because the work for which compensation is being requested built on other work. The Secretary illustrates her argument by pointing out that the opening Federal Circuit brief repeated arguments from the motion for review at the Court of Federal Claims.

A comparison of the relevant memoranda shows that while the arguments might overlap, the writing is different. It is true that some themes, such as the special master’s arbitrariness, appear repeatedly. But, the way the arguments are presented and the cases cited are different. Despite the Secretary’s argument about repetition, the Secretary has not identified any pages showing a great deal of similarity. Mr. Masias’s attorney has not simply copied and pasted whole pages of text from one document into another. Cf. Broekelschen v. Sec’y of Health & Human Servs., 102 Fed. Cl. 719, 730 (2011) (finding special master did not abuse his discretion in reducing time spent on appellate briefs when the briefs substantially overlapped). Instead, Mr. Moxley refined his arguments, creating fresh memoranda. Thus, the Secretary’s basic objection is not persuasive. The amount of time requested for Mr. Moxley’s work, with one exception discussed below, is reasonable.

The finding that the number of hours is reasonable is based, in part, on a comparison with other cases. See Saxton, 3 F.3d at 1521 (noting that special masters may use their expertise in evaluating fee applications). For example, for a Federal Circuit appeal, Broekelschen accepted 143 attorney hours plus 59 paralegal hours. For a Federal Circuit rehearing, the same case accepted 35 attorney hours plus 10 paralegal hours. Broekelschen v. Sec’y of Health & Human Servs., No. 07-137V, 2011 WL 2531199, at \*9-10 (Fed. Cl. Spec. Mstr. June 3, 2011), motion for review denied, 102 Fed. Cl. 719 (2011). For a petition for certiorari, another attorney was compensated for 72.5 hours. Hall v. Sec’y of Health & Human Servs., No. 02-1052V, 2012 WL 604141 (Fed. Cl. Spec. Mstr. Feb. 3, 2012).<sup>11</sup> While neither Broekelschen nor Hall establish immovable boundaries around the time appropriate for various phases of litigation, the relative closeness among the number of hours provides some assurance that the amount of time spent here was reasonable.

The only exception is Mr. Masias’s renewed motion for partial summary affirmance at the Federal Circuit. The record shows that Mr. Masias filed an initial motion for partial summary affirmance that a judge of the Federal Circuit denied without prejudice to this argument being raised at oral argument. However, at oral argument, Mr. Moxley did not argue for a partial summary affirmance. Then, after oral argument, Mr. Masias filed a renewed motion. There seems to be no basis for requesting relief that has already been denied. Thus, the amount of time associated with the renewed motion (7 hours) will be deducted.

Mr. Masias also seeks several hours of compensation for work performed after the submission of his supplemental fee application on February 29, 2012. See Pet’r Reply, filed May 1, 2012, at 3 n.5 (seeking five hours for preparing said reply brief); Pet’r Comment, filed May 16, 2012, at 4 n.6 (requesting three hours for preparing said comment). These hours, along with all remaining work performed in 2012, have since been submitted in petitioner’s exhibit 100. These hours are not considered here, as they will be the subject a future fees decision.<sup>12</sup>

---

<sup>11</sup> Mr. Masias asserted, and the record confirms, that Mr. Moxley’s certiorari reply brief in this matter served as the reply to respondent’s opposition to the application for certiorari in Hall. Pet’r Reply at 4, filed May 1, 2012.

<sup>12</sup> See exhibit 100 (“a comprehensive supplemental invoice for all the unpaid professional time accrued in various necessary legal efforts in this matter” from 1/11/2012 to 10/17/2012).

Lodestar Calculation			
Phase	Number of Hours	Hourly Rate	Subtotal
Federal Circuit appeal	113.1 <sup>13</sup>	\$247	\$27,935.70
Travel time at half rate	15.0	\$123.50	\$1,852.50
Federal Circuit rehearing	25.5	\$257	\$6,553.50
Supreme Court petition	130.3	\$257	\$33,487.10
TOTAL			\$69,828.80

### B. Adjustments to Lodestar

Avera recognizes that after the lodestar is calculated, the amount awarded in attorneys’ fees may be adjusted, either increased or decreased, “based on specific findings.” Avera, 515 F.3d at 1348, citing Blum v. Stenson, 464 U.S. 886, 888 (1984). Here, the Secretary argues that the amount requested in fees for fees should be reduced because this amount is “disproportionate” to the amount of fees awarded in the underlying action. Resp’t Resp. at 14. Mr. Masias argues that proportionality is not permitted as a matter of law. Pet’r Reply at 6-10.

The facts underlying the Secretary’s proportionality argument are straightforward.<sup>14</sup> To prosecute Mr. Masias’s underlying claim, a reasonable amount of attorneys’ fees was \$42,065.50. In the fees litigation, Mr. Masias has already been awarded approximately the same amount of money (\$44,886.65). The additional amount in dispute here is \$69,828.80. If this were awarded, Mr. Masias would receive nearly three times as much in “fees for fees” as he did in fees for the merits phase.

---

<sup>13</sup> The time associated with the renewed motion for partial summary affirmance at the Federal Circuit is deducted from this total (120.1 - 7.0 = 113.1).

<sup>14</sup> This analysis excludes associated costs.

Attorneys' Fees Awarded and Pending <sup>15</sup>	
Amount of Attorneys' Fees awarded to prosecute underlying action. Awarded in Interim Fees Decision	\$42,065.50
Amount of Attorneys' Fees for Fees	
Awarded in Final Fees Decision	\$19,035.25
Awarded in First Supplemental Fees Decision	\$25,851.40
Available Pursuant to Lodestar per this Decision	\$69,828.80
Total	\$114,715.45

Mr. Masias and the Secretary present different positions regarding proportionality of attorneys' fees. In each of the three cases Mr. Masias cites, the court discussed whether attorneys' fees needed to be proportionate to the amount of damages recovered in the merits phase. See City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality opinion) (rejecting "the proposition that fee awards under §1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers"); United Automobile Workers Local 259 v. Metro Auto Center, 501 F.3d 283, 292 (3d Cir. 2007) (defining the issue as "whether the District Court should have downwardly adjusted the lodestar because the fee award was disproportionate to the amount of the unpaid contributions recovered"); Kreimes v. Dep't of Treasury, 764 F.2d 1186, 1191-92 (6th Cir. 1985). These cases go to an argument that the government has not proposed.

Rather than arguing that the award of attorneys' fees for Mr. Moxley's work is disproportionate to the amount of compensation that Mr. Masias received for his injury, the Secretary is arguing that the "fees-on-fees" should be reduced because the litigation over fees has greatly surpassed the amount of litigation for the original fee request. The Secretary cites non-Federal Circuit cases that support a holding that supplemental fees need to be proportionate to the original fees. These cases are: United States v. Eleven Vehicles, 200 F.3d 203, 213 (3d Cir. 2000) (approving of district court's intent "to impose some degree of proportionality between the fees for the underlying merits litigation and fees for fees litigation," as "[a] trial court should be free to view a case in this pragmatic manner"), and Thompson v. Gomez, 45 F.3d 1365 (9th Cir. 1995) (affirming district court's award of 87.2% of supplemental fee because district court had awarded 87.2% of original fee application).

---

<sup>15</sup> These amounts do not take into account the \$5,635.92 awarded in increased fees. See footnote 1, above.

The Secretary previously argued to the Court that Mr. Masias's pending request for supplemental fees was "disproportionate" to the amount of fees incurred in the underlying action. Resp't Resp. to Mot. for Review, filed July 27, 2012, at 11. The Court's Opinion and Order, however, does not discuss the proportionality of fees at all. Instead, the Opinion and Order instructs the special master to determine whether "an attorney charged too much on an hourly basis or charged too many hours considering the amount or quality of the work required." 106 Fed. Cl. at 702 n.1. Later, the Court also stated "members of the Vaccine Bar should be encouraged to seek clarification of doctrine by way of appeal, even regarding availability of attorneys' fees." *Id.* at 704.

Furthermore, the unusual characteristics about Mr. Masias's supplemental fee litigation make reliance on a rule of proportionality inappropriate. Acting for his client (Mr. Masias), Mr. Moxley sought to change the paradigm through which attorneys are compensated in the Vaccine Program. In his words, "[t]he effort [in appellate litigation] most certainly was directed toward fees reform for the entire Program." Pet'r Reply at 4. Mr. Moxley had already accomplished one shift when he, as the Avera's attorney, successfully argued that special masters possess the authority to award attorneys' fees on an interim basis. Mr. Moxley continued pressing for systemic, Program-wide changes through the litigation that was resolved, initially, in the Final Fees Decision of this case, and, conclusively, by the Federal Circuit's review of that decision.

It is highly unlikely that the amount in dispute from one particular case could ever justify the effort needed to "reform" the jurisprudence in the Vaccine Program regarding attorneys' fees. This case illustrates the problem. The Final Fees Decision awarded \$19,035.25 in attorneys' fees for the initial fee application and associated litigation. This amount was approximately half the amount requested. *See* 2009 WL 1838979, at \*31. Thus, if the Final Fees Decision had been reversed and Mr. Masias were given all his relief, the amount awarded would have been approximately \$19,000 more (setting aside the fees for fees). The fees associated with a review by the Court of Federal Claims (\$25,851.40) and requested for a panel review by the Federal Circuit (\$46,030.00 (*see* exhibit 95)) exceed the amount at stake. In terms of dollars and cents, it hardly makes sense to spend more than \$70,000 to recover approximately \$19,000.<sup>16</sup>

Yet, Mr. Masias's fee dispute was about more than just \$19,000. In his Federal Circuit appeal, Mr. Masias sought a ruling that the Davis County exception was no longer valid because of an intervening Supreme Court case. Mr. Masias, potentially, could have opened the door to attorneys from around the country being compensated at rates set by the Laffey matrix, regardless of whether those rates were significantly different from the

---

<sup>16</sup> The comparison becomes even more pronounced when the fees requested for en banc review and certiorari (*see* exhibit 96) are added.

rates to which they were accustomed. Mr. Masias's fee litigation sought to "level the playing field for all Program attorneys." Pet'r Reply, filed May 1, 2012, at 9.<sup>17</sup>

Given the Court's holding that Wagner does not mandate the denial of supplemental fees to Vaccine Program petitioners who unsuccessfully appeal determinations of attorneys' fees, Mr. Masias's case is not one to reduce the amount of the lodestar award due to a lack of proportionality between the fees in the merits stage and the supplemental fees. A reasonable amount is \$69,828.80.<sup>18</sup>

Mr. Masias is awarded \$69,828.80 in supplemental attorneys' fees. This amount is in addition to the amount of fees awarded for the entitlement stage of the case (\$42,065.50) and the amounts previously awarded for the fee litigation (\$44,886.65). In total, the amount of attorneys' fees awarded for litigation over attorneys' fees is \$114,715.45. Whether Congress contemplated that a petitioner's attorney should receive this much in attorneys' fees just for arguing over fees is "a matter for Congress or the appellate court to consider." Opinion and Order, 106 Fed. Cl. at 704.

### **CONCLUSION**

The Court's October 5, 2012 Opinion and Order requires that Mr. Masias be awarded reasonable attorneys' fees for unsuccessful appellate litigation. With one small exception, Mr. Masias's request is reasonable. Thus, he is awarded a total of \$72,666.26, which includes \$69,828.80 in attorneys' fees and \$2,837.46 in attorneys' costs. **Specifically, petitioner is awarded a lump sum of \$72,666.26 in the form of a check payable jointly to petitioner and petitioner's attorney, Robert T. Moxley.**

---

<sup>17</sup> This recognition of Mr. Masias's goal to alter Vaccine Program jurisprudence may seem anomalous in light of the undersigned's rulings against Mr. Masias throughout the fee litigation. Mr. Masias's goal, however, has not been the problem. Mr. Masias's numerous applications have suffered from various evidentiary and legal flaws as explained in the decisions.

<sup>18</sup> In addition to seeking supplemental fees, Mr. Masias seeks an award of costs associated with his appellate litigation. For the Federal Circuit phase, Mr. Masias seeks \$1,605.82. For the Supreme Court petition, Mr. Masias seeks \$1,131.64. Exhibit 94. Mr. Masias also seeks \$100 for mileage costs associated with travelling to the Federal Circuit oral argument in Denver. Exhibit 95 at 8. The Secretary has not challenged the reasonableness of any cost item. See Resp't Resp., passim.

The Clerk's Office is instructed to enter judgment in accord with this Decision unless a motion for review is filed. The Clerk's Office is also instructed to provide a copy of this Decision to the presiding judge. See Vaccine Rule 28.1.

**IT IS SO ORDERED.**

s/Christian J. Moran  
Christian J. Moran  
Special Master

**APPENDIX**

<b>Table 1: Hourly Rates for Mr. Moxley<sup>19</sup></b>					
Year	Wy CPI	<u>Barnes</u>	<u>Hart</u>	<u>Hall</u>	<u>Masias</u> Awarded Rate
1999	3.1	<b>\$160.00</b>			\$160.00
2000	3.2	\$165.12			\$165.00
2001	3.5	\$170.90			\$171.00
2002	3.7	\$177.22			\$177.00
2003	3.6	\$183.60			\$184.00
2004	4.3	\$191.50	<b>\$200.00</b>		\$196.00
2005	5.0	\$201.07	\$210.00		\$206.00
2006	4.4	\$209.92	\$219.24	<b>\$220.00</b>	\$216.00
2007	6.1	\$222.72	\$232.61	\$230.00	\$228.00
2008	2.6	\$228.52	\$238.66	\$240.00	\$236.00
2009	2.7	\$234.69	\$245.10	\$240.00	\$240.00
2010	2.9	\$241.50	\$252.21	\$246.96	\$247.00
2011	3.9	\$250.91	\$262.04	\$256.59	\$257.00

---

<sup>19</sup> See Decision Correcting Clerical Errors, filed January 30, 2013, section IV.A (describing the method used to calculate these hourly rates).