

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

**No. 10-362V**

**Filed: January 31, 2013**

**To Be Published**

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JOHN AUSTIN and JUDY QUANT, \*  
parents of Crystal Austin, a minor, \*

Petitioners, \*

Reasonable Basis to File  
and Maintain Claim;  
Reasonable Fees and Costs

v. \*

SECRETARY OF THE DEPARTMENT \*  
OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

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Ronald Homer, Esq., Conway, Homer & Chin-Caplan, P.C., Boston, MA, for petitioners.  
Lara Englund, Esq., U.S. Dept. of Justice, Washington, D.C., for respondent.

**DECISION ON FEES AND COSTS APPLICATION<sup>1</sup>**

On June 10, 2010, John Austin and Judy Quant [“petitioners”] filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*<sup>2</sup> [the “Vaccine Act” or “Program”], on behalf of their minor daughter, Crystal Austin [“Crystal”]. The petition asserted that Crystal’s seizure disorder was caused by the administration of varicella and measles, mumps, and rubella [“MMR”] vaccines on April 14, 2008.

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<sup>1</sup> Because this decision contains a reasoned explanation for my action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public.

<sup>2</sup> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

After the petition was filed, efforts to find an expert proved fruitless.<sup>3</sup> Petitioners' counsel, Mr. Ron Homer of Conway, Homer, Chin-Caplan, PC ["CHCC"],<sup>4</sup> indicated his intent to withdraw from representation when he filed an application for interim fees and costs. See *generally* Petitioners' Interim Application for Final Attorneys' Fees and Costs ["Interim Application"], filed Sept. 29, 2011. On January 24, 2012, I deferred ruling on the interim fees and costs application in a published order in which I expressed my concern about the reasonable basis for filing and pursuing this claim. Order Deferring a Decision on an Interim Fees and Costs Application ["Order Deferring a Decision"], 2012 WL 592891, at \*5-6 (Jan. 24, 2012). Mr. Homer continued to represent petitioners during their unsuccessful search for new counsel.<sup>5</sup>

On February 17, 2012, I dismissed this case for insufficient proof. Decision at 2. No motion for review was filed.

In total, petitioners now request \$28,412.51 for final attorney fees and costs.<sup>6</sup> Respondent now opposes petitioners' application for final fees and costs, based on the lack of a reasonable basis for the claim. Respondent's Supplemental Memorandum in Opposition to Petitioners' Application for Attorneys' Fees and Costs ["Res. Supp. Opp.," filed May 7, 2012, at 2-4. Respondent also argues in the alternative that, if a reasonable basis exists, the hours expended on this case were excessive.<sup>7</sup> *Id.* at 4-5.

The issues are now fully joined. Although the issue of reasonable basis to file and maintain this claim is a close one, I grant in part and deny in part petitioners' application for fees and costs.

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<sup>3</sup> On October 29, 2010, I ordered petitioners to file an expert report by December 28, 2010. Between that date and May 16, 2011, I granted petitioners five extensions of time to file their expert report.

<sup>4</sup> CHCC is a firm with more than 24 years of experience in vaccine injury cases.

<sup>5</sup> Petitioners filed status reports on June 13, 2011, July 13, 2011, August 5, 2011, and September 12, 2011, updating the court on their search for alternate counsel and requesting time to determine how to proceed.

<sup>6</sup> In their Interim Application, petitioners requested \$26,877.91 for fees and costs (\$20,227.70 for attorney fees, \$6,468.21 for attorney costs, and \$182.00 for petitioners' costs). In Petitioners' Supplemental Application for Interim Final Attorneys' Fees ["Supplemental Application"], filed Nov. 1, 2011, they requested an additional \$1,534.60 for fees generated after their Interim Application.

<sup>7</sup> Both objections were also raised in respondent's October 17, 2011 Opposition to Petitioners' Interim Application for Final Attorneys' Fees and Costs, and are incorporated in her opposition to petitioners' Supplemental Application. Respondent's Opposition to Petitioners' Supplemental Application for Interim Final Attorneys' Fees, filed Nov. 18, 2011.

## I. Factual Background.

Because respondent challenges the reasonable basis for this petition, it is necessary to discuss briefly Crystal's medical condition and how the petition came to be filed.

### A. Relevant Medical History.

Crystal Austin was born on December 29, 2006. Petitioners' Exhibit ["Pet. Ex."] 3, p. 56. At her two-month well-baby visit on March 5, 2007, she was diagnosed with "mild developmental delay." Pet. Ex 4, p. 4. These delays persisted. See, e.g., *id.*, pp. 6, 8, 10.

On July 18, 2007, Crystal was seen for her 6-month checkup. See *id.*, p. 8. Her pediatrician noted "[normal growth and development except] gross motor delay" and recommended continuing early intervention. *Id.* At both her 9- and 12-month visits, her general development was described as "delayed." *Id.*, pp. 10, 12.

On April 14, 2008, during her 15-month well-baby visit, Crystal received her initial doses of the varicella and MMR vaccines. *Id.*, p. 15. Two days later, Crystal was taken by ambulance to the Emergency Department of Armstrong County Hospital, where she was diagnosed with an "atypical febrile seizure," with conjunctivitis listed as the possible cause of her fever. Pet. Ex. 3, pp. 5-6.

Crystal was seen by her pediatrician six days after her emergency department visit. The pediatrician noted that her febrile seizure was due "most likely to illness, not MMR." Pet. Ex. 4, p. 16. Later that day, following another seizure, Crystal was taken to the emergency department where she was diagnosed with a febrile seizure and pneumonia. Pet. Ex. 6, p. 13. On April 23, 2008, she returned to the emergency department after another seizure. See Pet. Ex. 5, pp. 181, 412-14.

On April 24, 2008, Crystal was "unable to maintain her head control," exhibited "decreased tone with occasional eye jerks," and had "a very altered mental status." *Id.*, p. 385. Her physicians were concerned that she had encephalitis. *Id.* Although a brain MRI was normal, *id.*, pp. 263-64, an EEG showed "background slowing and poor background regulation for age," reflecting "generalized degrees of diffuse cerebral dysfunction, which can be of multifocal causes." *Id.*, p. 266.

On October 15, 2009, Crystal received a genetic evaluation. See *id.*, pp. 934-64; 984-1003. A detailed family history given at the time revealed that Crystal's father, maternal grandmother, and cousin all suffer from epilepsy. *Id.*, p. 952. Additionally, multiple family members, including two half-brothers, also suffer from mental disabilities. *Id.*

The only reference anywhere in the record suggesting that a health care provider considered Crystal's vaccines to be causal of her seizures is a June 4, 2008 note from one of her primary care providers who recommended "defer[ring] dose #2," citing a "[history of] reaction [after] MMR [and] [varicella]." Pet. Ex. 4, p. 18.

On November 24, 2009, Crystal, then nearly three years old, was seen in the Child Development Unit of Children’s Hospital of Pittsburgh, Pet. Ex. 5, pp. 1004-08, due to her pediatrician’s “concerns about loss of language skills and possible autism spectrum disorder.” *Id.*, p. 1006. Mr. Austin reported that Crystal’s development was normal until she received her MMR shot at her 15-month well-baby visit. *Id.*, p. 1005. Crystal’s evaluator, however, referenced a hospital record indicating developmental delay prior to her receipt of the MMR vaccine. *Id.* In sum, the evaluator found that Crystal did not “meet[] the criteria for diagnosis of autism spectrum disorder but that her developmental patterns are related to neurological dysfunction as hypothesized by her neurologist.” *Id.*, p. 1008.

## B. Processing the Vaccine Injury Claim.

### 1. Initial Contact with CHCC.

On June 6, 2008, less than two months after Crystal received the vaccinations that allegedly caused her seizure disorder, Mr. Austin called CHCC about filing a petition for vaccine compensation on his daughter’s behalf. Interim Application, Tab A, at 1.<sup>8</sup>

### 2. Initial Processing by CHCC.

Although the Vaccine Act does not explicitly prohibit the filing of a Vaccine Act petition before the vaccinee has experienced an injury that has persisted for at least six months, it does so by implication. § 11(c)(1)(D)(i) (“A petition for compensation under the Program for a vaccine-related injury or death shall contain . . . an affidavit, and supporting documentation, demonstrating that the person who suffered such injury . . . suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine”). Thus, despite Mr. Austin’s early contact with CHCC, the petition could not be filed immediately.

Between June 6, 2008, the date of initial contact, and October 16, 2008, the date on which the statutory six-month requirement was satisfied, CHCC performed twelve tasks in this case, most of which were performed by paralegals. Interim Application, Tab A, at 1-2. These tasks included communication with petitioners, case file opening and compilation, “stage 1”<sup>9</sup> packet preparation and completion, and interoffice communications. Interim Application, Tab A, at 1-2. The two remaining tasks, both performed by attorney Kevin Conway, included communication with petitioners, record

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<sup>8</sup> As CHCC’s billing records were filed two pages per sheet, citations to these records are made to the page number, and not the sheet number.

<sup>9</sup> While CHCC does not state explicitly what “stage 1” entails, it appears from their billing records to involve petitioners’ provision of a list of pertinent health care providers to the firm, see Interim Application, Tab A, at 2, 7/7/2008 entry, followed by the firm’s dispatch of medical record request letters, see *id.*, 10/7/2008 entry, and finally the firm’s compilation of all requested medical records. See, e.g., *id.*, 10/24/2008 entry.

review, and interoffice communications. *Id.* at 1. In total, CHCC spent just under eight hours on this case prior to October 16, 2008, billing a little over \$1,300.00 for the work performed. *Id.* at 1-2.

### 3. Processing from the Six-Month Mark until Filing the Petition.

In the nearly 20 months between October 16, 2008, the date on which the statutory six-month requirement was satisfied, and June 10, 2010, the date on which the petition was filed, CHCC performed over 100 tasks, totaling about 75 hours, for which the firm billed about \$10,200.00. *See id.* at 1-12. Paralegals billed about \$2,700.00 for approximately 26 hours expended. *Id.* Law clerks expended about 38 hours, mostly for document drafting, and billed approximately \$5,100.00 for their work. *Id.* Finally, the firm's attorneys billed about \$2,300.00 for about 10 hours of work. *Id.*

A large portion of the firm's pre-filing, billable hours were devoted to "stage 2"<sup>10</sup> work, interoffice communications, and preparation of petitioners' affidavits and petition. *See* Interim Application, Tab A, at 1-2. The records reflect that, in addition to paralegals and law clerks, at least four attorneys were involved with this case to varying degrees during this time period.<sup>11</sup> *Id.*

Three "stage 2" tasks account for nearly half of the hours expended by paralegals on this case. These include (1) "case summary," (2) review of exhibits 1-9 and identification of missing records, and (3) updating the packet with additional records.<sup>12</sup> *See id.* at 4, 7.

The firm's attorneys, law clerks, and paralegals, billed about \$700.00 for about four hours of time spent on interoffice communications, case meetings, and case memos.<sup>13</sup>

The largest discrete tasks involved preparing petitioner John Austin's affidavit and the petition itself. It is impossible to determine the exact amount of time spent on these two tasks because the firm repeatedly lumped these tasks with others in their billing records. *See, e.g., id.* at 8. Excluding interoffice communications regarding the

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<sup>10</sup> As with "stage 1," CHCC does not state explicitly what "stage 2" entails. In another Program case, however, the firm explained that a "stage 2" memo is a "comprehensive, detailed, accurate, and complete summary of a petitioner's past medical and/or educational, rehabilitation, physical therapy, psychological, or similar records." *Hawkins v. Sec'y, HHS*, 00-646V, 2007 WL 5159581, at \*1 (Fed. Cl. Spec. Mstr. Apr. 30, 2007).

<sup>11</sup> Between October 16, 2008 and June 10, 2010, attorneys Kevin Conway, Ronald Homer, and Christina Ciampolillo each billed for work on this case. While she did not bill for work during this period, Sylvia Chin-Caplan was present at some interoffice meetings. *See, e.g.,* Interim Application, Tab A, p. 6, 6/8/2010 entry.

<sup>12</sup> These tasks were performed on July 2, 2009, July 6, 2009, and December 16, 2009.

<sup>13</sup> Due to the lumping of memo drafting and review with other tasks, any time spent on interoffice communications mentioned within other billing entries was not included in this calculation.

petition and affidavit, the firm spent over 42 hours preparing these two filings.<sup>14</sup> *Id.* at 6-12. The amount billed for preparing the petition<sup>15</sup> and affidavit (about \$6,500.00) accounts for about 63% of the total amount billed during this period. *See id.*

#### 4. Activities after the Petition was Filed.

In the over 15 months between the date CHCC filed the petition and September 29, 2011, the date they moved for interim attorneys' fees and costs, the firm performed over 175 tasks, totaling nearly 50 hours, for which they billed over \$8,600.00 in fees. *See* Interim Application, Tab A, at 12-28. Seven attorneys worked on this case during this time period. Together, they billed about \$6,500.00 for about 28 hours expended. Paralegals billed about \$2,100.00 for about 20 hours of work.

In addition to collecting and filing Crystal's remaining medical records, *see id.*, at 12-16, the firm's post-petition efforts centered on retaining an expert to opine on Crystal's behalf. *See id.*, at 12-28. During their search for an expert, the firm's attorneys and paralegals engaged in various interoffice communications. *See id.*, pp. 14-17, 19, 21-23. The firm spent about five hours on interoffice conferences, case meetings, and memoranda, billing over \$1,000.00 for these tasks.

In a status report filed with the court on June 13, 2011, Mr. Homer stated that petitioners were seeking alternate counsel, suggesting that CHCC's efforts to retain an expert proved fruitless. In the three months that followed, culminating in petitioners' motion for interim fees and costs, CHCC refocused their efforts on pursuing alternate counsel on petitioners' behalf. *See id.*, at 24-27. These efforts also proved fruitless, and I dismissed this case on February 17, 2012, for insufficient proof.

#### 5. Activities after Petitioners' Interim Application.

On April 20, 2012, petitioners filed a Supplemental Application. Between filing petitioners' Interim Application on September 29, 2011, and filing their Supplemental Application, CHCC performed 21 tasks, billing over \$1,500.00 for over 7 hours expended. Supplemental Application, Tab A, at 1-3. Most of this time was devoted to replying to respondent's opposition to petitioners' Interim Application.

### C. Issues Raised by the Processing of this Claim.

Two facts are glaringly obvious in a review of the medical evidence and the billing records in this case. First, this is not a claim filed on the eve of the statute of limitations' expiration. The case was presented to CHCC less than three months after

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<sup>14</sup> Excluding entries on the billing records in which preparation of the affidavit and petition are lumped, CHCC billed for over 7 hours of affidavit tasks, accounting for about \$1,200.00, and about 21 hours for work on the petition, totaling about \$3,400.00. Those entries in which preparation of the affidavit and petition are lumped (including an entry from 11/9/2009, stating only "prep for drafting") account for about 14 hours expended, and about \$1,900.00.

<sup>15</sup> The petition in this case was quite comprehensive. However, the degree of detail, including quotations from medical records, is not required in Vaccine Act cases. § 11(c).

the administration of the allegedly causal vaccinations. The firm expended over 80 hours of effort, for which it billed over \$11,500.00 in fees and just under \$750.00 in costs before filing the petition. The petition was filed 10 months before the expiration of the statute of limitations.

Second, throughout the 20 month period of processing by CCHC before the petition was filed, no effort was made to obtain a review by a medical expert. This failure is particularly significant, given the ample time to obtain such a review, the viral nature of the vaccines involved coupled with the short time period between vaccination and seizure onset, the evidence of alternate cause (the opinions by the specialists who treated Crystal that illnesses triggered her febrile seizures), and the strong family history of seizure disorders and developmental delays. Furthermore, as I pointed out in my order deferring decision on the interim fee application, the MMR vaccine has a long “track record” in the Program, and two days is simply too short a period of time for the viral replication required to produce fever and concomitant febrile seizures.<sup>16</sup> Order Deferring a Decision, 2012 WL 592891, at \*6. It does not appear from the billing records that anyone did any basic medical or legal research to determine the merits of this case prior to filing the petition.

## **II. Legal Issues Presented in this Fees and Costs Application.**

Respondent makes two general arguments in opposition to petitioners’ application. First, respondent contends that the record “does not support a finding of reasonable basis.” See *generally* Res. Supp. Opp. at 2. Respondent highlights the unexplained absence of an expert medical opinion. *Id.* at 3. According to respondent, “it was not possible for the petitioners—or [the] Court—to evaluate this claim without an expert.” *Id.* Respondent contends that petitioners, “under no pressure from the statute of limitations,” have no excuse for filing a “marginal case” without first obtaining an expert opinion. *Id.*

Respondent’s second argument is that the number of hours billed by petitioners’ counsel is excessive. See *generally id.* at 4. Here, respondent contends that billing for

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<sup>16</sup> Petitioners have pointed out that Crystal also received a varicella vaccination. Petitioners’ Reply to Res. Supp. Opp. [“Petitioners’ Reply”], filed May 17, 2012, at 6. The varicella vaccine was added to the Vaccine Injury Table in 1997, National Vaccine Injury Compensation Program: Revisions and Additions to the Vaccine Injury Table—II, 62 FR 7685-01, and thus there are fewer cases involving it than MMR vaccine, which appeared on the original Vaccine Injury Table. § 14(a)(II). Nevertheless, readily obtainable reference materials indicate that the incubation period for varicella, during which viral replication occurs, is approximately the same as that of measles. Compare Robert Kliegman, Richard Behrman, Hal Jenson, and Bonita Stanton, NELSON TEXTBOOK OF PEDIATRICS (19th ed. 2011) at 1104-08, and *Chickenpox (Varicella) – Topic Overview*, WEBMD, <http://www.webmd.com/vaccines/tc/chickenpox-varicella-topic-overview> (last visited Jan. 22, 2013) (“It usually takes 14 to 16 days to get the symptoms of chickenpox after you have been around someone with the virus.”), with 42 C.F.R. § 100.3(a)(III)(B). See also K. Stratton, *et al.*, eds. Committee to Review Adverse Effects of Vaccines, Institute of Medicine, ADVERSE EVENTS OF VACCINES: EVIDENCE AND CAUSALITY (2012) at 46 n.4 (“What constitutes reasonable latency will vary across vaccines and across adverse events. For example, most adverse reactions from live virus vaccines would not be expected to occur within hours of vaccination; rather, time must elapse for viral replication.”).

over 130 hours is unwarranted for a case in which no expert reports were filed and no hearings were held. *Id.* at 5. Specifically, respondent challenges the time billed for interoffice communication, which she attributes to the excessive number of people (including seven attorneys) who worked on this case. *Id.* “Particularly egregious” to respondent is the time spent “collecting and reviewing medical records, drafting a three-page affidavit for Mr. Austin, and drafting the petition.” *Id.*

In reply to respondent’s argument that petitioners lacked a reasonable basis to bring their claim in the absence of expert review, petitioners argue that pre-filing expert review was cost-prohibitive. Petitioners’ Reply at 2-3. Petitioners’ counsel acknowledges that “it was prudent for [him] to consult a medical expert regarding vaccine causation” in light of the complexity of Crystal’s case. *Id.* at 2. He also admits that the opinion of a medical professional was not only reasonable, but “necessary.” *Id.* He argues, however, that “petitioners[] were unable to afford the cost to retain a pediatric neurologist to review Crystal’s extensive medical records,” adding that “[i]t was prudent for the petitioners[] to file their claim . . . and subsequently incur the cost of retaining a medical expert.”<sup>17</sup> *Id.* at 2-3. Apparently, counsel means that it is “prudent” to do so because then those due-diligence costs can then be passed on to the Vaccine trust fund.

Despite the absence of an expert’s review, petitioners contend “reasonable basis was present at each stage of counsel’s evaluation and prosecution of the case.” *Id.* at 3. They base this conclusion, in part, on the statements of Crystal’s treating physicians allegedly associating Crystal’s vaccinations with the onset of her seizures. *Id.* at 4. Citing the Federal Circuit,<sup>18</sup> petitioners argue that a pediatrician’s recommendation to defer Crystal’s second doses of the MMR and varicella vaccines is probative of a causal link. Petitioners’ Reply at 5. Concerning the timing of Crystal’s seizures, petitioners’ counsel recognizes “the traditionally accepted time frame in which the MMR vaccine can cause or contribute to the onset of febrile seizures.” *Id.* at 6. He notes, however, “several additional factors,” such as Crystal’s receipt of the varicella vaccine and the reports of seizures following varicella vaccination, *id.*, to support his belief that “petitioners maintained reasonable basis during the pendency of their claim.” *Id.* at 7.

In reply to respondent’s argument that the number of hours billed by petitioners’ counsel is excessive, petitioners’ counsel argues that the time his firm expended was reasonable, considering the case’s “complex medical and legal issues.” *Id.*

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<sup>17</sup> These comments in Petitioners’ Reply are a candid acknowledgment of one of the problems caused by our current approach to paying fees and costs to unsuccessful litigants. Petitioners effectively concede that seeking an expert in a marginal case before filing a petition would involve the expenditure of funds that could not be recovered from the Program. By delaying their search for an expert until the petition was filed, the attorneys sought to ensure that these expenditures would be compensated. These problems are addressed more specifically in footnote 26 below.

<sup>18</sup> *Andreu v. Sec’y, HHS*, 569 F.3d 1367, 1376 (Fed. Cir. 2009) (“A treating doctor’s recommendation to withhold a particular vaccination can provide probative evidence of a causal link between the vaccination and an injury a claimant has sustained.”).

### III. Reasonable Basis: Law and Analysis.

#### A. The Law Applicable to Determining a Reasonable Basis.

For purposes of awarding fees and costs, the Vaccine Act creates three classes of litigants, two explicitly, and one by implication. The first class is comprised of those petitioners who establish vaccine causation of an injury. They are entitled to the award of reasonable attorneys' fees and costs as part of the compensation for their claim. § 15(e)(1)(A) and (B). Those who do not prevail on the merits of their petition fall into one of the other two classes.

The second class is comprised of those litigants who can demonstrate that their unsuccessful claim was brought in good faith and upon a reasonable basis. They may, in the discretion of the special master, be awarded reasonable fees and costs. § 15(e)(1)(A) and (B); *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993) ("If the petition for compensation is denied, the special master 'may' award reasonable fees and costs. . . . [T]he statute clearly gives [a special master] discretion over whether to make such an award.").

The third class is the one created by implication, for if only the losing litigants who establish reasonable basis and good faith are eligible to receive fees and costs, it follows that those who fail those tests may not be awarded fees and costs. Historically, for a variety of reasons, the last class of litigants has been very small, comprised primarily of petitioners who failed to meet a statutory requirement other than proving causation. *Schmidt v. Sec'y, HHS*, 11-401V, 2012 WL 1392632 (Fed. Cl. Spec. Mstr. Mar. 30, 2012); *Rydzewski v. Sec'y, HHS*, 99-571V, 2008 WL 382930 (Fed. Cl. Spec. Mstr. Jan. 29, 2008); *Van Houter v. Sec'y, HHS*, 90-1444V, 1992 WL 266301 (Cl. Ct. Spec. Mstr. Sept. 1992), *aff'd*, 1992 WL 370270 (Fed. Cl. Nov. 18, 1992); *Dover v. Sec'y, HHS*, 90-2299V, 1992 WL 42924 (Cl. Ct. Spec. Mstr. Feb. 14, 1992).<sup>19</sup>

"Good faith" is a subjective standard,<sup>20</sup> and "reasonable basis" an objective standard. At issue here is the reasonable basis to file and maintain this claim.

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<sup>19</sup> The petitioners in these cases failed to establish receipt of a vaccine listed on the Vaccine Injury Table as required by § 11(c)(1)(a). In each case, reasonable basis was found to be lacking and fees and costs were denied. With regard to fees and costs determinations following denial of entitlement for failure to satisfy the Act's statute of limitations, the Federal Circuit has held that "[t]he good faith and reasonable basis requirements apply to the claim for which the petition was brought; this applies to the entire claim, including timeliness issues." *Cloer v. Sec'y, HHS*, 675 F.3d 1358, 1362 (Fed. Cir. 2012), *cert. granted*, 133 S. Ct. 638 (U.S. 2012).

<sup>20</sup> Due to its subjective nature, the standard for good faith is very low. A petitioner is entitled to a presumption of good faith. *Grice v. Sec'y, HHS*, 36 Fed. Cl. 114, 121 (1996); *see also Heath v. Sec'y, HHS*, No. 08-85V, 2011 WL 4433646, at \*2 (Fed. Cl. Spec. Mstr. Aug. 25, 2011); *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 WL 4793152, at \*3 (Fed. Cl. Spec. Mstr. Nov. 19, 2007); *Di Roma v. Sec'y, HHS*, No. 90-3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993); *Chronister v. Sec'y, HHS*, No. 89-41V, 1990 WL 293438, at \*1 (Cl. Ct. Spec. Mstr. Dec. 4, 1990).

Neither the Vaccine Act nor the rules governing Program proceedings define “reasonable basis.” In the absence of definitive guidance, special masters and the judges of the Court of Federal Claims have considered the totality of the circumstances in determining the existence of a reasonable basis. *McKellar v. Sec’y, HHS*, 101 Fed. Cl. 297, 303 (2011) (“The presence of a reasonable basis is an objective consideration determined by the totality of the circumstances.”) (citing *Hamrick*, 2007 WL 4793152, at \*4). Some special masters have interpreted this requirement as one of “feasibility.” See, e.g., *Di Roma*, 1993 WL 496981; *Turner v. Sec’y, HHS*, No. 99-544V, 2007 WL 4410030, at \*6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). However, determining the feasibility of a claim can be as problematic as determining reasonable basis.

## B. Analysis of Reasonable Basis.

Determining whether this particular claim had a reasonable basis when filed is as difficult now as it was when petitioners’ interim fees application was filed. The record in support of the fees application is essentially the same now as it was then. There is only one comment in the medical records suggesting possible vaccine involvement in Crystal’s initial seizures. Marshaled against this comment is evidence of developmental delays long pre-dating the allegedly causal vaccines, a strong family history of seizure disorders, and the presence of an alternate cause for the initial seizures to which her treating specialist attributed her fever and the ensuing febrile seizures. The question presented here is whether petitioners’ failure to seek an expert review of this case (or to conduct a rigorous “in house” review of the relevant law and medicine) before filing the petition renders the entire claim unreasonably filed and maintained.

The policy behind the Vaccine Act’s extraordinarily generous provisions authorizing attorney fees and costs in unsuccessful cases—ensuring that litigants have ready access to competent representation—militates in favor of a lenient approach to reasonable basis.<sup>21</sup> Once more reluctant, special masters have, in recent years, been more willing to find a reasonable basis to file a claim even in the absence of medical records or medical opinions suggesting vaccine causation,<sup>22</sup> particularly when later-filed evidence supports vaccine causation.<sup>23</sup> Generally speaking, the special masters have

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<sup>21</sup> In spite of the somewhat esoteric nature of Vaccine Act practice, over 100 attorneys currently appear on the court’s referral list. Available at <http://www.uscfc.uscourts.gov/list-attorneys-accepting-referrals-certain-vaccine-injury-cases>. Undoubtedly, there are other attorneys representing litigants who are not currently on the referral list.

<sup>22</sup> Compare *Everett v. Sec’y, HHS*, 91-1115V, 1992 WL 35863, at \*2 (Cl. Ct. Spec. Mstr. Feb. 7, 1992) (declaring that “to have a ‘reasonable basis’, a claim must, at a minimum, be supported by medical records or a medical opinion,” and recognizing that “it may have been necessary to incur some costs to determine whether or not there was a reasonable basis to file a petition”), and *Smith v. Sec’y, HHS*, 91-57V, 1992 WL 210999, at \*2 (Cl. Ct. Spec. Mstr. Aug. 13, 1992) (“To show . . . reasonable basis . . . petitioner must show that she filed a claim that was supported by medical records or by a medical opinion), with *McNett v. Sec’y, HHS*, 99-684V, 2011 WL 760314, at \*7 (Fed. Cl. Spec. Mstr. Feb. 4, 2011) (noting the Program trend of considering the impending expiration of the statute of limitations in the reasonable basis calculus in the absence of medical records and/or a medical opinion).

<sup>23</sup> See, e.g., *McNett*, 2011 WL 760314, at \*8 (finding reasonable basis for filing a petition without medical records based, in part, on petitioner’s eventual production of records supporting her claim).

not required a medical opinion supporting vaccine causation as a prerequisite to finding a reasonable basis to file a claim. See, e.g., *Hamrick*, 2007 WL 4793152, at \*7 (finding that “[w]hile petitioner’s attorney did not have much information to support the petition, the meager information sufficed to establish a reasonable basis for filing the petition); *Lamar v. Sec’y, HHS*, 99-583V, 2008 WL 3845165, at \*4 (Fed. Cl. Spec. Mstr. July 30, 2008) (finding reasonable basis in the absence of a supporting medical opinion where it was “not reasonable to expect an attorney . . . to dismiss the petition without seeking an expert opinion” in light of “competing views of causation reflected in the medical records”). The Court of Federal Claims has agreed, noting that the statute contemplates a simple pre-filing “review of available medical records to satisfy the attorneys that the claim is feasible.” *Silva v. Sec’y, HHS*, No. 10-101V, --- Fed. Cl. ----, 2012 WL 6789066, at \*5 (Dec. 11, 2012).

Caselaw may also provide some guidance on the merits of a potential claim. The fact that special masters have found in favor of vaccine causation in similar cases or a history of settlements in particular types of cases may provide a reasonable basis for filing a claim, even in the absence of a medical opinion or medical records supportive of vaccine causation.

Claims filed on the eve of the expiration of the statute of limitations have received the most lenient treatment with regard to finding a reasonable basis for filing.<sup>24</sup> The special masters have recognized that the ability to investigate adequately a claim is constrained by the need to file quickly to preserve the claim, and have found the balance between these competing obligations favors filing. Of course, when the “due diligence” required of an attorney reveals lack of merit in a case, the attorney is expected to dismiss the meritless petition or withdraw from representation. In such cases, special masters have generally awarded compensation. Compare *Lamar*, 2008 WL 3845165, at \*4-5 (noting that, even for a sparsely documented claim, “fees and costs should be paid, at least up to the point that an expert opined that there was no support for vaccine causation” where, due to “competing views of causation reflected in the medical records, it [was] not reasonable to expect an attorney . . . to dismiss the petition without seeking an expert opinion”), with *Perreira v. Sec’y, HHS*, 90-847V, 1992 WL 164436, at \*2 (Cl. Ct. Spec. Mstr. June 12, 1992), *aff’d*, 27 Fed. Cl. 29 (1992), *aff’d*, 33 F.3d 1375 (Fed. Cir. 1994) (denying attorneys’ fees for hours expended to litigate a case after the point “counsel should have known that [petitioners’ expert’s] unsupported medical theory was legally insufficient to establish causation in-fact”).

Although reasonable basis may exist in the early stages of a case, it can be lost as more information concerning the merits is obtained. A distinction has been drawn

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<sup>24</sup> See, e.g., *McNett*, 2011 WL 760314, at \*7 (citing *Hearell v. Sec’y, HHS*, 94-1420V, 1993 WL 129645, at \*1 (Fed. Cl. Spec. Mstr. Apr. 6, 1993) (“Because of the time constraints, it was reasonable for the petitioner to file an incomplete petition in this case.”); *Lamar*, 2008 WL 3845165, at \*3 (“Given the impending statute of limitations and the lack of contrary authority, I am willing to attribute petitioner’s good faith belief to her counsel, based on the severe constraints on his time to investigate this case.”); *Turner*, 2007 WL 4410030, at \*6 (stating that “a filing on the eve of the running of the statute of limitations may be supported by less information than would be expected if counsel had more time to conduct a prefiling investigation of the factual underpinnings and the medical basis for a vaccine claim”).

between a reasonable basis for filing a claim and a reasonable basis for continuing to pursue a claim. See *Hamrick*, 2007 WL 4793152, at \*7 (applying a different level of scrutiny for the period after the filing of the petition). The Federal Circuit has held that “when the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith.” *Perreira*, 33 F.3d at 1377 (affirming the holding of the Court of Federal Claims and the special master that petitioners lost reasonable basis when they found their expert’s opinion to be “grounded in neither medical literature nor studies”).<sup>25</sup> A reasonable basis may be lost when a medical expert cannot opine favorably regarding vaccine causation, see, e.g., *Browning v. Sec’y, HHS*, 02-929V, 2010 WL 3943556, at \*13-14 (Fed. Cl. Spec. Mstr. Sept. 27, 2010) (finding that reasonable basis ceased when it was clear petitioner could not produce a legally significant expert opinion), or when a special master has determined that the “facts” upon which the expert’s opinion is based do not exist. See, e.g., *Heath*, 2011 WL 4433646, at \*12 (noting that an expert’s reports “no longer provided a reasonable basis to proceed” when the “factual underpinnings” of his opinion were found to be unsupported after a fact hearing was held).

There exists a tension between supporting the policy behind the award of fees to unsuccessful litigants and discouraging “gaming the system.”<sup>26</sup> Imposing a requirement

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<sup>25</sup> See also Special Master Moran’s comment in *Hamrick* that “[s]etting a relatively low standard for [finding] a reasonable basis in filing a petition (as opposed to prosecuting a petition) is supported by public policy and cases interpreting roughly analogous rules from civil litigation.” 2007 WL 4793152, at \*5. Applying a lenient standard is particularly appropriate when the impending expiration of the statute of limitations prevents an attorney from conducting an adequate investigation of the basis for the claim. *Id.*

<sup>26</sup> In *Lamar*, 2008 WL 3845165, at \*5 n.15, I noted that our approach to fees and costs encourages “gaming the system.” I provided the following hypothetical examples to illustrate the problem encountered when a potential petitioner consults an attorney about what she believes to be a vaccine-caused injury:

Example 1. The attorney conducts an adequate review of the facts and circumstances, including seeking advice from a medical professional on the likelihood of vaccine causation. The medical professional indicates that causation is unlikely. As a matter of professional ethics, the attorney refuses to file the petition. Under these circumstances, the attorney could not file for the fees and costs incurred in investigating the claim, because no petition was filed.

Example 2. The attorney examines the medical records, noting that a covered vaccine was received and that petitioner thereafter suffered an injury lasting for more than six months. The Act’s statute of limitations is rapidly approaching. The attorney does not seek advice from a medical professional before filing the petition. After filing, petitioner is ordered to file the report of a medical expert and fails to do so because no medical expert will opine that the vaccine caused the injury. The attorney thereafter files for fees and costs. Under these circumstances, our case law will support payment of reasonable fees and costs, to include the costs of obtaining the “no causation” opinion.

Example 3. Assume the facts and circumstances of Example 2, except that the statute of limitations is not rapidly approaching and there is adequate time to obtain advice from a medical expert. The attorney does not do so. When the attorney thereafter files for fees and costs, should they be paid? To do so encourages the failure to adequately investigate cases before filing. However, an attorney’s willingness to take such cases

to have either medical records<sup>27</sup> or a medical opinion supporting vaccine causation before fees and costs could be awarded would go a long way towards weeding out claims with no merit at the outset. The current practice of liberal payment of fees and costs encourages attorneys to shift the point at which an expert opinion is sought to later in the process—after the claim is filed—because a negative opinion obtained before the claim is filed would, in most instances, ethically preclude the claim from being filed at all. Thus the work on the case, including the cost of obtaining an expert’s opinion, would be pro bono.

Respondent emphasizes the absurdity of not seeking review by a medical expert before filing the petition. However, at this juncture, I am not willing to hold that all petitions filed without an expert report or medical records supportive of vaccine causation are unreasonably filed. In many cases, such a review might not be necessary or advisable based on the facts and circumstances. For example, cases in which petitioners allege that the influenza vaccine caused Guillain-Barré syndrome frequently settle within a year or two of filing, without the submission of expert reports, even when no treating physician has causally linked the two events.

The petition in this case was filed by a firm with considerable experience in Vaccine Act litigation. That degree of expertise would presumably work to “weed out” non-meritorious cases. The billing records are silent about how the decision to take this case was made and upon what it was based. In spite of the very early point at which the case came to CHCC’s attention, the firm delayed in filing the case for nearly a year and eight months after the satisfaction of the Act’s six-month requirement. Nothing in the billing record accounts for this delay. That may reflect a desire to determine Crystal’s prognosis before filing, a thorough analysis of the case, or simply inefficiency in processing it. Alternatively, it may reflect the firm’s concern about the merits of the case. Although the records collection process dragged on for many months, the records relevant to causation appear to have been available fairly early in this process. I recognize that Crystal’s subsequent treatment and condition would be relevant to determining damages, but these records were not essential to determining whether vaccine causation could be supported. Her diagnosis appeared to be the same when she was 18 months of age (nearly four months after the initial seizures) as it was at 41 months of age, when the petition was filed. *Compare* Pet. Ex. 4, p. 21, *with* Petition.

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may mean that the petition is not filed pro se. Does encouraging attorneys to take vaccine cases sufficiently advance the Congressional purposes behind the Vaccine Act such that the filing of unsubstantiated petitions is deemed reasonable?

*Id.*

<sup>27</sup> I recognize that medical records can support the existence of vaccine causation, even in the absence of a statement of a health care provider attributing the injury to a vaccination. To an attorney experienced in Vaccine Act litigation or a special master with the expertise gained by review of numerous petitions and case files, medical records alone may strongly suggest a causal relationship between vaccination and a subsequent injury, even if they do not, standing alone, satisfy all the *Althen* factors. *Althen v. Sec’y, HHS*, 418 F.3d 1274, 1278 (Fed Cir. 2005).

As I indicated earlier, I am troubled by the fact that a firm with this degree of experience in Vaccine Act cases filed this petition without conducting any medical or legal research. The only notation that salvages the reasonable basis for this case is the one medical record suggesting a link between Crystal's seizures and her vaccination.<sup>28</sup> Pet. Ex. 4, p. 18 (“[History of] reaction [after] MMR [and] [varicella] – defer dose #2”). Although contradicted by other records from the same primary care practice, *id.*, p. 16, it provided some basis to file the claim. Thus, I conclude that there was a reasonable basis, albeit an extremely weak one, to file and maintain this claim, up to the point when a favorable expert report could not be obtained. Whether, given the facts of this case, all of the hours expended by CHCC were reasonably expended is a matter addressed below.

#### **IV. “Reasonable” Attorneys’ Fees and Costs: Law and Analysis.**

##### **A. Law Pertaining to Fees and Costs Calculations.**

In determining the amount of fees to be awarded, the court applies the lodestar method. See *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1998); *Avera v. Sec’y, HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008). The amount to be awarded is initially determined by “multiplying the number of hours reasonably expended on the litigation [by] a reasonable hourly rate.” *Avera v. Sec’y, HHS*, 515 F.3d at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Then, if appropriate, the court may amend the product upward or downward based on specific findings. *Avera*, 515 F.3d at 1348. In determining the number of hours reasonably expended, a court must exclude hours that are “excessive, redundant or otherwise unnecessary, just as a lawyer in private practice

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<sup>28</sup> In Petitioners’ Reply, they assert that “Crystal’s treating physicians immediately and repeatedly associated the onset of her seizures with her recent vaccinations.” Petitioners’ Reply at 4. In footnote 4 of Petitioners’ Reply, they cite several instances in Crystal’s medical records where her April 14, 2008 vaccinations are mentioned in relation to her seizures. Unlike the lone note suggesting causation, these notes merely indicate that Crystal’s seizures occurred in close temporal proximity to the allegedly causal vaccinations. See Pet. Exs. 3, pp. 5-7; 4, p. 16; 5, pp. 93, 130, 138, 147-48, 318-19; 7, pp. 1-2. Temporal connection is insufficient to establish causation. *Strother v. Sec’y, HHS*, 18 Cl. Ct. 816 (1989), *aff’d*, 950 F.2d 731 (Fed. Cir. 1991); see also *Grant v. Sec’y, HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992) (a vaccination is not the cause for all events that follow it); *Cedillo v. Sec’y, HHS*, 89 Fed. Cl. 158, 176 (Fed. Cl. 2009), *aff’d*, 617 F.3d 1328 (Fed. Cir. 2010) (affirming the special master’s rejection of the petitioners’ vaccine causation argument because the treating doctors were recognizing a mere temporal relationship). Moreover, the temporal connection referenced in these notes is incongruous with the incubation period for both the MMR and varicella vaccines. See *supra* note 16. Petitioners cite three additional physician notes they mistakenly assert are suggestive of vaccine causation. Petitioners’ Reply at 4 n.4. A pediatric record from April 22, 2008, contains the note: “? reaction to MMR/Varivax.” Pet. Ex. 4, p. 16. Just below that note, however, Crystal’s primary care provider asserts that “likely febrile [seizures], most likely [secondary] to illness, not MMR.” *Id.* Two other notes discuss post-vaccination fever and seizures. The note from May 2, 2008, reads, “Discussed known but rare risk of post-vaccine [seizures]. Will [discuss with doctor] whether to give [varicella]/MMR boosters.” *Id.*, p. 18. Finally, on the record for Crystal’s 18-month checkup, “Y” [yes] is circled next to the question, “Problems with immuniz[at]ions?,” followed by, “[after] MMR/Varivax[,] seizure[,] fever.” *Id.*, p. 21.

is ethically obligated to exclude such hours from his fee submission.” *Hensley v. Eckhart*, 461 U.S. 424, 434 (1983).

A special master has “wide discretion in determining the reasonableness of [attorneys’ fees and costs]”. See *Perreira*, 27 Fed. Cl. at 34. She may use her experience in Vaccine Act cases to determine whether the hours expended are reasonable. *Wasson v. Sec’y, HHS*, 24 Cl. Ct. 482, 483 (1991), *aff’d*, 988 F.2d 131 (Fed. Cir. 1993) (noting special masters have broad discretion in calculating fees and costs awards); see also *Saxton*, 3 F.3d at 1521 (“Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications”). She is not limited to respondent’s objections in determining an award, *Guy v. Sec’y, HHS*, 38 Fed. Cl. 403, 406 (1997) (citing *Moorhead v. United States*, 18 Cl. Ct. 849, 854 (1989)), nor must she base her decision on a “line-by-line evaluation of the petition.” *Wasson*, 24 Cl. Ct. at 483-84 (holding that a special master did not abuse her discretion by rendering a fee decision based on general guidelines where the billing records were cryptic).

#### B. Analysis of the Hours Claimed.

For the reasons explained below, I find that CHCC expended far more hours on this case than reasonably required. Respondent has not challenged the hourly rates requested for the paralegals, law clerks, and attorneys at CHCC, and I find them to be reasonable. Deductions to the amounts requested are based solely on a reduction in the hours claimed.

##### 1. CHCC’s Billing Records Before the Filing of the Petition.

###### a. Initial Contact to the Satisfaction of the Six-Month Requirement.

I find the hours billed between the time Mr. Austin approached CHCC and the satisfaction of the six-month requirement to be reasonable. Before a statutorily-compliant petition could be filed, CHCC had to wait until October 16, 2008. Moreover, the hours billed for standard case-intake tasks during this time frame such as communication with petitioners, record collection, record review, and interoffice communications are similar to those I have seen in other program cases in which the attorneys’ fees and costs requested have been awarded.

###### b. Six-Month Mark to Filing the Petition.

Despite ample time to do so, CHCC did not refer the case to a medical professional for an opinion on causation. Instead, the firm proceeded to churn fees for a period of nearly one year and eight months before filing the petition on June 10, 2010. Between October 16, 2008 and June 10, 2010, CHCC billed almost 75 hours for a total cost of about \$10,200.00. Respondent objects to the hours billed for three specific tasks: collecting medical records, preparing Mr. Austin’s affidavit, and drafting the petition. Res. Supp. Opp. at 5.

The time billed for collecting medical records appears reasonable. I note that all but one of the medical record exhibits referenced in the petition itself were available and reviewed by July 6, 2009. Application Tab A, at 4, 7/6/2009 entry. One line in the

petition references an emergency medical services record from April 22, 2008. Petition, ¶ 14. Those records were requested on July 27, 2009, and received on August 14, 2009. I note that even if CHCC had sought expert review earlier, the collection of records would have been necessary.

The only other exhibit referenced in the petition itself (at ¶¶ 5, 13, 34, 42) is Mr. Austin's three-page affidavit, which a law clerk began drafting in November, 2009. Interim Application Tab A, at 6, 11/4/2009 entry. That process continued over the next 6 months, until petitioner signed it on May 19, 2010, and returned it to CHCC on May 24, 2010. Affidavit of John Austin at 3; Interim Application, Tab A, at 11, 5/24/2010 entry. Some four paragraphs of the petition are based exclusively on this short affidavit. Petition, ¶¶ 5, 13, 34, 42. For the drafting process, CHCC billed over \$1,200.00 for nearly 8 hours of work solely on the affidavit.

The petition itself, exclusive of the case heading and signature, comprises 14 pages. It quotes extensively from the medical records, in addition to quotations from the affidavit of Mr. Austin. For researching, drafting, and reviewing the petition alone, CHCC billed about \$3,400.00 for over 21 hours of work.

In addition to billing entries for work done only on the petition or affidavit, CHCC repeatedly lumped the two tasks. Under the Program's Guidelines for Practice, petitioners' counsel are encouraged to separate, rather than lump, entries to facilitate assessment of the reasonableness of a fee request. Guidelines for Practice, Section XIV.A.3. The lumping of these tasks has made this assessment more difficult.<sup>29</sup> Nevertheless, it is apparent that CHCC billed about \$1,900.00 for about 14 hours of work on both the affidavit and petition. Altogether, the firm billed over \$6,500.00 for over 42 hours expended on these two documents.

Based on my experience in reviewing hundreds of vaccine cases and billing records, the time billed for drafting Mr. Austin's affidavit (Pet. Ex. 11) and the petition itself is excessive. A Program petition should be a "short and plain statement of the grounds for an award of compensation." Vaccine Rule 2(c)(1)(A). The time CHCC expended attempting to make a compelling case, in part, through artful drafting, including selectively quoting from the medical records,<sup>30</sup> exceeded that required by the Act. A brief and complete statement of the evidence would have been more sufficient and appropriate. The inordinate amount of time spent on the petition and affidavit hints

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<sup>29</sup> CHCC has been warned about the inappropriateness of lumping tasks. *Caves v. Sec'y, HHS*, No. 07-443V, 2012 WL 6951286, at \*5 n.5 (Fed. Cl. Spec. Mstr. Dec. 20, 2012); see also *Doe v. Sec'y, HHS*, No. XX-XXXV, 2010 WL 529425, at \*4 n.9 (Fed. Cl. Spec. Mstr. Jan 29, 2010) (citing cases approving reductions of fees awards due to the lumping of tasks).

<sup>30</sup> CHCC extensively and repeatedly quoted those notations in Crystal's medical records recognizing a mere temporal relationship between her vaccinations and the onset of her condition. See, e.g., Petition, ¶¶ 9, 10, 15. Additionally, they cited a note that, when taken out of context, seemingly raises the question of "reaction to MMR/Varivax." Petition, ¶ 12 (citing Pet. Ex. 4, p. 16). Just below that note, however, the same doctor attributed Crystal's seizures "most likely . . . to illness, not MMR." Pet. Ex. 4, p. 16. CHCC omitted this latter notation. See Petition.

at the firm's recognition of problems with the case itself. **Accordingly, I find the billing for work on the affidavit and petition to be excessive, and deduct \$4,000.00 for CHCC's work on these documents.**

2. CHCC's Billing Records between Filing of the Petition and Petitioners' Interim Application.

Between filing the petition on June 10, 2010, and moving for interim attorneys' fees and costs on September 29, 2011, CHCC billed about 49 hours for a total of about \$8,600.00. For the most part, these fees, generated largely by the efforts to find an expert, appear reasonable.

The first mention of a search for an expert is on August 13, 2010. Interim Application Tab A, at 14. Altogether, efforts related to the search for, communication with, and review of the expert's report (which was never filed), consumed about 21 hours, for which approximately \$3,800.00 was billed. Although the hours spent on obtaining an expert report are longer than would be expected, I do not find them so excessive so as to warrant a reduction in the hours billed.

Once the expert report was received, CHCC acted expeditiously to communicate the problems with the case to petitioners. *Id.* at 22, 5/5/2011 entry; 23, 5/13/2011 entry. The hours and fees claimed for winding down CHCC's involvement and preparing the case for possible transfer to another law firm are reasonable and therefore compensable.

3. Interoffice Communications between Initial Contact and Dismissal.

Between the initial contact with Mr. Austin and the dismissal of this case, CHCC billed approximately \$1,800.00, for about 9 hours expended on case meetings, conferences, and memos. *Id.*, pp. 1-27. Respondent objects to the amount of time billed for interoffice communication in this case. Res. Supp. Opp. at 5. She argues that the "excessive" number of hours spent on interoffice meetings and memos is due to the number of attorneys and unidentified paralegals who handled this matter. *Id.*

I agree that the number of hours spent on interoffice communication at CHCC is excessive. Seven attorneys and an unspecified number of paralegals engaged in verbal or written communications. Interim Application, Tab A, at 1-27. **I deduct \$500.00 from the bill for excessive interoffice communications occasioned by the large number of attorneys and paralegals working on this case over the lengthy period between initial contact and filing the claim.**

#### 4. CHCC's Billing Records between Petitioners' Interim Application and Supplemental Application.

Between filing petitioners' Interim Application and filing their Supplemental Application, CHCC billed approximately \$1,500.00 for over 7 hours expended. Supplemental Application, Tab A, at 1-3. As this time was devoted to continuing the search for alternate counsel, replying to respondent's opposition to petitioners' Interim Application, and preparing petitioners' Supplemental Application, I find these fees to be reasonable.

### V. Conclusion.

Ultimately, the purpose of awarding fees and costs to losing petitioners is not to benefit Program attorneys, but rather to ensure that petitioners have access to competent counsel. In assessing a fees and costs application, a balance must be struck between the needs of petitioners and the desires of attorneys. Attorneys well versed in the particulars of the Vaccine Act facilitate more efficient and effective prosecution of petitioners' claims. Such attorneys, however, will agree to represent Program petitioners only if they are ensured adequate recompense for their time.

When attorneys spend a reasonable amount of time and incur reasonable costs in representing Program petitioners, they should be fairly compensated, thus encouraging them to take future cases. However, when attorneys proceed in the absence of a reasonable basis, fees should not be awarded, or the Program risks encouraging baseless petitions to be filed. Likewise, paying unreasonable fees and costs would simply encourage similar requests without improving the lot of petitioners in the Program. The possibility that denying a particular fee application in total or in part may discourage some attorneys from representing Program petitioners in the future cannot serve as a justification to misallocate Program funds.

I find this claim to have been brought in good faith. The issue of reasonable basis to file and maintain this claim is a very close one, but I conclude, based on the persuasive authority found in the decisions of other special masters and judges of the Court of Federal Claims, that a reference in Crystal's medical records supportive of vaccine causation provided a sufficient basis to file this case. Therefore, an award of fees and costs is appropriate, pursuant to § 15(b) and (e)(1).

However, the requested amounts will be adjusted by the court as indicated above to an amount that is reasonable. **Accordingly, I hereby award the total of \$23,912.51<sup>31</sup> as follows:**

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<sup>31</sup> This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, § 15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See generally *Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed.Cir.1991).

- a lump sum of \$23,730.51 in the form of a check payable jointly to petitioners, John Austin and Judy Quant, and petitioners' counsel, Ronald Homer, for attorney fees and costs, and
- a lump sum of \$182.00 in the form of a check payable to petitioners, John Austin and Judy Quant, for their litigation costs.<sup>32</sup>

The clerk of court shall enter judgment in accordance herewith.<sup>33</sup>

**IT IS SO ORDERED.**

**s/Denise K. Vowell**  
Denise K. Vowell  
Special Master

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<sup>32</sup> Petitioners filed a statement in compliance with General Order #9 on October 4, 2011.

<sup>33</sup> Entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review. See Vaccine Rule 11(a).