IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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BREANNE BARBER, a minor, by her parent and natural guardian, DANA IMLAY, Petitioner,	*	No. 99-434V Special Master Christian J. Moran Filed: August 21, 2008
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	*	Attorneys' fees and costs; hourly rate for attorney; Rupert IV; number of hours for a paralegal; cost for an expert; reasonable basis.
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David L. Terzian, Esq., Rawls & McNelis, P.C., Richmond, Virginia, for petitioner;
Michael P. Milmoe, Esq., United States Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS[*]

Dana Imlay sought compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 et seq. (1994). Ms. Imlay claimed that the hepatitis B vaccine caused her daughter, Breanne Barber, to develop aplastic anemia. Ms. Imlay was denied compensation in an unpublished decision filed on November 17, 2007.

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

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–(12)(d)(4); Vaccine Rule 18(b).

Ms. Imlay now seeks an award for her attorneys' fees and costs pursuant to 42 U.S.C. § 300aa–15(e). Ms. Imlay is awarded $49,016.50 in attorneys' fees and $9,350.15 in costs.

I. Factual Background

Breanne was born on January 8, 1991. Transcript ("Tr.") 6. Her medical history until she was four years old was routine. Tr. 7.

On October 26, 1995, Breanne saw her pediatrician, Dr. Panitda Toochinda. During this visit, two events with consequence to this case occurred. First, Dr. Toochinda obtained a sample of Breanne's blood for routine testing. (As discussed below, the results of these tests were not routine.) Second, Dr. Toochinda gave Breanne several vaccinations, including the first dose of the hepatitis B vaccine. Exhibit 5 at 17.

The October 26, 1995 blood tests showed that Breanne's mean corpuscular volume (MCV) was 90.3 and that her platelet count was 153,000. Exhibit 2 at 5. The result of MCV test led to a finding that Breanne was suffering from aplastic anemia before she received the hepatitis B vaccine, meaning that the hepatitis B vaccine did not cause the aplastic anemia. Decision, slip op. at 7.

After the blood tests were performed, Breanne eventually showed other signs of the aplastic anemia, such as bruises on her body. The manifestation of the disease prompted more medical attention, including the diagnosis and treatment for aplastic anemia.

II. Procedural Background

Ms. Imlay filed the petition for compensation under the Vaccine Act on July 2, 1999. At that time, she was represented by Mr. Clifford Shoemaker. She filed her first set of medical

records on February 12, 2002. Approximately two years later, Ms. Imlay filed another set of medical records.

Along with several other cases in which petitioners alleged that the hepatitis B vaccine harmed them, this case did not proceed on the formal litigation track for several years. During this time, attorneys for these petitioners, attorneys representing the Secretary, and the Office of Special Masters attempted to establish a structure for resolving these disputes efficiently. These attempts, ultimately, were not successful.

The case was then transferred to the undersigned in 2006, and the case resumed. On May 8, 2006, Mr. David Terzian filed a motion to substitute as counsel of record for Ms. Imlay. This motion was granted on June 1, 2006. Mr. Shoemaker did not participate in the case after this date.

Respondent filed its report, pursuant to Vaccine Rule 4. Respondent argued that Breanne was not entitled to compensation because there was no medical evidence showing that the hepatitis B vaccine caused Breanne's aplastic anemia. Resp't Rep't at 9.

Ms. Imlay then filed a report from Dr. Eric Gershwin, an immunologist. Dr. Gershwin opined that Breanne was healthy before the hepatitis B vaccine and that the hepatitis B vaccine caused Breanne's aplastic anemia. Exhibit 15.

Respondent filed the report of Dr. James Nachman, a pediatric hematologist, which stated that Breanne exhibited the signs of early aplastic anemia at the time of her vaccination and that therefore, the vaccination had nothing to do with the development of her aplastic anemia. Exhibit A. Later, respondent filed two supplemental reports from Dr. Nachman and one article

on which he relied. Exhibits C-E. Despite being given an opportunity to present information about the normal result for a test of MCV before the hearing, Ms. Imlay did not.

A hearing was held on September 25, 2007. A decision denying compensation was issued on November 29, 2007. Judgment in favor of respondent was entered on January 10, 2008.

On February 19, 2008, Ms. Imlay filed the pending motion for attorneys' fees and costs. This motion produced several rounds of briefing, which concluded on July 7, 2008. Thus, the motion is ripe for adjudication.

The parties dispute three significant issues. Those issues are: the reasonable hourly rate for Mr. Terzian, the reasonable hourly rates for a member of Mr. Terzian's staff, and the reasonable hourly rate for Dr. Gershwin. In addition, there is the appropriate amount of compensation for Mr. Shoemaker. These issues are addressed in detail below.

III. Attorneys' Fees

In the Vaccine Program, when petitioners fail to establish that they are entitled to compensation, special masters enjoy discretion to award petitioners reasonable attorneys' fees and costs. When compensation is not awarded,

> 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).

Section 15(e)(1) permits, but does not mandate, an award of attorneys' fees and costs when an unsuccessful petitioner fulfills two requirements: specifically, that the petition was brought in good faith and that there was a reasonable basis for the claim. Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) ("If the petition for compensation is denied, the special master 'may' award reasonable fees and costs if the petition was brought in good faith and upon a reasonable basis; the statute clearly gives [a special master] discretion over whether to make such an award.") (citation omitted).

Here, the good faith of Ms. Imlay in bringing the petition is accepted. However, the reasonable basis for the petition ended after respondent filed a report from Dr. Nachman showing that Breanne's aplastic anemia was a condition that existed before the vaccination. The determination that Ms. Imlay's case lacked a reasonable basis requires that some portion of the amount of attorneys' fees and costs claimed by Ms. Imlay be eliminated.

A. Reasonable Compensation for Mr. Terzian

Reasonable attorneys' fees are determined using the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

1. Reasonable Hourly Rate for Mr. Terzian

Ms. Imlay seeks compensation for Mr. Terzian at an hourly rate of $350 per hour. Respondent opposes this proposed hourly rate and suggests the evidence supports an hourly rate of $230 per hour. Resp't Opp'n, filed April 3, 2008, at 11. The evidence presented in this case supports an award of $340 per hour.

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

In support of his claim, Mr. Terzian presents several affidavits about the reasonable hourly rate for attorneys in Richmond, Virginia, the location of his practice. (Mr. Terzian did not present any information about the reasonable hourly rate for attorneys in Washington, D.C., the location of the Court of Federal Claims, although he was entitled to make this claim. See Avera, 515 F.3d 1343.)

a. Summary of the Evidence of Hourly Rate

(1) Affidavits from Attorneys Outside Mr. Terzian's Firm

In support of Mr. Terzian claim that he should be awarded $350 per hour, Mr. Terzian has filed affidavits from three attorneys who do not work in his firm. For various reasons, respondent challenges the value of these affidavits. Respondent's arguments are addressed in paragraph two, which analyzes the evidence presented.

The first affiant is H. Aubrey Ford, III. Fee exhibits 2-3. Mr. Ford asserts that "[a]t a minimum, Mr. Terzian should be awarded a rate of $350 per hour for his services. This is the

same hourly rate that I charge and receive for my services for comparably complex legal matters in the same location in Richmond, Virginia." Fee exhibit 2 at 2.

Mr. Ford bases his assessment on his practice of law for 26 years in Richmond. Mr. Ford's own practice includes representing approximately 25 petitioners who allege that a vaccine caused autism. Mr. Ford also practices in fields involving commercial litigation, business torts, false claims act and qui tam actions, and employment litigation. In his non-vaccine work, Mr. Ford states that his standard rate is $350 per hour. Fee exhibits 2 & 3.

The second affidavit comes from Karen A. Gould. Like Mr. Ford, Ms. Gould asserts that "[a]t a minimum, Mr. Terzian should be awarded a rate of $350 per hour for his services." Fee exhibit 4 (affidavit, dated Dec. 15, 2006) at 2.

Ms. Gould rests her opinion upon her 26 years of experience in working in Richmond. Her own practice focuses on medical malpractice and workers' compensation defense. Ms. Gould also states that she has learned, through voluntary activities with the Virginia State Bar, that "$350 per hour is a reasonable and pervasive market rate for legal services of attorneys of comparable experience and skill as Mr. Terzian, which involve the same or comparable complex medical issues." Id. Ms. Gould served as president of the Virginia State Bar in 2006-07. Id. at 1. Although not stated in her affidavit, Ms. Gould subsequently became the Executive Director of the Virginia State Bar. Despite her reference to the reasonable market rate for attorneys in Richmond, Ms. Gould does not provide her own hourly rate.

The final affidavit from a lawyer outside of Mr. Terzian's firm is an affidavit from Malcolm P. McConnell III. Mr. McConnell avers that "Mr. Terzian should minimally be

awarded a rate of $350 to $400 per hour for his services based on his experience, expertise and superior litigative skills." Fee exhibit 5 at 2.

Mr. McConnell began practicing law in 1987, and has focused primarily on representing plaintiffs in medical malpractice and personal injury law. Id. at 1, 4. He states that in most cases, he is paid through a contingent fee. However, he believes that if he were paid on an hourly basis, he would receive "in the $350 to $450 per hour range." Id. at 2. Mr. McConnell did not explain the basis for his estimate of his effective hourly rate.

(2) Affidavits from Attorneys Inside Mr. Terzian's Firm

Mr. Terzian submitted affidavits from Brewster Rawls, an attorney in his firm. Fee exhibit 6 & 24. In response to an order from the court, Mr. Terzian also described his own practice. Pet'r Reply to Resp't Status Report, filed July 8, 2008.

Mr. Rawls provides information about the hourly rates charged by attorneys in his firm in different practice areas. According to Mr. Rawls, when his firm defends doctors who are alleged to have committed medical malpractice, the firm is typically retained by an insurance company. For senior attorneys, such as Mr. Terzian, the insurance company pays $170 to $230 per hour. Fee Exhibit 6 at 3. Sometimes, a doctor retains the law firm directly. In these cases, the firm charges $250 to $350 per hour. Id. at 4.

Attorneys in Mr. Rawls's firm also refer potential clients who are required to appear before the Virginia Board of Medicine, such as for professional discipline, to other firms that specialize in this work. These firms, according to Mr. Rawls's understanding, charge clients $275 to $350 per hour. Id.

Finally, Mr. Rawls explained that attorneys in his firm represent people who allege they suffered an injury due to medical malpractice and are pursuing compensation pursuant to the Federal Tort Claims Act. In his initial affidavit, Mr. Rawls estimates that the "average effective hourly rate for senior lawyers" who perform this type of work is $440 to $470 per hour. Id. At the request of the court, Mr. Rawls submitted another affidavit explaining the basis for this estimate. In his second affidavit, Mr. Rawls calculates a range of hourly rates for 27 FTCA cases. The hourly rate ranged from a low of approximately $160 per hour to a high of more than $2,600 per hour. Mr. Rawls performed various other calculations, attempting to eliminate cases that, arguably, distort the information and determined that a more accurate estimate of the effective hourly rate is $500 per hour. Fee exhibit 24.

(3) Mr. Shoemaker's Hourly Rates

Although Ms. Imlay is currently represented by Mr. Terzian, her request for attorneys' fees and costs includes a submission from Clifford Shoemaker, the attorney who represented Ms. Imlay from the start of these proceedings until June 1, 2006. Fee exhibit 18. Mr. Shoemaker's invoice indicates that depending upon the period of time, his hourly rate was either $250 or $300. Id. at 11.[1]

From this submission, respondent argues that Mr. Shoemaker's hourly rate is an appropriate starting point. Respondent proposes some reductions to Mr. Shoemaker's hourly rate based upon differences between Vienna, Virginia, the location of Mr. Shoemaker's practice, and

[1] Mr. Shoemaker's submission references, but did not attach, an agreement between his firm and the respondent regarding his hourly rate. Fee exhibit 18 at 2. Neither Mr. Terzian nor the attorney from the United States Department of Justice wished to submit the agreement.

Richmond, Virginia, the location of Mr. Terzian's practice. Resp't Opp'n, filed April 3, 2008, at 11.

Respondent supports its argument that an adjustment is needed by providing some information showing a difference between earnings for lawyers in Northern Virginia and earnings for lawyers in Richmond, Virginia. Resp't Opp'n, Tab A and exhibit F (pay scales for federal employees at GS-15), exhibit G (information from Bureau of Labor Statistics).

b. Analysis of Evidence

The special master's task is to determine the hourly rate as one part of the lodestar calculation. The hourly rate is "'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 at 1348 (Fed. Cir. 2008), quoting Blum, 465 U.S. at 896 n.11. The parties agree with this statement. The parties also agree that the relevant "community" is Richmond, Virginia.[2]

The difficulty is that there is no agreement between the parties and relatively little guidance about how to determine what the prevailing market rate is for similar services. A determination about the prevailing market rate "cannot be made with the same certainty as ascertaining the value of a futures contract for pork bellies or wheat on a given day." Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1300 (11th Cir. 1988).

Furthermore, what are "similar services" is disputed. The parties have identified only one appellate case determining what work is similar to the work performed by attorneys representing

[2] Again, Mr. Terzian has chosen not to claim an hourly rate prevalent in Washington, D.C., the location of the forum (the Court of Federal Claims) where this action is pending.

petitioners in the Vaccine Program, Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293, 304 (2003) (Rupert IV). Rupert IV is not binding upon special masters, except as an order on remand. Although not binding authority, Rupert IV is entitled to consideration.

In the decision underlying Rupert IV, the special master determined the prevailing market rate based upon testimony of three attorneys who "represent plaintiffs and defendants in a variety of matters." Rupert v. Sec'y of Health & Human Servs., Fed. Cl. 99-774V, 2002 WL 31441211 * 4 (Spec. Mstr. Aug. 26, 2002) (Rupert III) (citing transcript). On appeal, respondent argued that the special master's determination was in error because the special master "failed to establish the manner in which complex litigation is comparable to the services provided by an attorney in a Vaccine Act case." Rupert IV, 55 Fed. Cl. at 299. The judge of the United States Court of Federal Claims observed that respondent's criticism was "correct." Nevertheless, Rupert IV continued, stating "The record on review, however, supports a finding that certain types of civil matters are comparable to Vaccine Act practice." Id. at 300; accord id at 304 (stating "The record supports a finding that the most comparable practice to Vaccine Act work is complex civil matters, not plaintiff's personal injury, medical malpractice, and personal liability work"). This determination was based upon the judge's review of the record in Rupert, which included testimony from at least seven witnesses and two days of hearing. That record is much more extensive than the record developed in this case, which is summarized in the preceding section. Rupert IV did not explain why "complex civil matters" are comparable to work pursuant to the Vaccine Act, although the witnesses whose testimony was reviewed probably provided that basis.

Rupert IV holds that the record may support (and in Rupert did support) a finding that "certain types of civil matters are comparable to Vaccine Act practice." This holding, however,

provides little direction because the "certain types of civil matters" are not defined. A close reading of Rupert IV indicates that the attorneys whose testimony was credited practice in the fields of "civil rights, commercial litigation, shareholder derivative actions, and for providing the service of 'good counsel.'" Rupert IV, 55 Fed. Cl. at 299. Beyond providing these examples, Rupert IV did reject some fields. Rupert IV stated that "[t]he court's own review of the record confirms that respondent failed to mount an adequate case for including in the lodestar analysis rates paid to defense attorneys in the personal injury, products liability, and medical malpractice fields." Rupert IV, 55 Fed. Cl. at 304.[3] The Court also rejected a comparison with any fields in which attorneys' fees are set by a contingency fee agreement because contingency fees impermissibly account for risk in determining the hourly rate. Id. at 301-02. These factors from Rupert IV are the basis for the analysis of the evidence presented in this case. These standards are roughly equivalent to determining whether the information is relevant, i.e., does the evidence make more or less likely a point that is in dispute.

Another factor to consider in this case is whether the evidence presented is reliable. Many of respondent's objections attack Ms. Imlay's evidence because the affidavits do not meet the standard of proof necessary. In general, information about hourly rates is helpful (or reliable) when the information is set out with specificity and the reasoning made explicit:

> [G]eneralized and conclusory "information and belief" affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice. To be useful an affidavit stating an attorney's opinion

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

> as to the market rate should be as specific as possible. . . . The best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm. Alternatively, the affidavit might state that the stated rate is based on the affiant's personal knowledge about specific rates charged by other lawyers or rates for similar litigation.
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> The District Court's task is to determine the approximate market rate. Its inquiry is aided little by an affidavit which just offers one attorney's conclusory and general opinion on what that rate is. Nor is it helpful if the affiant simply states that he is familiar with the attorney and the litigation and that he thinks the fee request is reasonable. What is needed are some pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate.

Rupert v. Sec'y of Health & Human Servs., 52 Fed. Cl. 684, 693 (2002) (Rupert II), quoting Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense, 675 F.2d 1319, 1325-26 (D.C. Cir. 1982).

The first piece of evidence presented by the petitioner is the set of two affidavits from Mr. Ford. Mr. Ford's opinion has some value. He states that he represents both petitioners who claim that a vaccine caused them autism and also parties in commercial litigation, business torts, false claims act and qui tam actions, and employment litigation. In his non-vaccine work, Mr. Ford states that his standard rate is $350 per hour. This evidence is what Rupert II describes as "the best evidence" about the market rate. Mr. Ford believes that his work in Vaccine Program cases is "very comparable" to his other work. Fee exhibits 2 & 3.

Mr. Ford's affidavit passes a minimal level of reliability. He states that his practice in "commercial and tort litigation involve[s] complex issues of accounting and business principles, engineering, physics and architecture. Thus, all these matters are as complicated as vaccine injury litigation and comparably require intense research, education, and study in order to achieve a well prepared and well presented case." Fee exhibit 3.

Because Mr. Ford represents petitioners in Vaccine Program cases, a reasonable inference is that he must know about this field. However, the extent of Mr. Ford's knowledge should not be presumed to be especially great. Although Mr. Ford filed cases for 25 petitioners who allege that a vaccine caused them autism, these cases have not been developed. Instead, they (like thousand of other cases) have been stayed pending the outcome of certain test cases. In addition, Mr. Ford is no longer counsel of record in many of these 25 cases. (In some cases, Mr. Terzian has become counsel of record.) Therefore, in the absence of a more detailed explanation of Mr. Ford's basis of knowledge, his affidavit will be credited but not given as much weight as if he explained his basis for knowledge about the Vaccine Program.

The second piece of evidence is the affidavit from Ms. Gould. This affidavit is not helpful, although this decision, itself, is relatively close. Importantly, Ms. Gould does not provide what Rupert II calls the "best evidence" – the hourly rate that she customarily charges. A reasonable inference is that Ms. Gould did not provide this information because it would not have supported the rate requested by Mr. Terzian.

Ms. Gould, on the other hand, does offer an opinion that the reasonable hourly rate for Richmond is $350, based upon information that she has learned through activities in the Virginia State Bar. She states that the cases in which Richmond attorneys received $350 per hour are comparable to Mr. Terzian's work. The basis for her comparison appears to be that she is "familiar with practice pursuant to the National Vaccine Injury Compensation Program."

It is here that Ms. Gould's affidavit falls short of the standard for being helpful. She does not state how she is familiar with cases in the Vaccine Program. Without more detail about how Ms. Gould is "familiar with" litigation pursuant to the Vaccine Act, her opinion cannot be

credited. Her conclusory statement is not any better than the testimony of witnesses called by respondent to testify during the Rupert hearing. The special master rejected their testimony in part because they had little information about the Vaccine Program. Rupert III, *3. Rupert IV, in turn, endorsed the special master's decision. Rupert IV, 55 Fed. Cl. at 304. Ms. Gould does not express the basis for her knowledge in her affidavit. Consequently, although Ms. Gould's affidavit contains some information that at a superficial level could be helpful, her affidavit contains gaps that prevent reliance upon it.

The third source of evidence is an affidavit from Mr. Malcolm P. McConnell III. Mr. McConnell's affidavit is not helpful for two reasons. First, like Ms. Gould, he states that he is "familiar with practice pursuant to the National Vaccine Injury Compensation Program." Fee exhibit 5. However, again like Ms. Gould, Mr. McConnell does not explain the basis for his familiarity. Mr. McConnell may be correct that the amount of medical knowledge required to prosecute petitions in the Vaccine Act is comparable to the amount of medical knowledge required to pursue cases alleging medical malpractice. However, the structure of litigation is much different. For example, in cases in the Vaccine Program, the parties are not entitled to discovery by right and the Rules of Evidence do not restrict the admissibility of information. These two differences greatly simplify the litigator's task.

The other problem with Mr. McConnell's affidavit is that he compares Mr. Terzian's requested hourly rate with the hourly rate that Mr. McConnell believes that he has earned for representing plaintiffs in medical malpractice and personal injury cases if he calculated an hourly rate. Setting aside the point that Mr. McConnell appears not to have calculated his hourly rate, Mr. McConnell's comparison is not relevant. The "most comparable practice to Vaccine Act

work is . . . not plaintiff's personal injury [or] medical malpractice." Rupert IV, 55 Fed. Cl. 304. Mr. McConnell's affidavit constitutes the proverbial orange, not an apple.

The next set of affidavits is from attorneys within Mr. Terzian's firm, Mr. Terzian's partner (Brewster Rawls) and Mr. Terzian, himself. In some respects, Mr. Rawls's affidavit is very helpful. He provides a range of different hourly rates. This range is helpful because as noted in Blum, 465 U.S. at 895 n. 11, fee rates vary from lawyer to lawyer, case to case, and client to client. Listed below are the ranges of rates for attorneys in Mr. Rawls's firm.

Type of Litigation	Hourly Rates for Senior Attorneys
Medical malpractice defense work retained by insurance company	$170-$230
Medical malpractice defense work retained by doctor, individually	$250-$350
Professional discipline (referred to other attorneys)	$275-$350
FTCA work	$500 (calculated)

The first category of medical malpractice defense, in which an insurance company retains Mr. Rawls's firm, is not relevant. Rupert IV, 55 Fed. Cl. at 304.

The second category of medical malpractice defense meets the minimal threshold of relevancy, because it differs from the first category. In this category, individual doctors retain Mr. Rawls's firm. These engagements happen on a case-by-case basis probably because individual doctors are not responding to medical malpractice cases continually. Mr. Rawls's describes this work as happening "[f]rom time to time." Fee exhibit 6 at 3.

These individual engagements are not the same as work generated pursuant to a contract between an insurance company and a law firm. The insurance defense model was rejected because of the existence of a contract. Rupert IV, 55 Fed. Cl. at 301 (stating that the "negotiation that takes place [between insurance companies and law firms] would not support a finding that the rates insurance companies pay defense lawyers represent a purely market-driven rate for those services."). When a long-term contract is not present (as in Mr. Rawls's second category), then defending individual doctors in medical malpractice cases may function as one piece of evidence as to the prevailing market rate for an attorney in the Vaccine Program.

The third category of work discussed by Mr. Rawls is work in professional discipline cases, which is referred to other attorneys. Mr. Rawls's statement that other firms charge $275-$350 is accepted as reliable because Mr. Rawls has probably been informed by the attorneys to whom he refers matters how much they charge. If Mr. Rawls did not know the different billing rates, then he could not make reasonable recommendations about where his potential clients should seek counsel.

In addition, Mr. Rawls's implicit comparison between the work of attorneys in professional discipline cases and Mr. Terzian's work in Vaccine Act cases has some relevance. Mr. Rawls's affidavit could be more persuasive if he described what type of work the attorneys who represent doctors or nurses before professional disciplinary boards actually perform. (Some information can be found at Randy R. Koenders, Rights as to Notice and Hearing in Proceeding to Revoke or Suspend License to Practice Medicine, 10 A.L.R. 5th 1 (1993).)

Mr. Rawls also states that he has some basis for knowing about work in the Vaccine Program. Although Mr. Rawls does not explain how he developed familiarity with the Vaccine

Program, a reasonable inference is that he learned about it through daily interactions with Mr. Terzian, his partner in a law firm with ten attorneys. See Pet'r Reply, filed July 8, 2008, at 6 (discussing that Mr. Terzian and Mr. Rawls discussed a business plan for Mr. Terzian's work). Mr. Rawls also has attended at least one status conference before the undersigned.

The final category of work described by Mr. Rawls is representing plaintiffs in FTCA work. Although Mr. Rawls's statement about the hourly rate received by attorneys in his firm is very reliable, the comparison must be rejected as not relevant.

Before explaining why the comparison to the FTCA is not relevant, the undersigned must pause to compliment Mr. Rawls on a well-prepared explanation of how he determined the hourly rates his firm received in FTCA work. In Mr. Rawls's first affidavit, he estimates that "the average effective hourly rate . . . is approximately $440 to $470 per hour." Fee exhibit 6 at 4. In response to an order, Mr. Rawls presented a supplemental affidavit with attached charts showing how the effective hourly rate varied. Mr. Rawls also proposes various ways of interpreting the data, such as an average of the hourly rate in all cases, an average of the hourly rate in all cases except the three lowest and three highest to exclude aberrations, and an average for all cases. After noting two methods that produced a higher effective hourly rate, Mr. Rawls proposes that the effective hourly rate, as actually calculated, is $500 per hour. Fee exhibit 24.

It is difficult to see how Mr. Rawls's statement could have been more reliable. Respondent's criticisms are completely off-base. Respondent criticizes Mr. Rawls for using a limited sample size (27 cases) but Mr. Rawls has used every case his firm has concluded. Although a larger sample size would have increased the confidence in the resulting analysis, 27 is not such a small number for this type of calculation. Respondent also argues that Mr. Rawls did

not account for work performed by attorneys nationwide. This argument is particularly misplaced because the issue is what is the prevailing market rate in the relevant community, which the parties agreed was Richmond, Virginia. Mr. Rawls's firm is located in Richmond, VA. Therefore, this firm's experience is part of the market.

Nevertheless, despite the reliability of Mr. Rawls's information regarding FTCA work, this information is not relevant. The retention of Mr. Rawls's firm in FTCA work is based upon a contingency fee. Fee exhibit 24 ¶ 1. Mr. Rawls explains that he believes that the risk of not receiving any compensation is minimal because his firm has dropped only one case in which significant time was expended without receiving a fee. Id. ¶ 4. Nevertheless, some risk of nonpayment remains.

The risk of nonpayment makes extrapolating an appropriate hourly rate in Vaccine cases from the effective hourly rate in FTCA cases inappropriate. Rupert IV, 55 Fed. Cl. at 301 (holding that the special master "acted contrary to statute and precedent" when basing an hourly rate on cases that contain some risk of nonpayment).

Another potential source of information about the prevailing market rate is information about Mr. Terzian himself. In response to an order, Mr. Terzian submitted details about his practice. Between September 1, 2005 and July 1, 2008, Mr. Terzian performed some duties for two different insurance companies and was paid at rates ranging from $125 per hour to $165 per hour. For the first 22 months of this period (a span beginning September 1, 2005 and ending July 1, 2007), Mr. Terzian estimates that he spent approximately five percent of his time on insurance defense matters. In the next year, Mr. Terzian estimates that this percentage decreased to less than one percent. Pet'r Reply to Resp't Status Report, filed July 8, 2008, at 8

Some authorities indicate that the rate the attorney charges his paying clients is relevant to determining the prevailing market rate in a fee-shifting case. Carson v. Billings Police Dept., 470 F.3d 889, 892 (9th Cir. 2006) (reducing requested hourly rate because attorney charged more than market rate); Dillard v. City of Greensboro, 213 F.3d 1347, 1354-55 (11th Cir. 2000) (stating the amount an attorney "charges clients is powerful, and perhaps the best, evidence of his market rate; that is most likely to be what he is paid as 'determined by supply and demand.'")

However, using the rate Mr. Terzian charges his paying clients to determine the prevailing market rate would not be appropriate for two reasons. First, the underlying type of work, medical malpractice defense, has been determined to be not an appropriate comparison. Rupert IV, 55 Fed. Cl. at 304. Second, even if Mr. Terzian's work were in a relevant field, Mr. Terzian's work for insurance companies is such a minor part of his practice that rates for these clients cannot carry much weight. See People Who Care v. Rockford Bd. of Educ., School Dist. No. 205, 90 F.3d 1307, 1313 (7th Cir. 1996) (stating "reduced-rate hours should be considered only in proportion to the percentage of the attorney's practice they represent.")

The final form of evidence is odd. Mr. Shoemaker is requesting, pursuant to an agreement between the respondent and himself, an hourly rate of $300. Fee exhibit 18 at 2, 11. The agreement, however, is not included in the record. This omission has not stopped respondent from arguing that Mr. Shoemaker's rate should cap the hourly rate earned by Mr. Terzian. Resp't Opp'n at 12; see also Resp't Status Rep't, filed June 3, 2008, at 3.

Even after setting aside the curious point that Mr. Shoemaker's agreement is not in the record, respondent's argument is not persuasive. The parties have agreed that the relevant legal community is Richmond, Virginia. Mr. Shoemaker's practice is not in Richmond, Virginia; it is

in Vienna, Virginia. Therefore, Mr. Shoemaker's hourly rate does not provide information directly relevant to the legal community in Richmond.

The second reason for rejecting Mr. Shoemaker's hourly rate as useful for setting Mr. Terzian's hourly rate is that respondent assumes that Mr. Shoemaker's rate, itself, is the ceiling for rates in communities located in northern Virginia close to Washington, D.C. If this were correct, then there would be some logic to extending Mr. Shoemaker's hourly rate to Richmond. However, another alternative is that Mr. Shoemaker's hourly rate is not, in fact, the highest rate earned by attorneys in northern Virginia suburbs. If the prevailing market rate for attorneys with more than 20 years of experience practicing in northern Virginia suburbs ranged from $275 to $400, then Mr. Shoemaker's hourly rate of $300 would still be reasonable, yet some attorneys in the northern Virginia suburbs would earn more than attorneys in Richmond.

Indeed, the significance of Mr. Shoemaker's hourly rates is attenuated. If respondent wished to present evidence about the prevailing market rate in Richmond, respondent would have been better served to present this evidence directly. Respondent, however, is not obligated to submit information about the prevailing market rate. Rupert II, 52 Fed. Cl. at 693. Respondent appears to have seized upon the fortuity that some information about Mr. Shoemaker's hourly rates appears in the record and then formed an argument based upon this "evidence." To the extent that respondent has offered information from the Bureau of Labor Statistics (exhibit G) as direct evidence of the appropriate hourly rate for an attorney in Richmond, Virginia (as opposed to evidence supporting merely an adjustment to Mr. Shoemaker's rate), the information from the Bureau of Labor Statistics is much too generalized to be useful. Ceballos v. Sec'y of Health & Human Servs., Fed. Cl. 99-97V, 2004 WL 784910 *6 & n.12 (Spec. Mstr. Mar. 25, 2004).

c. Determination of Prevailing Market Rate

For the reasons explained in the preceding section, some evidence regarding the prevailing market rate cannot be considered. The proffered evidence is either irrelevant, in the sense that the affiant uses an improper field of law as a basis for comparison, or unreliable, in the sense that the affiant has not established his or her basis for making the comparison.

To recapitulate, the following evidence passes standards of being both reliable and relevant. First, Mr. Ford's opinion that $350 is a reasonable hourly rate for attorneys in Richmond, Virginia is afforded some weight although his opinion would have been given more weight had he explained his basis for knowledge about the Vaccine Program. Second, Mr. Rawls's statement that individual doctors sometimes retain attorneys in his firm who charge $250-$350 per hour. Third, Mr. Rawls's statement that firms that represent doctors and nurses before disciplinary boards charge $275-$350 per hour. Of these pieces of evidence, the most persuasive evidence is the second form.

Respondent argues that the field most comparable to work in the Vaccine Program is medical malpractice defense. Resp't Resp., filed July 8, 2008, at 4-5. The selection of the rates charged by attorneys in Mr. Rawls's firm for representation of individual defendants in medical malpractice comports with respondent's primary argument.

Respondent focuses exclusively on the rates for attorneys who are retained by insurance companies. Resp't Resp., filed July 8, 2008, at 8-9. As discussed above, Rupert IV has rejected this argument. This focus overlooks the rates for attorneys who are retained by individual doctors.

Rates charged by attorneys who are retained by individual doctors, serve as a basis for establishing the prevailing market rate for attorneys retained by individual petitioners to bring cases pursuant to the Vaccine Act. In both fields, the attorney must understand how to litigate a case, involving such skills as preparing pleadings, gathering information (medical records), understanding medical records, possessing some comfort with medical science, finding doctors who can serve as expert witnesses, assisting medical experts in preparing their reports, examining and cross-examining the experts in hearings, and arguing their clients' case to the finder of fact. These similarities in skills make a comparison between medical malpractice cases and cases in the Vaccine Program valid. See Rupert IV, 55 Fed. Cl. at 306 (noting that the "skill set [for petitioner's attorneys] is equivalent to plaintiff's . . . medical malpractice").

The subset of medical malpractice cases in which an individual doctor (not an insurance company) retains an attorney refines this comparison. Like a petitioner in the Vaccine Program, the doctor probably does not have a pre-existing relationship with the attorney. The doctor cannot offer a promise of repeated engagements that could lead a law firm to offer lower hourly rates to an insurance company. The doctor's bargaining strength is relatively analogous to the fictional bargaining strength of a petitioner pursuing a claim pursuant to the Vaccine Act. Consequently, the rates that law firms charge individual doctors can be a proxy for the rates that a law firm would charge an individual in the Vaccine Act.

Of course, the comparison between medical malpractice work and work pursuant to the Vaccine Act is not perfect. Notable differences include the lack of discovery by right in Vaccine Act cases and the elimination of Rules of Evidence in Vaccine Act cases. 42 U.S.C. § 300aa - 12(d)(1)(B), (E). These two changes make litigation more simple and means that a competent

attorney representing petitioners in the Vaccine Program is not required to possess the same range of skills as an attorney representing doctors in medical malpractice cases. These differences will be considered when setting the hourly rate for Mr. Terzian. Based on the evidence presented, the appropriate prevailing rate for an attorney in Richmond, VA in this matter is in the range of $275-$350 per hour.

d. Determination of Hourly Rate for Mr. Terzian

After determining the prevailing market rate in Richmond, Virginia, the next task is to determine Mr. Terzian's hourly rate. See Rupert IV, 55 Fed. Cl. at 306 (finding prevailing market rate before determining the hourly rate for the attorneys involved in that case).

Rupert IV awarded hourly rates "at the lower end of the range of comparables." Id. Rupert IV selected the lower end because attorneys in the Vaccine Program do not need to have the same skills as an attorney who practices "complex civil matters." An equally great reduction is not appropriate for Mr. Terzian for two reasons.

First, the baseline for comparison to Mr. Terzian is the set of attorneys who are retained by individual doctors in medical malpractice cases. The skill set in medical malpractice work more closely resembles work in the Vaccine Act than general (and undefined) "complex civil matters" which was the basis for the comparison in Rupert IV. Therefore, a significant adjustment is not needed.

Second, Mr. Terzian possesses skills that warrant an hourly rate toward the higher end of the range. On a basic level, Mr. Terzian is well-prepared for status conferences, comprehends medical issues, and advocates for his client appropriately. These traits entitle Mr. Terzian to some hourly rate in the range of the prevailing market ($275-$350).

Additionally and importantly, Mr. Terzian has additional skills and traits that distinguish him from other attorneys who represent petitioners in the Vaccine Program. First, Mr. Terzian defended the Secretary of Health and Human Services in Vaccine cases for more than 10 years. Fee exhibit 1 at 7-9 (curriculum vitae of Mr. Terzian). No other attorney who commonly represents petitioners possesses the advantage of having worked for the other side. Mr. Terzian's experience at the Department of Justice gives him knowledge and insights that other attorneys do not possess. This specialized knowledge is worth a premium.

Second, Mr. Terzian litigates his cases efficiently and appears to exercise billing judgment. Mr. Terzian delegates tasks to more junior attorneys and paralegals appropriately. This approach ensures that specific tasks are done by the person who charges the least. Yet, Mr. Terzian retains overall responsibility, ensuring that efforts are not duplicated. One example of how Mr. Terzian spends less time on cases but still accomplishes a good result concerns motions for enlargements of time. When Mr. Terzian requires additional time to present the report of an expert (something common for almost every attorney representing petitioners), Mr. Terzian makes an informed estimate of how much time is likely to be required. When Mr. Terzian and the potential expert determine that the requested time is likely to be 120 days, Mr. Terzian seeks an enlargement of that much time.

In contrast, other attorneys often file a motion for enlargement of time that their expert will prepare a report in 30 days. However, the expert does not produce the report and the attorney is forced to file an additional motion for enlargement of time. This pattern could repeat until the attorney has filed four motions for enlargement of time, totaling 120 days. The result is

the same as Mr. Terzian's approach, but Mr. Terzian obtains the extension by filing one motion, not four. Thus, Mr. Terzian's practice appears to be very efficient.

A concern about efficiency is also reflected in Mr. Terzian's time records. Mr. Terzian's time records contain enough information and details so that it is easy to understand what Mr. Terzian is doing. In addition, Mr. Terzian appears to exercise the "billing judgment" discussed by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983). For example, Mr. Terzian's billing statements omit relatively insubstantial items such as charging 6 minutes for reviewing a notice of appearance or 6 minutes for reviewing a notice of assignment to a special master. If Mr. Terzian spends less time on a case (either because he operates efficiently or he refrains from billing every hour) and accomplishes a similar result, then his hourly rate should be toward the higher end of the range.

On the other hand, Rupert IV indicates that attorneys who are not required to possess the same set of skills are not entitled to be paid like attorneys who use those skills. This principle prevents an award of the highest hourly rate to Mr. Terzian, who is not required to use all the skills, such as an understanding of the Federal Rules of Evidence. After accounting for the pluses and minuses, the undersigned finds that the appropriate hourly rate for Mr. Terzian is $340 per hour.

2. Reasonable Number of Hours for Mr. Terzian

Having found the reasonable hourly rate for Mr. Terzian, the next step in the lodestar calculation is to determine the reasonable number of hours. Mr. Terzian seeks compensation for a total of 102.3 hours. Fee exhibit 17 at 19 (49.50 hours), fee exhibit 23 at 4 (32 hours), fee exhibit 25 (8.10 hours), fee exhibit 27 (12.70 hours). A substantial amount of work reflected in

these hours was performed reasonably in the dispute over attorneys' fees. For the reasons explained in detail in section IV.B.2.b., below, some of Mr. Terzian's hours are not reasonable because Ms. Imlay's case ceased to have a reasonable basis.

Ms. Imlay's claim that the hepatitis B vaccine caused Breanne's aplastic anemia stopped having a reasonable basis after respondent presented an expert's report showing that Breanne's aplastic anemia began before the hepatitis B vaccine. Ms. Imlay's expert, Dr. Gershwin, failed to offer any response that was even minimally persuasive.

When a petitioner's case lacks a reasonable basis, a petitioner may not be awarded attorneys' fees and costs. 42 U.S.C. § 300aa–15(e)(1); Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29 (1992), aff'd 33 F.3d 1375 (Fed. Cir. 1994).

Mr. Terzian's time sheets indicate that he spent 10.2 hours preparing for and participating in the hearing. Fee exhibit 17 at 15. This time was not reasonably spent. Therefore, no compensation is awarded for these hours.

Consequently, the number of hours reasonably spent by Mr. Terzian is 92.1 (102.3 - 10.2). Because the reasonable hourly rate for Mr. Terzian is $340 per hour, the compensation for Mr. Terzian is $31,314.

B. Reasonable Compensation for Ms. Jenvey and Other Staff

In conjunction with the request for attorney's fees for Mr. Terzian, Ms. Imlay seeks compensation for members of his support staff. Ms. Imlay seeks compensation for activities performed by Ms. Wendy Jenvey, a person who supports Mr. Terzian. Ms. Jenvey worked for 66 hours on this case. Fee exhibit 17 at 19 (60.2 hours), fee exhibit 23 at 4 (4.4 hours), fee exhibit 25 (0.8 hours), fee exhibit 27 (0.6 hours). The parties do not dispute that Ms. Imlay is entitled to

compensation for these activities. Rather, the parties dispute whether Ms. Jenvey should be paid as a nurse consultant at $150 per hour or as a paralegal at $85 per hour. The issue is really one of degree because Ms. Imlay concedes that some activities performed by Ms. Jenvey were paralegal in nature. Similarly, respondent recognizes that some of Ms. Jenvey's tasks called upon her specialized training in nursing.

In Ms. Imlay's petition for reimbursement of attorneys' fees and costs, she had originally requested $150.00 per hour for all of Ms. Jenvey's work in this case as a nurse consultant. After further briefing, Ms. Imlay reduced her claim to Ms. Jenvey's legal nurse consultant time down to 42.0 hours at the $150 per hour nurse consultant rate and requested that the remaining 18.2 hours be reimbursed at the paralegal rate of $85 per hour. Pet'r Reply at 25. (After Ms. Imlay filed her reply brief, Ms. Jenvey worked additional hours.)

Respondent maintains that a majority of Ms. Jenvey's activities were paralegal; they did not require a nursing background to perform them. Respondent suggested that 20% of Ms. Jenvey's total number of hours be compensated at the nurse consultant rate of $150 per hour and the remaining 80% be compensated at the paralegal rate of $85 per hour. Resp. Brief, page 14-15.

A detailed review of Ms. Jenvey's time entries indicates that 23.3 hours required a nursing background. For the remaining 42.7 hours, Ms. Jenvey functioned as a paralegal. A line-by-line explanation of the basis for this determination is not required. See Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (approving special master's bulk reduction in the number of hours claimed). Some examples of paralegal functions include conducting an inventory of medical records and filing medical records with the court, printing,

scanning, and binding medical records and articles, emailing various staff members to generate checks, obtaining medical records from various providers, reviewing the legal docket for court deadlines, and other clerical and administrative tasks. Some entries could have required Ms. Jenvey's nurse consultant background, such as a conference with Mr. Terzian on the status of the case, but without any information provided indicating that Ms. Jenvey was using her nursing background, Ms. Jenvey's nurse consultant rate cannot be justified for these particular entries.

Ms. Imlay has submitted evidence about the appropriate hourly rate for both a nurse-consultant and a paralegal. Respondent has not opposed the requested hourly rate for either task. Therefore, 23.3 hours of Ms. Jenvey's time will be compensated at the nurse consultant rate of $150 per hour, and 42.7 hours will be compensated at the $85 per hour paralegal rate. The total amount of compensation for Ms. Jenvey is $7,124.50.

Ms. Imlay has also requested compensation for other paralegals who work with Mr. Terzian. Respondent has not objected to this request and the request is reasonable. These amounts are 25.7 hours at $85 per hour. Fee exhibit 17 at 19 (20.5 hours), fee exhibit 23 at 4 (2.6 hours), fee exhibit 25 at 2 (1.9 hours), fee exhibit 27 at 2 (0.7 hours). Ms. Imlay is awarded $2,184.50 for work by other staff.

C. Mr. Shoemaker's Compensation

Ms. Imlay also seeks compensation for the work performed by her previous attorney, Clifford Shoemaker and his associates. Ms. Imlay seeks $10,514.73 for work performed and costs incurred by Mr. Shoemaker. Fee exhibit 18. Respondent has not objected.

Although respondent has not objected to this portion of petitioner's fee request, a special master may review it independently. Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403,

406 (1997); Moorhead v. United States, 18 Cl. Ct. 849, 854 (1989). Significantly, many of the items listed below are unreasonable because they repeat billings made by Mr. Shoemaker in other cases. Individual attorneys representing respondent may not be aware of this repetition. See Lamar v. Sec'y of Health & Human Servs., Fed. Cl. 99-583V, 2008 WL 3845157 *6-11 (Spec. Mstr. July 30, 2008) (discussing repetitious billing).

The following activities are not reasonable.

Item	Date	Staff	Description	Hours Claimed	Hours Awarded	Rate	Excess Amount
1	9/23/02	GAS	File Review - got packet ready for mass mailing	0.40	0.00	$55	22.00
2	1/20/04	CJS	Review case with Sabrina and discuss how to proceed	1.00	0.25	$250	187.50
3	2/6/04	GAS	Go through file and accounts folder to find all of the bills for medical records, etc.	0.80	0.25	$55	30.25
4	3/9/04	CJS	Discuss case during meeting w/ Dr. Geier	0.50	0.00	$250	125.00
5	6/25/04	CJS	Meeting re medical literature and recent decisions (½ travel time charged)	0.05	0.00	$250	12.50
6	2/5/06	CJS	Various	0.70	0.00	$300	210.00
7	2/15/06	CJS	Review order of 20060208- Re reassignment to SM Moran	0.10	0.00	$300	30.00
8	3/1/06	CJS	Review order of 20060224 - Joint STC on 20060327	0.10	0.00	$300	30.00
9	7/26/06	CJS	Emails rescheduling the SC	0.20	0.00	$300	60.00
			TOTAL				707.25

For item 1, a staff member at Mr. Shoemaker's firm prepared the file for a mass mailing. This amount of time is not justified. The file was very thin – only three exhibits had been filed. Preparing the file should not have taken much time. In addition, the same activity for the same amount of time on the same day has appeared in at least three other cases in which compensation has been sought on the docket of the undersigned. These are Goss, 99-407V; Kay, 01-467V; and Wied, 01-505V. This repetition raises a question about the accuracy of the record-keeping. Thus, no compensation is awarded.

A similar analysis indicates that the amount of time for item 2 should be reduced from one hour to 15 minutes. Given the extent of the documents obtained, it is extremely unlikely that Mr. Shoemaker could have discussed this case for one hour with his associate. It is also notable that this same entry has been repeated in three cases. These are Hamrick, 99-683V; Nicks, 99-662V; and Nicks, 99-663V.

For item 3, a staff member again appears to have made a general entry running across several cases. These include: Goss, 99-407V; Hamrick, 99-683V; Kay, 01-467V; and Wied, 01-505V; Perrodin, 99-473V; Nicks, 99-662V; Nicks, 99-663V; and Emmendorfer, 99-553V. Without some showing that Ms. Imlay's case required the particular amount of time claimed, a more reasonable estimate is 15 minutes.

The record remained undeveloped in March 2004. By this date, Ms. Imlay had filed only three exhibits. The attorneys' time sheets show that many more records arrived after March 2004. Without a well-developed record, meeting with Dr. Geier was not necessary. Therefore,

the 0.50 hours for item 4 is eliminated. Similarly, a meeting to discuss medical literature in June 2004 (item 5) was not necessary because Breanne's case was not well-developed.

Item 6 combines seven entries in which Mr. Shoemaker claimed one-tenth of an hour for reviewing documents at least three years old. In 2006, there is no basis for reviewing these documents, which were routine documents such as a notice of appearance from respondent. Thus, this time is eliminated.

Item 7 and item 8 both concern time for reviewing orders filed in dozens of cases. Both orders were short orders. Mr. Shoemaker has already received compensation for his activity in reviewing them. See Duncan v. Sec'y of Health & Human Servs., Fed. Cl. 99-455V, 2008 WL 2465811 *5 (Spec. Mstr. May 30, 2008), motion for review denied (Aug. 4, 2008).

The final item, item 9, concerns efforts to reschedule a status conference at the end of July 2006. This entry appears to be an error. Mr. Shoemaker was replaced as counsel of record in early June 2006. Thus, Mr. Shoemaker was not participating in status conferences in July 2006.

The sum of these deductions is $707.25. Mr. Shoemaker has requested $9,100.75 in attorneys' fees and is awarded $8,393.50. Mr. Shoemaker has also requested $1,413.98 in costs, which is a reasonable amount and adequately documented. Thus, the total award for Mr. Shoemaker is $9,807.48.

IV. Costs

Ms. Imlay requests $16,011.17 in costs incurred by Mr. Terzian. The largest single item is reimbursement for work performed by Dr. Gershwin. Fee exhibit 17 at 19-20. As explained below, the amount requested is unreasonable in part. Other than the cost associated with Dr.

Gershwin, the costs incurred by Ms. Imlay are reasonable and adequately documented. Thus, those other costs are awarded in full. The total amount of costs awarded to Ms. Imlay while represented by Mr. Terzian is $7,936.17.

A. Reasonable Cost for Dr. Gershwin

Ms. Imlay proposes that the court award her $13,775 for Dr. Gershwin's work. She derives this figure by multiplying Dr. Gershwin's proposed hourly rate ($500 per hour) by the number of hours he claims to have spent (27.55 hours). Respondent has challenged the amount of compensation. Respondent suggests that either the hourly rate be reduced or the number of hours be reduced.

1. Reasonable Hourly Rate

Ms. Imlay seeks compensation for Dr. Gershwin at $500 per hour. Because the evidence is not sufficient to justify this amount, Dr. Gershwin is awarded $300 per hour.

As the applicant, Ms. Imlay bears the burden of establishing the reasonableness of the proposed hourly rate. Presault v. United States, 52 Fed. Cl. 667, 670 (2002). Ms. Imlay's evidence of the reasonableness of Dr. Gershwin's hourly rate is not persuasive. Her primary piece of evidence is a statement from Dr. Gershwin that he charges this rate. Fee exhibit 22. However, in the context of discussing the process of setting the reasonable hourly rate for an attorney, "something more than an attorney's own affidavit is required to establish the prevailing market rate for attorney's fees." Raney v. Federal Bureau of Prisons, 222 F.3d 927, 938 (Fed. Cir. 2000), citing Blum 465 U.S. at 895 n.11. This level of proof is appropriate for determining the reasonable hourly rate for an expert, which is part of the attorneys' cost. While Dr. Gershwin's own experience may be some evidence of the market rate, his personal rate could

exceed the market rate. See Carson, 470 F.3d at 892 (reducing requested hourly rate because attorney charged more than market rate).

Additional information about the market rate for immunologists would be helpful. See Raney, 222 F.3d at 938 (stating "in future cases, the trial court should demand adequate proof from individuals familiar with the market of the community billing rate charged by attorneys of equivalent skill and experience performing services of similar complexity."). Ms. Imlay has produced a sufficient quantum of evidence with regards to the reasonable hourly rate for attorneys in Richmond, Virginia. A similar presentation of evidence could be made for immunologists.

Ms. Imlay's secondary argument is that Dr. Gershwin is comparable to Marcel Kinsbourne, a doctor who was determined to have a reasonable hourly rate of $500 per hour approximately six months ago. See Simon v. Sec'y of Health & Human Servs., Fed. Cl. 05-941V, 2008 WL 623833 (Spec. Mstr. Feb. 21, 2008). This argument is not persuasive because the evidence does not support comparing Dr. Kinsbourne to Dr. Gershwin for purposes of determining an appropriate hourly rate.

At least two points differentiate Dr. Kinsbourne from Dr. Gershwin. First, Dr. Kinsbourne's background is in neurology, the "medical speciality that deals with the nervous system." Simon, * 7; Dorland's Illustrated Medical Dictionary (30th ed. 2002) at 1255. Dr. Gershwin's practice is immunology, which is the "branch of biomedical science concerned with the response of the organism to antigenic challenge, the recognition of self and not self, and all the biological (in vivo), serological (in vitro), and physical chemical aspects of immune

phenomena." Dorland's at 914. No evidence supports the proposition that the reasonable hourly rate for a neurologist should set the standard for the reasonable hourly rate for an immunologist.

In addition, Dr. Kinsbourne has approximately 20 years of experience in testifying in cases brought pursuant to the Vaccine Act. The chief special master specifically took Dr. Kinsbourne's experience into account when determining his appropriate hourly rate. Simon, * 7. In contrast, Dr. Gershwin's appearance in this case was his first experience testifying as an expert witness in the Vaccine Program. Dr. Gershwin should not receive the same hourly rate as Dr. Kinsbourne because Dr. Kinsbourne warrants a premium based upon his experience. Therefore, Ms. Imlay's secondary argument concerning the appropriate hourly rate regarding Dr. Gershwin is rejected.

In absence of any meaningful evidence about Dr. Gershwin, a reasonable alternative is to consider awards made to other immunologists by special masters. (Another alternative is to deny the requested compensation entirely. Garnder-Cook v. Sec'y of Health & Human Servs., Fed. Cl. 99-480V, 2005 WL 6122520 *4 (Spec. Mstr. June 30, 2005); see also Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (affirming trial court's decision to deny all attorneys' fees requested pursuant to the Equal Access to Justice Act because the attorneys failed to document their activities adequately); Presault, 52 Fed. Cl. at 679 (denying attorneys' fees requested pursuant to the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 for a period when the attorneys' invoices generally provided neither a number of hours nor a billing rate.))

In some respects, an appropriate starting point to develop a comparison is Joseph Bellanti, a doctor who testifies on behalf of petitioners in cases brought pursuant to the Vaccine

Act. Like Dr. Gershwin, Dr. Bellanti specializes in immunology. By itself, this match in specialties makes a comparison more fitting than Ms. Imlay's suggestion that Dr. Gershwin is comparable to Dr. Kinsbourne. Dr. Bellanti has been awarded $350 per hour in vaccine cases. Savin v. Sec'y of Health & Human Servs., Fed. Cl. 99-537V, 2008 WL 2066611*4 & n.8 (Spec. Mstr. Apr. 22, 2008), motion for review filed (May 22, 2008). Thus, $350 per hour is an appropriate baseline.

From this starting point, certain adjustments are required. First, Dr. Bellanti has more experience in practicing medicine. Dr. Bellanti's longer career is also reflected in the number of publications authored by Dr. Bellanti. See Keenan v. Sec'y of Health & Human Servs., Fed. Cl. 99-561V, 2007 WL 1231592 *2 (Spec. Mstr. April 5, 2007) (describing Dr. Bellanti's background). Second, Dr. Bellanti has more experience in testifying as an expert witness especially in the Vaccine Program. See, e.g., Platt v. Sec'y of Health & Human Servs., Fed. Cl. 93-264V, 1998 WL 928439 *1 (indicating that Dr. Bellanti testified in a hearing in 1997). This experience probably allows Dr. Bellanti to perform some tasks, such as reviewing medical records, more quickly. (The amount of time Dr. Gershwin spent in reviewing medical records is discussed in the next section.)

Together these two factors suggest that Dr. Bellanti is entitled to a higher hourly rate than Dr. Gershwin. A reasonable adjustment is to reduce the baseline rate by $50.00 per hour to account for these differences. Thus, Dr. Gershwin's reasonable hourly rate, for this case, is $300.00.

The lack of information about hourly rates of people who are similar to Dr. Gershwin in training, experience and geographic area of practice bears repeating. If a party in a different case

submits relevant information about the reasonable rate for Dr. Gershwin, then that information will be considered.

2. Reasonable Number of Hours

Ms. Imlay bears the burden of showing the reasonableness of the number of hours spent by her expert. Interfaith Community Organization v. Honeywell Internat'l, Inc., 426 F.3d 694, 714 (3d Cir. 2005).

Dr. Gershwin's time is comprised of the following activities.

Date of Invoice	Description	Time
8/25/06	Review medical records	10.75
8/25/06	Prepare letter	3.00
9/12/06	Review [and] provided document on aplastic anemia, articles on MMR	3.75
3/17/07	Review documents on MCV and opinions	1.50
9/30/07	Preparation for trial	3.25
9/30/07	Trial time, portal-to-portal	5.50
TOTAL		27.75

Fee exhibit 17 at 30-31, 35, 41. For ease of analysis, Dr. Gershwin's time can be divided into two periods. First, activities performed before preparation for the hearing. Second, activities directly connected to the hearing. Ms. Imlay's time request is approved for the first period of time. Her request is denied for the second period.

a. Initial Activities

Dr. Gershwin claims to have spent 10.75 hours reviewing medical records. This amount of time seems to be a long amount of time, given the number of relevant medical records.

On the other hand, Dr. Gershwin apparently believed that he needed to review all the medical records thoroughly. Penalizing Dr. Gershwin for his thoroughness by reducing the number of hours for which compensation will be awarded could suggest that doctors should take less care. This would not be a good result. Consequently, all of the time that Dr. Gershwin spent on reviewing medical records will be compensated, albeit at an hourly rate lower than the requested rate.[4]

As discussed in the following section, the opinion presented in Dr. Gershwin's report that Breanne did not have aplastic anemia when she received the hepatitis B vaccine ignores Breanne's medical record that shows her MCV was abnormal. Exhibit 2 at 5. Thus, Dr. Gershwin's initial report, arguably, was not reasonable.

Nevertheless, Ms. Imlay will be awarded compensation for the time Dr. Gershwin spent for preparing his report (3.00 hours), for reviewing articles on aplastic anemia (3.75 hours), and for reviewing documents on mean corpuscular volume (1.50 hours). Without some indication that Dr. Gershwin actually understood the significance of Breanne's MCV result, it will be assumed that Dr. Gershwin acted in good faith in presenting his report. Therefore, Ms. Imlay will be compensated.

b. Activities for the Hearing

The analysis differs for the time associated with the hearing. These activities are not reasonable. This includes the time spent on preparation for trial and attending the trial. This hearing should not have occurred because after considering all the material filed in the case, Dr.

[4] An alternative method would be to award compensation at an increased rate (either $350 or $500 per hour) but for a decreased number of hours.

Gershwin lacked a reasonable basis for maintaining his opinion that the hepatitis B vaccine caused Breanne's aplastic anemia.

Before the hearing, Dr. Gershwin had a fair opportunity to realize his opinion was unsound and to withdraw it. After Dr. Gershwin issued his opinion, respondent filed, on March 2, 2007, an opinion from Dr. Nachman, a pediatric hematologist. Dr. Nachman opined that Breanne was suffering from aplastic anemia when she was vaccinated. Dr. Nachman's reasoning alerts Dr. Gershwin to a significant flaw in his opinion. Thus, his report is quoted at length:

> Breanne received her first hepatitis B vaccine on 10/26/95. Interestingly, she had a complete blood count performed at the time of vaccination. The petitioner's expert cites this in his report and suggests that since the blood count was normal, the administration of the hepatitis B vaccination led to the aplastic anemia. In point of fact, the blood count was not normal at the time of the vaccination. There was evidence at that time of an early aplastic anemia. . . .
>
> Aplastic anemia is characterized by reductions in platelets, white blood cells, and red cells. However, it is also associated with changes in red cell size. Changes in red cell size may be the first manifestation of incipient aplastic anemia. At the time of the first hepatitis B vaccination, Breanne had a platelet count of 153,000 which is at the very low end of the normal range. Taken by itself, this finding would have little significance. However, Breanne had an [MCV] of 90.3 which is outside the normal range. An elevated MCV is generally a result of . . . red cell damage. It is known that in early aplastic anemia, there is a reversion to a fetal pattern of erythropoiesis. Fetal erythropoiesis is characterized by significantly larger cells than are seen in later erythropoiesis. In the early stages of aplastic anemia, fetal erythropoiesis is able to maintain the Hemoglobin in the normal range, but the MCV increases. I think it is highly likely that Breanne was in the early stages of aplastic anemia at the time that the first hepatitis B vaccination was given.

Exhibit A at 1-2 (all emphasis added).

After receiving this exhibit, the undersigned filed two exhibits about mean corpuscular volume and issued an order requesting additional material about the normal values for this test. This order set a deadline for filing material on this point as April 11, 2007. Order, dated March 8, 2007. One of the exhibits states that for MCV "[n]ormal values vary according to age and gender." Exhibit 101 (Kathleen Deska Pagana and Timothy J. Pagana, Mosby's Manual of Diagnostic and Laboratory Tests (3d ed.)) at 451.

In response to the March 8, 2007 order, respondent filed a supplemental report from Dr. Nachman, which attached a chart from the Harriet Lane Handbook. Once again, Dr. Nachman's statement is quoted at length.

> [The Harriet Lane Handbook] shows values for MCV as a function of age. For a 5 year old, 90.3 is clearly above the 97th percentile for this age. . . . If you saw an isolated MCV of 90.3 without other hematologic abnormalities, you might pass it off to a normal variant. However, in a child with a borderline low platelet count who subsequently develops aplastic anemia, the MCV of 90.3 is clearly an indication of marrow damage.

Exhibit C at 1. Dr. Nachman is accurate when he describes the Harriet Lane Handbook as showing the normal MCV values changing with age. Exhibit C at 2.

Although given an opportunity to present material about the normal range for MCV for Breanne in the March 8, 2007 order, Ms. Imlay and Dr. Gershwin did not. Instead, during the hearing Dr. Gershwin referenced an article printed from the internet cite for the National Library of Medicine and the National Institutes of Health. After the hearing, Ms. Imlay filed this article as exhibit 26. It discusses various red blood cell indices. For MCV, it states that the normal values are 80 to 100 femtoliters. Exhibit 26 at 2.

During the hearing, Dr. Gershwin stated that he believed that Breanne's October 26, 1995 MCV was normal. This statement is wrong. The test result itself shows that the result was not normal. Exhibit 2 at 5. It is important to recognize that whether Breanne's MCV was within normal limits is an objective question. There is a right answer and a wrong answer. It is not a matter of subjective interpretation of a test result on which reasonable people can differ reasonably.

How Dr. Gershwin could conclude that Breanne's test was normal is not clear. Dr. Gershwin could have lacked knowledge about the normal MCV values for children. However, it seems like a doctor would have learned the different normal values as part of medical school training. If this assumption were the only basis for drawing conclusions about Dr. Gershwin's knowledge, then Dr. Gershwin's mistake could be understandable and supports the award of compensation for preparing his report.

However, the documents filed in this case informed Dr. Gershwin (and Mr. Terzian) that normal values differ. The Mosby's Manual states that "[n]ormal values vary according to age." Exhibit 101 at 451. In addition, Dr. Nachman's initial report explains why MCV increases during incipient aplastic anemia — the body returns to a fetal process of erythropoiesis. Dr. Nachman's supplemental report included the Harriet Lane Handbook that showed different normal values for different ages.

All this information was available to Dr. Gershwin several months before the hearing. Dr. Gershwin's use of the material from the National Library of Medicine could have possibly been justified when Dr. Gershwin formed his original opinion. However, once the more specific information about age-specific norms was filed in this case, it was incumbent on Dr. Gershwin to

address this information. He did not. Furthermore, if Dr. Gershwin had presented the exhibit he discussed during the hearing in response to the March 8, 2007 order, a status conference could have been held in advance of the hearing.

While Ms. Imlay's motion for attorneys' fees was pending, a status conference was held to discuss whether a reasonable basis existed after Dr. Nachman's supplemental report had been filed. In response, Ms. Imlay submitted a document listing places in the record where Breanne's MCV was reported as normal. Pet'r Status Report, filed May 21, 2008. These citations do not support a finding of a reasonable basis for two reasons. First, the NIH reports do not report normal values for people of Breanne's age. Tr. 63, 77-78. Second, these reports come from the time after Breanne was diagnosed with aplastic anemia. As Dr. Nachman explained in his supplemental report, the MCV is sometimes elevated early in the disease. Exhibit A at 1-2. Thus, the fact that Breanne's MCV was reported as normal later in her life does not change the fact that the result of the October 26, 1995 test was abnormal. Exhibit 2 at 5; see also tr. 41.

Dr. Gershwin's failure to recognize that Breanne's MCV was abnormal when she received her vaccination eliminates the reasonable basis for going forward to the hearing. Thus, Dr. Gershwin will not be compensated for the time spent preparing for the hearing or testifying at the hearing.

This case is analogous to Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29 (1992), aff'd 33 F.3d 1375 (Fed. Cir. 1994). Like the present case, in Perreira, the special master awarded attorneys' fees and costs to an unsuccessful petitioner only until the point of the hearing. The special master declined to compensate the attorney and the expert for time spent during a hearing because "petitioners' counsel should have recognized that the expert's unsupported

medical theory was legally insufficient to establish causation in-fact, and that there was no reasonable basis for continuing the case after counsel had reassessed the expert's report prior to the hearing." Perreira, 27 Fed. Cl. at 31. Against various challenges, a judge of the Court of Federal Claims upheld the special master's decision because the denial of attorneys' fees was not an abuse of discretion. Id. at 32-35.

On further appeal, the Federal Circuit affirmed the decision of the judge of the Court of Federal Claims. Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375 (Fed. Cir. 1994). The Federal Circuit reasoned "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." Id. at 1377.

Ms. Imlay may contend that the denial of fees and costs for the time spent on the hearing either interferes with her attorneys' duty to advocate zealously for her or will increase the difficulty of finding competent attorneys and qualified experts to participate in the Vaccine program. Such arguments are not persuasive. First, both the Federal Circuit and a judge of the Court of Federal Claims have rejected these arguments in their respective decisions in Perreira. Second, it is expected that the denial of fees for participating in a hearing will occur only rarely.

To explain why Ms. Imlay's case constitutes a rare case such that the hearing was unnecessary, the analysis is repeated. Dr. Gershwin's opinion that the hepatitis B vaccine caused Breanne's aplastic anemia is premised upon an assertion that Breanne did not have aplastic anemia when she was vaccinated. This assertion is based upon a view that Breanne's MCV was normal. If Breanne's MCV was abnormal, then Dr. Gershwin could not opine that she was not suffering from aplastic anemia at the time of vaccination.

Dr. Gershwin's reasoning is based on a faulty foundation. In fact, Breanne's MCV was abnormal on the date of her vaccination. The test result, itself, says so. Exhibit 2 at 5. Dr. Gershwin offered no persuasive reason to contradict the simple (and seemingly uncontroversial) indication that Breanne's MCV was not normal.

Certainly, by the time of the hearing, Dr. Gershwin either actually knew or should have known that Breanne's test result was consistent with an early (asymptomatic) form of aplastic anemia. Dr. Gershwin could have known that Breanne's condition was not normal from his medical school training. (If Dr. Gershwin did not know the signs of aplastic anemia, then his ability to render an opinion would be questionable.) He also could have known (and probably should have known) that Breanne's condition was abnormal because the lab report said Breanne's score was abnormal. Dr. Gershwin overlooked, or ignored, this abnormal test result when writing his initial opinion.

If Dr. Gershwin did not possess information to determine that Breanne's test result was not normal when writing his report, submissions from respondent before trial informed him. Dr. Nachman explained why early forms of aplastic anemia can produce an abnormal mean corpuscular volume. He also stated that normal values for mean corpuscular volume vary by age and, in doing so, alerted Dr. Gershwin to the need to use age-specific references. Exhibit A at 1-2; exhibit C at 1. (Dr. Nachman also repeated his reasoning during the hearing. Tr. at 64-65, 89-90.) But, when Dr. Gershwin was asked to produce information supporting his opinion, he first did not submit any information and later, during the hearing, produced a general reference that failed to include age-appropriate norms. This is not adequate or reasonable.

Compensating Dr. Gershwin for time spent on the hearing would encourage petitioners and their experts to offer virtually any opinion with the comfort that they will be paid. Congress did not guarantee payment of attorneys' fees and costs to every petitioner whose claim was denied. "Since the funds which are payable under this statute are limited, Congress must not have intended that every claimant, whether being compensated or not under the Vaccine Act, collect attorney fees and costs by merely having an expert state an unsupported opinion that the vaccine was the cause in-fact of the injury." Perreira, 33 F.3d at 1377 (footnote omitted).

Furthermore, to the extent that this case alerts petitioners, their counsel and experts whom they retain that compensation will not be paid automatically, the Program will benefit as a whole. Petitioners will consider whether there is a reasonable basis for going forward to a hearing in light of all the evidence in the case. Without a guarantee of payment, petitioners are more likely to withdraw cases that lack a reasonable basis eliminating unnecessary and time-consuming hearings, improving judicial efficiency, and allowing stronger cases to move forward more quickly.

In sum, Dr. Gershwin reasonably spent 19 hours. His reasonable hourly rate is $300 per hour. Therefore, Ms. Imlay is awarded $5,700 for Dr. Gershwin's work.

B. Other Costs

Ms. Imlay has submitted material to document her costs totaling $16,011.17. Fee exhibit 17 at 20 ($15,935.46 (including Dr. Gershwin)); fee exhibit 23 at 4 ($91.64); fee exhibit 25 (26.50); fee exhibit 27 ($17.56); Pet'r Reply, filed April 24, 2008, at 34 (reducing amount requested by $59.99). The total amount of costs that have been requested is reduced by the

amount deducted from Dr. Gershwin's fee ($8,075). The total amount of costs awarded to Ms. Imlay for expenses incurred while she was represented by Mr. Terzian is $7,936.17.

V. Conclusion

The following items are awarded to Ms. Imlay.

Attorneys' Fees - Mr. Terzian	$31,314.00
Attorneys' Fees - Mr. Terzian's support staff	$9,309.00
Attorneys' Fees - Mr. Shoemaker	$8,393.50
Attorneys' Costs - Mr. Shoemaker	$1,413.98
Attorneys' Costs - Mr. Terzian	$7,936.17
TOTAL	**$58,366.65**

Ms. Imlay is awarded $49,016.50 in attorneys' fees and $9,350.15 in costs for a total of $**58,366.65**.

IT IS SO ORDERED.

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