

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 05-886V

December 13, 2007

To be Published

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DIETER and YU-SHUANG PAUL, as \*  
Parents and Natural Guardians, on \*  
Behalf of their Minor Daughter, \*  
ASHLEY JEAN PAUL, \*

Petitioners, \*

v. \*

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

Respondent. \*

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Sheila A. Bjorklund, Minneapolis, MN, for petitioners.  
Linda S. Renzi, Washington, DC, for respondent.

Attorney's fees and costs;  
contingency fees not allowed;  
fees for setting up trust allowed

**MILLMAN, Special Master**

### **DECISION ON ATTORNEY'S FEES AND COSTS<sup>1</sup>**

On August 15, 2005, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that their daughter Ashley Jean Paul

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

(hereinafter, “Ashley”) suffered an on-Table encephalopathy 15 days after receiving MMR vaccine.

On November 10, 2005, respondent filed a Rule 4(c) Report conceding liability. There was no hearing in this case.

On June 7, 2007, respondent filed a Proffer on Award of Compensation to which petitioners agreed.

On June 8, 2007, the undersigned issued a Decision awarding damages.

On June 11, 2007, the parties filed a notice not to seek review.

On July 16, 2007, judgment was entered on the award of damages.

On October 8, 2007, petitioners filed a Petition for Reimbursement of Attorney’s Fees and Costs. Petitioners requested a total of \$136,422.49 in fees and costs.

On November 5, 2007, respondent filed an Opposition to Petitioners’ Application for Attorney’s Fees and Costs.

On November 19, 2007, petitioners filed a Reply to Respondent’s Objections to Their Fee and Cost Petition.

### **Petitioners’ Position**

Petitioners request as follows:

Attorney’s fees of **\$95,752.30** plus a 40% contingency fee based on what petitioners’ attorneys would have earned in a civil court.

Costs of **\$12,660.99**, including fees and costs of analysis of the structured settlement by Dave Brackett, fees and costs incurred by Donna Bashaw, Esq. and her associates to establish the required guardianship of Ashley’s estate in California where petitioners initially lived, and fees

and costs incurred by a law firm to transfer guardianship to Colorado, the state to which petitioners moved on August 1, 2007.

Ms. Bjorklund, petitioners' counsel, bills at a rate of \$260.00 an hour in 2004, \$270.00 an hour in 2005, and \$275.00 an hour in 2007 for standard litigation, but imposes a contingency fee of 40% as a premium on litigation which comes to \$364.00 an hour in 2004 and 2005, and \$385.00 an hour in 2007.,

Ms. Bjorklund's paralegal Ilana Farb bills at a rate of \$90.00 an hour for standard litigation, but imposes a contingency fee of 40% as a premium on litigation which comes to \$125.00 an hour for the years 2004-06. Paralegal rates in 2007 rose to \$95.00 an hour for standard litigation, with a premium of 40% to \$133.00 an hour.

Others participating on a limited basis were an associate and three other partners.

Before petitioners filed their petition, they retained the services of Dr. Marcel Kinsbourne, a pediatric neurologist, to whom they paid a retainer of \$1,500.00 on March 1, 2005, Dr. Kinsbourne reviewed Ashley's file and medical literature, conferred with counsel, and prepared a report, charging a further \$2,100.00 for a total cost of **\$3,600.00** at a rate of \$300.00 an hour for 12 hours of work. Petitioners filed his report with their petition as Exhibit J.

Petitioners' life care planner Linda K. Graham charged a total of **\$17,400.00** at a rate of \$150.00 an hour including \$150.00 per night for travel out of town. She spent 24 hours reviewing medical and school records and bills (\$3,600.00), traveled to California (2/1/06-2/4/06) which includes 8.75 hours per day and a pre-visit preparation of 8 hours (\$7,050.00), had phone consultations with petitioners' attorney for 10 hours (\$1,500.00), had phone consultations

with respondent's life care planner for 17 hours (\$2,550.00), and researched the cost of services in California and Colorado for 18 hours (\$2,700.00).

David Brackett and associates with Trusted Settlements, Inc. charged a total of **\$6,913.45**, consisting of \$6,343.75 in fees and \$569.70 in costs to review the settlement and to travel to California to meet petitioners, at a rate of \$200.00 an hour for Mr. Brackett and \$125.00 an hour for his staff.

Attorney Donna R. Bashaw, her paralegal Mary Telford, and another attorney Melinda Junsaker billed for fees totaling **\$1,644.25** for setting up guardianship for petitioners in the State of California where petitioners resided with Ashley at the time.

Attorney Amos L. Soignier and his associates charged fees of \$1,137.50 for 6.5 hours at a rate of \$175.00 per hour and costs of \$164.00 for a total of **\$1,301.50** for setting up guardianship for petitioners in the State of Colorado where they moved with Ashley.

Petitioner Dieter Paul filed an Affidavit stating he spent **\$750.00** in costs for setting up a guardianship for Ashley in the State of California.

### **Respondent's Objections**

Respondent objects to paying for the expenses of Dr. Marcel Kinsbourne who did his expert report before petitioners filed their petition. Respondent says that petitioners did not need to file an expert report because respondent conceded liability.

Respondent objects to the hourly rate and fees for services charged by Mr. Brackett, the settlement broker. Respondent states that respondent fully protects petitioners' interests by purchasing and taking ownership of all annuity contracts ordered by the Vaccine Program. Respondent states that the Secretary of the Department of Health and Human Services is

obligated to effectuate the exact terms of the undersigned's judgment and uses insurance companies who meet only the most stringent standards, which are based on the criteria of the Uniform Periodic Payment of Judgments Act. Respondent further says that petitioners have no legal right to select the annuity company or be consulted in matters pertaining to the purchase of a government-owned annuity.

Mr. Brackett contacted Robert Elgin, respondent's annuity broker, in June 2006 to discuss a fee-sharing arrangement with him, i.e., he proposed that Mr. Elgin split the fee from the purchase of the annuity that Mr. Elgin would normally retain alone. Informed of this contact, respondent's counsel contacted petitioners' counsel to inform her that there would not be any fee-sharing of any commission earned on the purchase of an annuity and respondent would not use Mr. Brackett's services as an annuity broker or reimburse him for performing those services.

This was followed by a status conference with the undersigned on July 24, 2006, during which the undersigned said that respondent was not required to split Mr. Elgin's fee with Mr. Brackett, but the undersigned would consider awarding reasonable costs to petitioners if petitioners wanted to discuss financial matters with a consultant other than respondent's Mr. Elgin, i.e., with Mr. Brackett.

Respondent objects to any reimbursement of Mr. Brackett for tasks that were solely Mr. Elgin's responsibility, including sending medical records to insurance companies for rated ages, running annuity quotes, pricing the life care plan, and securing insurance quotes. Respondent says Mr. Brackett's services were irrelevant because the cost of an annuity that the government purchases and owns is of no consequence to petitioners as long as the annuity provides for payment of items in the life care plan.

Respondent states that, if the undersigned finds petitioners entitled to compensation for Mr. Brackett's services as a personal financial advisor, then only those hours should be reimbursed and at a rate no more than \$150.00 an hour.

Respondent objects to petitioners' life care planner Linda Graham's billing at her normal hourly rate of \$150.00 for travel time and says she should be reimbursed at half her hourly rate for travel time. Moreover, respondent states that Ms. Graham should not be reimbursed for an overnight rate.

Respondent objects to petitioners' receiving payment for establishing two guardianships, one in California and the other in Colorado, because respondent states that such costs are not compensable under the Vaccine Act.

Respondent objects to the hourly rate for which Ms. Bjorklund, her associates, and her paralegals applied because Ms. Bjorklund based these rates on her firm's standard litigation hourly rates and added a premium contingency fee of 40% to them. Respondent says that this raises Ms. Bjorklund's hourly rate from \$275.00 to \$385.00 (this would be the rate charged in 2007). Respondent cites an hourly rate in the Minnesota area as of January 2006 of \$253.00.

Respondent states that Ms. Bjorklund has not provided affidavits to substantiate her requested hourly rate. Respondent further says that since this was a conceded case, Ms. Bjorklund did not have to do extensive trial preparation, expert witness preparation, or write legal memoranda. Respondent concludes that \$250.00 is a sufficient hourly rate for an attorney in the Minneapolis area.

Respondent also objects to the amount of time Ms. Bjorklund spent on certain matters, such as the three hours she billed for issues related to guardianship, the hours she spent on

creating a trust with Wells Fargo Bank, and travel time. Respondent says Ms. Bjorklund's travel time rate should be reduced to half her hourly rate.

### **Petitioners' Reply to Respondent's Objections**

Petitioners state that Dr. Kinsbourne's report was central to minimizing the amount of time and costs required to litigate the case.

Petitioners state they hired David Brackett as a structured settlement expert and not as a broker to purchase an annuity. Petitioners hired him to help them make sense out of the structured settlement, annuity, and other financial options available to them concerning the vaccine award.

Petitioners state that Ms. Bjorklund and life care planner Linda Graham spent the 3.5 hours flying from Minneapolis to Anaheim, California and back discussing the medical issues and site visit for this case. Ms. Graham's \$150 per night fee was a per diem to cover her food, room, and transportation expenses.

Petitioners state that the costs of creating a guardianship in California and transferring the guardianship to Colorado are a requirement for petitioners to receive an award under the Vaccine Act. Without the undersigned's Order and respondent's proffer requiring petitioners to establish guardianship, petitioners would not have expended these costs.

Petitioners cite the reversal of the undersigned's decision to award such fees in Mol v. Secretary of HHS, 50 Fed. Cl. 588 (2001), in which the Honorable Bohdan A. Futey held that such costs are not reimbursable under the Vaccine Act. Petitioners state that the U.S. Court of Federal Claims decision in Mol is not binding on the undersigned in the instant action.

Petitioners also cite two cases by other special masters which were not appealed (and hence not

reversed) in which conservatorship fees were awarded: Thomas v. Secretary of HHS, 1997 WL 74664 at \*3 (Fed. Cl. Spec. Mstr. Feb. 3, 1997), and Velting v. Secretary of HHS, 1996 WL 937626, at \*3 (Fed. Cl. Spec. Mstr. Sept. 24, 1996). Lastly, petitioners cite the Laffey Matrix (which applies to Washington, DC, attorneys) to justify the rates charged by the attorneys in California and in Colorado who set up petitioners' guardianships.

Petitioners justify Ms. Bjorklund's time spent on issues related to guardianship because Ms. Bjorklund is not licenced to practice law in either California or Colorado. She had to identify local counsel who could best represent petitioners in establishing guardianship. Petitioners state that three hours devoted to this issue is a reasonable amount of time.

Petitioners assert that Ms. Bjorklund's travel time was taken up with work and therefore she is entitled to 100% not 50% of her hourly fee for the time.

Petitioners describe Vaccine Act cases as contingency fee cases because they do not get paid until the end of the case. Petitioners refer again to the Laffey Matrix which lists hourly rates for Washington, DC attorneys, and state that their rates are well within this standard. Petitioners attach the Laffey Matrix for years 2003-2008 as Exhibit 3 to their Reply.

## **DISCUSSION**

The Vaccine Act provides that the special master shall award attorney's fees and costs incurred during the proceedings so long as they are reasonable. Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468, at \*2 (Fed. Cl. Spec. Mstr. Sept. 17, 1999). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended during litigation and the reasonable hourly rate." Blum v. Stetson, 465 U.S. 886, 888 (1984). It is within the court's discretion to make adjustments if "a fee charged is out of

line with the nature of services rendered.” Barnes, 1999 WL 797468, at \*2, citing Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J., concurring).

To determine the number of hours reasonably expended, the court must “exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). A “special master is given reasonably broad discretion when calculating [attorney’s fees and costs].” Wasson v. Secretary of HHS, 24 Cl. Ct. 482, 483 (1991), aff’d, 988 F.2d 131 (Fed. Cir. 1993). In the absence of sufficient proof, “the special master may rely upon both her own general experience and her understanding of the issues raised.” *Id.*

The first issue before the undersigned is whether petitioners’ counsel’s interpretation of the fees as contingency fees under the Vaccine Program is correct. It is not. As petitioners’ counsel surely realizes, in the civil arena, a tort attorney who charges a contingency fee (usually from one-third to 40% of the damages awarded in a successful outcome of litigation) does not also charge an hourly rate. He or she may request that his or her client pay costs. But the fee is a future-looking one, based on the success of the suit, and resulting in a percentage of the award. Congress set up attorney awards under the Vaccine Program differently.

The first difference is that petitioners’ counsel in this Program receive hourly wages, not fees contingent on the outcome of the petition and based on a percentage of what petitioners are awarded, if they are awarded anything.

The second difference is that petitioners’ counsel in this Program may receive attorney’s fees and costs even if petitioners do not prevail in their suits as long as the petition was brought

in good faith and it was reasonable to go forward with the case. 42 U.S.C. § 300aa-15(e)(1).

The method for evaluating petitioners' requested fees is the lodestar model, which is a product of reasonable hours expended times a reasonable hourly rate. Doe v. Secretary of HHS, 19 Cl. Ct. 439 (1990).

In awarding attorney fees under the Vaccine Act, the undersigned does not have any statutory justification for adjusting the lodestar method to account for any contingency factor. Moreover, there is no policy reason justifying an award of contingency fees under the Program because there is small risk of non-payment of attorney's fees and costs since petitioners' counsel are practically assured of a statutory award of fees regardless of the outcome of the cases here. Greene v. Secretary of HHS, 19 Cl. Ct. 57 (1989); Strother v. Secretary of HHS, 18 Cl. Ct. 816 (1989). The only exception to the award of fees and costs is where there was no good faith in filing the petition and/or no reasonable basis for going forward. 42 U.S.C. § 300aa-15(e)(1). That is obviously not the situation here where respondent conceded liability.

Clearly, respondent is correct in objecting to petitioners' counsel's adding a 40% premium to her and her associates's hourly rate. The total attorney's fees petitioners request is **\$95,752.30**. Forty percent of this amount (petitioners' counsel's "contingent fee") is \$38,300.92. Subtracting this contingent fee of \$38,300.92 from \$95,752.30 yields a sum of **\$57,451.38** for total attorney's fees without the added 40% contingency premium.

Respondent objects to petitioners' retaining Dr. Marcel Kinsbourne and filing his expert report (Ex. J filed with the petition, together with medical records, and petitioners' affidavit). The undersigned finds respondent's objection unwarranted. The Vaccine Act requires petitioners to file supporting affidavits with their petition and medical records. So few petitioners actually

file an expert report with their petitions that it is refreshing to find petitioners herein obeyed the requirements of the Vaccine Act. 42 U.S.C. § 300aa-11(c). The undersigned awards petitioners **\$3,600.00** for Dr. Kinsbourne's work.

Respondent objects to the services of David C. Brackett who, in essence, checked out insurance companies to get age ratings from nine of them (30 minutes), ran annuity quotations (90 minutes), worked on annuity quotes (150 minutes), ran more annuity quotes (60 minutes), and re-ran more annuity quotes (60 minutes). This totals six and one-half hours that Mr. Brackett spent duplicating respondent's structured settlement expert Rob Elgin's work in obtaining an annuity which the government would purchase and from which payments would be made in accordance with the terms in the agreed-upon life care plan.

The undersigned agrees with respondent that there is no legitimate reason for petitioners to duplicate respondent's efforts in obtaining an annuity from a life insurance company since the company that respondent selects must meet rigid standards and the government is obligated to pay the sums in the life care plan to petitioners. Nothing petitioners' settlement expert Mr. Brackett could do would affect respondent's role in this payment process. 42 U.S.C. § 300aa-15(f)(4)(C) specifically states that the government "may enter into agreements regarding the purchase price for and rate of return of the annuity...."

The undersigned accepts Mr. Brackett's efforts to understand and explain the life care plan and permutations of the annuity terms to petitioners and will reimburse him for those efforts. But his fee will be reduced from his claimed **\$6,913.45**. Since Mr. Brackett charges \$200.00 an hour for his work (and the undersigned will accept that fee rather than respondent's suggested \$150.00 an hour), and the undersigned has found six and one-half hours of his time not

reimbursable, the undersigned reduces the amount to be paid to Mr. Brackett and his associates by \$1,300.00. Petitioners are therefore awarded **\$5,613.45** for Mr. Brackett's work.

Respondent objects to petitioners' life care planner Linda K. Graham billing \$150.00 per hour for travel time. Petitioners' counsel explained that Ms. Graham and she worked all during the travel time, and the overnight bill reflects the cost of lodging, food, and transportation. The undersigned accepts petitioners' counsel's explanation and awards petitioners the full amount of **\$17,400.00** for Ms. Graham's work.

Respondent's final objection is to any payment for the costs of putting together a trust and setting up guardianship because these efforts proceeded outside the Vaccine Program. That means that the costs of petitioners' counsel's Ms. Bjorklund and her associates working on these items, David Brackett's efforts on the trust agreement, and the guardianship efforts of the law firms in California (Donna R. Bashaw and her associates) and in Colorado (Amos L. Soignier and his associates) would not be reimbursable.

As petitioners' and respondent's counsel know full well, in the past, the undersigned has agreed with other petitioners who have made the argument petitioners make here. Thus, in Mol, the undersigned awarded cost of guardianship proceedings to petitioners. Respondent appealed and Judge Futey reversed the decision. The Thomas and Velting cases upon which the undersigned relied in Mol were never appealed and, obviously, were decided before Mol. The chief special master decided in Ceballos v. Secretary of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004), against awarding guardianship fees because he never ordered that petitioners set up guardianship, but he engaged in a lengthy dictum on the unreasonableness of respondent to refuse to pay guardianship costs where setting up a

guardianship was a prerequisite for payment and/or a special master ordered petitioners to set up guardianship. 2004 WL 784910, at \*18-22.

The undersigned has the option of now holding that petitioners may recover fees and costs for setting up the guardianships, in which case respondent might appeal, or holding that petitioners may not recover these costs, leaving petitioners the option to appeal. Since the latest ruling from the United States Court of Federal Claims on this issue was in Mol against awarding guardianship fees and costs because they did not arise as part of the prosecution of a vaccine petition before this court (50 Fed. Cl. at 591), the undersigned declines to award them.

However, the undersigned will reimburse petitioners for the time and costs spent setting up a trust because these efforts occurred within this Program in order to establish a vehicle for the receipt of payments under the life care plan to which the parties have agreed and which the undersigned has ordered. The proceeds of the government's payments will go into this trust. Petitioners' submissions show that they set up the trust with Wells Fargo Bank. These submissions also show that mention of the trust instrument was part of the guardianship papers submitted in the California court. But, even though the terms of the trust probably appeared in the papers Donna Bashaw filed in a local California court (not this court) in order to obtain guardianship for petitioners, the actual establishment of the trust not done in court but was a transaction between petitioners's counsel and Wells Fargo Bank, which has nothing to do with a local court authorizing it (unlike setting up a guardianship which must come from a local court's order). Therefore, respondent should not argue that setting up a trust is outside prosecution of a vaccine petition before this court. See Zeman v. Secretary of HHS, No. 92-0240V, 1994 WL

325425, at \*2 (Fed. Cl. Spec. Mstr. June 20, 1994), in which the special master awarded petitioners fees for their counsel's consultation with a trust officer.

Regarding petitioners' counsel's efforts in the area of setting up guardianship, the undersigned finds unreimbursable the following: 3.4 hours spent on California guardianship (11/11/05), 0.20 of an hour spent on California guardianship (11/22/05), 0.20 of an hour e-mailing California attorney (11/22/05), 0.40 of an hour corresponding with California attorney (1/31/06), 0.20 of an hour talking with California attorney (5/2/06), one hour speaking to California attorneys (5/15 and 16/06), two hours preparing a letter for California attorneys (5/17/06), 0.40 of an hour speaking to California attorney (5/31/06), 0.40 of an hour speaking to California attorney (6/16/06), 0.20 of an hour speaking to Donna Bashaw (6/20/06), 0.30 of an hour corresponding with California attorney (11/13/06), 0.10 of an hour speaking to Donna Bashaw (4/25/07), 0.05 of an hour speaking to Donna Bashaw (4/27/07; there was another 0.5. talking about the trust), 0.50 of an hour speaking to California attorney (5/1/07), 0.10 of an hour speaking to Donna Bashaw (5/11/07), 0.50 of an hour speaking with and e-mailing Donna Bashaw (5/22/07), 0.20 of an hour speaking with Donna Bashaw (7/9 and 10/07), 0.20 of an hour speaking with Donna Bashaw (7/11 and 12/07), and 0.20 of an hour speaking with Donna Bashaw (7/13/07).

Ms. Bjorklund's hourly fee in 2005 was \$270.00 and, in 2007, it was \$275.00. In 2005 and 2006, she spent 8.7 hours on guardianship matters which will not be reimbursed for a total of \$2,349.00. In 2007, she spent 1.85 hours on guardianship matters which will not be reimbursed for a total of \$508.75. Adding the two amounts comes to \$2,857.75. The attorney's fees of \$57,451.38 (without the 40% contingency premium) minus \$2,857.75 comes to **\$54,593.63**.

The undersigned accepts the hourly rate Ms. Bjorklund has claimed as reasonable but cautions that her reference to the Laffey Matrix, which applies only to attorneys practicing in the location of Washington, DC, is irrelevant since Ms. Bjorklund's office is located in Minneapolis, Minnesota, and the locality rule applies to the hourly rate for attorneys. See Avera v. Secretary of HHS, 75 Fed. Cl. 400, 403-04 (2007), appeal docketed, No. 2007-5098 (Fed. Cir. Apr. 16, 2007) (locality rule, not Laffey Matrix, applies outside Washington, DC); Ceballos, 2004 WL 784910, at\*5, n.10. See generally Rupert v. Secretary of HHS, 52 Fed. Cl. 684 (2002) (locality rule applies).

The undersigned therefore awards petitioners the following for attorney's fees and costs:

Attorney's fees of **\$54,593.63**.

Attorney's costs of **\$12,600.99**.

Filing fee of **\$250.00** to petitioners. (Petitioners did not ask for this but it is in the case docket and they are entitled to reimbursement.)

Dr. Marcel Kinsbourne's fees of **\$3,600.00**.

David C. Brackett's fee of **\$5,613.45**.

Linda K. Graham's fee of **\$17,400.00**.

This comes to **\$81,207.08** in fees, **\$12,699.00** in costs to petitioners' counsel, and **\$250.00** in costs to petitioners. (Petitioners will not receive the \$750.00 they claim as costs for California guardianship proceedings for the reasons stated above.)

### **CONCLUSION**

Based on the reasons presented above and the court's reductions in fees and costs, a reasonable award in this case is \$94,156.08. This is quite generous considering the case did not go to hearing, but the undersigned recognizes that a great deal of preparation for determining the damages of a grievously injured child requires appropriate compensation.

The clerk of the court shall enter judgment for **\$94,156.08**. The first check shall be made payable to petitioners in the amount of **\$250.00**. The second check shall be made jointly payable to petitioners and petitioners' counsel Sheila A. Bjorklund in the amount of **\$93,906.08**. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court shall enter judgment herewith.<sup>2</sup>

**IT IS SO ORDERED.**

December 13, 2007  
DATE

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

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.