# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

**No. 02-0110V**

**Filed: January 29, 2013**

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| SARAH ALICE KOMPOTHECRAS, by GARY KOMPOTHECRAS, as the parent and natural guardian, | * | |
| Petitioner, | * | Motion for Relief from Judgment; RCFC 60(b)(1); Excusable Neglect; Non-Meritorious Claim |
| v. | * | |
| SECRETARY OF HEALTH AND HUMAN SERVICES, | * | |
| Respondent. | * | |

**ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT**[1]

**Vowell,** Special Master:

On May 9, 2012, petitioner, Gary Kompothecras, filed a Motion for Relief from Judgment pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims ["Motion for Relief"]. His petition was dismissed on July 26, 2011, based on a failure to prosecute. Because petitioner has failed to demonstrate "excusable neglect," his motion for relief is denied.

### I. Procedural History.

On February 8, 2002, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq*.[2] [the "Vaccine Act" or "Program"], on behalf of his minor daughter, Sarah Kompothecras

[1] Because this unpublished order contains a reasoned explanation for the action in this case, I intend to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access.

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

["Sarah"]. Petitioner filed the "short form" petition authorized by Autism General Order # 1.[3] By filing a short form petition, petitioner asserted that Sarah has an autism spectrum disorder ["ASD"] which was caused by (1) the measles-mumps-rubella ["MMR"] vaccination, (2) by the thimerosal ingredient in certain vaccines, or (3) by some combination of the two. No medical records were filed with the petition.

On April 4, 2003, the case was included in the Omnibus Autism Proceeding ["OAP"][4] and reassigned to Special Master George L. Hastings. Like most other cases in the OAP, the case remained on hold until discovery in the OAP was concluded, causation hearings in the test cases were held, and entitlement decisions were issued in the test cases.[5]

This case was assigned to me on March 9, 2007. At the time, the attorney of record was Steven Savola. I granted a motion to substitute Walter S. Holland ["Mr. Holland"], in place of Mr. Savola, as the attorney of record on November 30, 2007.

On January 15, 2008, while the OAP cases were being litigated, I ordered petitioner to file Sarah's medical records in order to position this case for resolution after the test case decisions. On May 15, 2008, Mr. Holland filed Petitioner's Exhibits ["Pet. Exs."] 1–20 via CD-ROM, on behalf of petitioner. On May 22, 2008, Mr. Holland filed a motion to convert this case to electronic filing, which was granted on May 30, 2008. Based on the medical records filed, respondent acknowledged that Sarah had been diagnosed with an ASD and that the claim was timely filed. Statement Regarding Jurisdiction, filed June 26, 2008, at 3; s*ee also* § 16(a)(2) (for information concerning the Vaccine Act's statute of limitations). Petitioner filed Sarah's remaining medical records and a "Statement of Completion" on October 30, 2008.

On February 12, 2009, the *Hazelhurst*, *Cedillo* and *Snyder* cases were decided. Following those decisions, Mr. Holland filed a motion for extension of time in this and his other pending OAP cases, to communicate with petitioners about the effect of the test case decisions on their claims. Motion, filed Mar. 3, 2009. This motion was petitioner's last filing before the dismissal of his claim in July 2011.

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[3] The text of Autism General Order #1 can be found at http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf ["Autism Gen. Order #1"], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

[4] The OAP is discussed in detail in *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

[5] The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are *Dwyer*, 2010 WL 892250; *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

After the final appeal in the OAP test cases was decided on August 27, 2010, the court began the process of determining how the approximately 4800 remaining OAP claims would be resolved. The court anticipated that most OAP claims would be dismissed but that some cases would proceed on alternate theories or, possibly, based on new evidence for the rejected theories. How to ascertain what cases would continue, and to dismiss and resolve attorney fees and costs applications for those that would not, presented a significant logistical challenge for the court and counsel alike.

In February 2011, Special Master Golkiewicz and I began holding conference calls with counsel representing more than 20 OAP petitioners, and counsel for respondent, to determine how the claims would proceed.[6] Mr. Holland, with 46 OAP cases, was one of the attorneys contacted by the court informally to determine the status of their cases. At 11 AM on February 4, 2011, Special Master Golkiewicz held a conference call with Mr. Holland. Affidavit of Office of Special Masters Staff Attorney Stacy Sims ["Sims Aff."] at 1.[7] Ms. Linda Renzi appeared on behalf of respondent. *Id.* During this call, Special Master Golkiewicz updated Mr. Holland on the current status of the OAP, and instructed him to contact petitioners in his OAP cases and ascertain whether they wished to proceed with their claims. *Id.* Special Master Golkiewicz also instructed Mr. Holland to update Ms. Sims on the status of his autism cases in 30 days, copying Ms. Renzi on any correspondence. *Id.*

Between March and April 2011, Ms. Sims tried contacting Mr. Holland several times via email to get an update on his OAP cases. Either Mr. Holland or his daughter, Ms. Kristina Holland, who works in his office, would respond to Ms. Sims' emails with reasons for delay, but no update on his cases was conveyed or filed. Sims Aff. at 2. On April 14, 2011, Mr. Holland indicated to Ms. Sims that he was moving offices, but that he would have a preliminary report for her by the following week. *Id.* He failed to make this report. During this time period, Ms. Sims was communicating with Mr. Holland at the following email address: swh@ferrarolaw.com. *Id.*

Based on Mr. Holland's failure to update the court on the status of his cases, on May 16, 2011, the special masters began issuing formal orders in Mr. Holland's cases, to inform the court how petitioners intended to proceed. Because Mr. Holland's cases were electronic, he would have received an electronic notification of these orders through the court's Case Management/Electronic Case Filing ["CM/ECF"] System[8] at

[6] Pro se litigants and counsel who represented smaller numbers of OAP litigants received orders in individual cases, spread over a period of several months, to inform the court how they intended to proceed. Attorneys who represented larger numbers of OAP petitioners were contacted to discuss how best to handle the workload that would ensue if the court ordered them to file case-specific amended petitions in all their pending cases.

[7] Ms. Sims' affidavit was filed on January 11, 2013 as Court Exhibit 1.

[8] "CM/ECF is a comprehensive case management system that allows courts to maintain electronic case files and offer electronic filing over the Internet. Whenever a document is filed, the CM/ECF system automatically generates a NEF. The NEF is an email message containing a link to the filed document [sent] to registered attorneys involved with the case. The link allows e-mail recipients to access the electronically filed document once free of charge." *Robinson v. Wix Filtration L.L.C*, 599 F.3d 403, 406

the email address listed in his contact information on file with the court in each case in which an order was issued. On May 16, 2011 and June 22, 2011, I ordered petitioner to inform the court within 30 days if he wished to proceed with this claim. Petitioner failed to respond to either order. The petition was dismissed on July 26, 2011, based on a failure to prosecute. Judgment entered on August 26, 2011.

In October 2011, Mr. Holland called OSM staff attorney, Jocelyn McIntosh, and requested a list of all his OAP cases. Sims Aff. at 3. Ms. Sims attempted to send Mr. Holland a list of his cases at his email address: swh@ferrarolaw.com but received an error message. *Id.* She contacted Mr. Holland who informed her that he was using a new email address: wsh@samhollandlaw.com. *Id.* Ms. Sims sent Mr. Holland a list of his autism cases[9] via his new email address on October 12, 2011. *See* Email # 4.[10]

Since it was apparent that Mr. Holland was having trouble accessing his CM/ECF account, individuals in the Clerk's office worked with Mr. Holland and his daughter, Kristina Holland, to help him log into his account. Sims Aff. at 3. Mr. Holland updated his contact information in his OAP cases on December 2, 2011. *Id.*; *see also* Notice of Change of Address, filed Dec. 2, 2011.

On April 22, 2012, petitioner filed a motion for attorney's fees and costs in this case. Two days later, petitioner requested that I stay his motion for attorneys' fees and costs claiming he can prove that Sarah's vaccinations caused her injuries and indicating petitioner's counsel was "in the process of preparing a Motion for Relief from the Judgment of August 26, 2011." Motion, filed Apr. 24, 2012, at 2.

On May 9, 2012, petitioner filed the instant motion.[11] Petitioner claims that his attorney, Mr. Holland, was unaware of my orders dated May 16, 2011 and June 22, 2011. Motion for Relief, at 2. Petitioner argues that this failure by counsel constitutes mistake or inadvertence and is grounds for relief under the Rules for the United State Court of Federal Claims ["RCFC"]. *Id.* at 3; *see* RCFC 60(b)(1). Furthermore, petitioner asserts "there is sufficient medical information available that can be filed to confirm that [Sarah suffered] a table injury or that her injuries were actually caused by a vaccination." Motion for Relief, at 2.

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n.1 (4th Cir. 2010) (citing Jessica Belskis, Electronic Case Filing: Is Failure to Check E-mail Related to an Electronically Filed Case Malpractice?, 2 Shidler J.L. Com. & Tech. 13 (2005)). Litigants can save or print one free copy of any document filed electronically in their cases. The link expires after fifteen days, after which time period attorneys may continue to access the document for a per view fee. *Id.*

[9] Mr. Holland never provided Ms. Sims with the update of his autism cases which was due on March 6, 2011. Instead, on October 12, 2011, Ms. Sims had to send him a list of his autism cases.

[10] Email # 4 was filed on January 11, 2013 as Court Exhibit # 5.

[11] Petitioner's counsel filed the motion with the wrong caption, incorrectly including Sarah's mother, Beth Kompothecras, as a petitioner. Although both Mr. and Mrs. Kompothecras were petitioners in a case involving Sarah's brother, the petition in this case was filed only by Mr. Kompothecras. *See* Petition, filed Feb. 8, 2002.

In response, respondent contends that petitioner's "arguments are without merit." Response, filed May 24, 2012, at 2.[12] Respondent argues that petitioner's counsel "could have taken simple steps to receive the court's filings, but he failed to do so." *Id.* at 3. Respondent claims that petitioner "took no affirmative steps to further his claim." *Id.*

On June 5, 2012, petitioner filed a reply. Petitioner argues that the neglect in this case was excusable. Reply, filed Jun. 5, 2012, at 1-2 (referencing the four factors enumerated in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)).[13] Furthermore, petitioner contends that the issue of whether "Sarah suffered an encephalopathy within 72 hours of receiving her May 26, 1998, vaccinations, is fact intensive and must be resolved by the Special Master." Reply, filed Jun. 5, 2012, at 2.

## II. The Applicable Legal Standards.

Under Vaccine Rule 36, Appendix B, RCFC, a party may seek relief from judgment pursuant to Rule 60 of the RCFC. Rule 60 is identical to Rule 60 of the Federal Rules of Civil Procedure. Under RCFC 60, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." RCFC 60(b)(1). In considering Rule 60(b) motions, courts also have considered the merits of the underlying claim in determining whether relief from judgment is appropriate. *See, e.g.*, *Curtis v. United States*, 61 Fed. Cl. 511, 512 (2004)("[A] litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise.") (quoting *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Inc.,* 953 F.2d 17, 20 (1st Cir. 1992)) (emphasis added).

Thus, in evaluating petitioner's motion for relief from judgment, I consider whether his failure to respond to court orders was excusable as well as whether the underlying claim is viable.

### A. Excusable Neglect.

The term "excusable neglect" is not defined in the RCFC. Thus, I look to decisions of other courts to determine when neglect of a litigant's obligations to the court is excusable. The United States Supreme Court has held that determination of excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer,* 507 U.S. at 395. *Pioneer* sets out four factors for consideration when determining whether a party's conduct constitutes excusable neglect: (1) the danger of prejudice to the nonmoving party; (2)

[12] Respondent initially filed a response which was not signed by respondent's counsel of record. Respondent filed her response again, with the correct signature block, later that same day.

[13] I note that petitioner discusses factors 1, 2, and 4 but does not mention factor 3. *See* discussion *infra* at Parts II.A. and III.

the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Id.* In *Pioneer*, the Court granted a debtor relief from a filing deadline for his petition at a bankruptcy court. *Id.* at 399. The Court's ruling was based on the circumstances surrounding the party's conduct, focusing on the reason for the delay and whether it was within the party's control. *Id.* at 398-99. The Court found that the neglect of counsel was excusable due to the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors' meeting." *Id.* at 398. Relief from judgment was granted primarily because of an "unusual form of notice" employed by the Bankruptcy Court to notify counsel of a deadline. *Id.* at 398-99.

Since *Pioneer*, several United States Circuit Courts of Appeals have addressed the term "excusable neglect" in the context of 60(b)(1) motions. *See, e.g., Fischer v. Anderson*, 250 Fed. Appx. 359 (Fed. Cir. 2007); *Robinson v. Wix Filtration Corp. L.L.C.*, 599 F.3d 403 (4th Cir. 2010). Circuit Courts have typically given greater weight to the third *Pioneer* factor. See *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003) (citing *Graphic Communications Int'l Union, Local 12–N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5–6 (1st Cir. 2001)).

In *Fischer*, the Federal Circuit, in an unpublished decision, affirmed a decision by the United States Patent and Trademark Office Trademark Trial and Appeals Board ["TTAB"] denying a 60(b)(1) motion in light of *Pioneer. Fischer*, 250 Fed. Appx. at 363. The TTAB had denied an application for a trademark registration due to the applicant's prior counsel's failure to prosecute. *Id.* at 361. The Federal Circuit held that prior counsel's inaction and failure to respond to the court's order to show cause did not constitute "excusable neglect." *Id.* at 362. The court further held that the applicant was bound by the conduct of her attorney, and his conduct was imputable to her. *Id.*

In *Robinson,* the Fourth Circuit held that the inability of an attorney to receive email because of computer problems did not constitute "excusable neglect." *Robinson*, 599 F.3d at 413. The Fourth Circuit noted that counsel did not actively monitor the court's docket to ascertain whether summary judgment motions were filed on the date that he expected. *Id.* Further, he never informed the court or opposing counsel of the computer malfunctions, and was therefore not entitled to relief under 60(b)(1). *Id.* at 413-14.

B. Meritorious Claim.

A meritorious claim "merely states a legally tenable cause of action." *Stelco Holding Co. v. United States*, 44 Fed. Cl. 703, 709 (1999). For Rule 60(b) determinations, the underlying merits of the claim are of particular importance where relief is sought from a default judgment. *See Solano v. Lascola,* 48 Fed. Appx. 4 (1st Cir. 2002); *Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396 (5th Cir. 1981).

In *Solano*, the defendant faced both a civil and a criminal case filed by the Department of Labor. *Solano*, 48 Fed. Appx. 4. The defendant requested relief from default judgment in his civil suit, under 60(b)(1), arguing that his failure to respond to the

case was a result of preoccupation with the criminal suit, and should constitute excusable neglect. *Id.* at 5. The First Circuit held, in an unpublished decision, that even if the default judgment were a product of excusable neglect, relief was not appropriate because defendant failed to demonstrate a meritorious defense to the underlying claim. *Id.*

*Seven Elves* lists eight factors important in determinations of relief under Rule 60(b): "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5*)* whether, if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *Seven Elves*, 635 F.2d at 402 (emphasis added).

In *Kennedy*, another Vaccine Act case, the petitioner filed a motion for relief under Rule 60(b)(4) and (6). *Kennedy v. Sec'y, HHS,* 99 Fed. Cl. 535, 539 (Fed. Cl. 2011). While affirming the special master's denial of the motion for relief, Judge Allegra noted that a motion for relief "is not a pleading, like a complaint, in which the factual allegations are presumed to be true." *Id.* at 550. As Judge Allegra explained, a motion for relief "seeks to set aside a final decision and it is incumbent upon the motion-filer to demonstrate that he or she is entitled to that relief." *Id.*

While these cases are not binding precedent, I find them persuasive. Based on these interpretations of Rule 60(b), the relevant inquiries in evaluating the instant motion for relief are, whether (1) counsel's neglect is excusable, and (2) the underlying Vaccine Act claim is legally tenable.

## III. The Motion for Relief from Judgment.

In the instant motion, petitioner claims that his failure to respond to two successive court orders resulted from "excusable neglect" under RCFC 60(b)(1). Motion for Relief, filed May 9, 2012, at 1.[14] Furthermore, petitioner asserts he can prove that Sarah's injuries were caused by her vaccinations. *Id.* at 2.

[14] The motion is filed by Mr. Holland, and primarily discusses his conduct in failing to prosecute petitioner's claim. I note that Mr. Holland neglects to mention any of the informal communications by court staff with him and his associates at the office of record for him during the February – April 2011 time frame. *See* Sims' Aff. and supporting court exhibits, filed January 11, 2013.

A. Lack of Excusable Neglect.

Petitioner's counsel has listed several reasons for his failure to prosecute the claim, and why his conduct should be categorized as "excusable neglect." First, he contends that he took over the case from petitioner's prior counsel, Mr. Savola, and therefore was not aware whether the court reports were addressed to him or to Mr. Savola. Motion for Relief at 1. Second, he was in the process of transitioning from the Ferraro Law Firm to another office between February 2011 and December 2012, and was completely out of the Ferraro Law Firm by July 1, 2011. *Id.* at 2. He asserts that he was unaware of my May 2011 and June 2011 orders, and had no notice of the Decision on July 26, 2011, and the Judgment on August 26, 2011, because he left the Ferraro Law Firm. *Id.*

1. Substituting for another attorney.

Mr. Holland states that he took over this case from petitioner's previous attorney, Mr. Savola, in "approximately 2006," and that he received several reports from the Office of Special Masters detailing the handling of OAP test cases. *Id.* at 1. He goes on to state that he has no "special recollection" if such reports were formally addressed to himself or to Mr. Savola. *Id.*

I reject this attempt by Mr. Holland to characterize the situation as one that results from one attorney substituting for another. Mr. Savola was terminated as the attorney of record on November 30, 2007. Thereafter, Mr. Holland was actively involved in the filing of petitioner's exhibits and motions of extension of time. *See, e.g.,* Pet. Exs. 1–20, filed May 15, 2008; Motion, filed Mar. 3, 2009. Further, Mr. Holland appeared on behalf of petitioner in a status conference as late as February 2011, and he and an associate were communicating with the court staff about his OAP cases until April 2011.

It is clear to me that Mr. Holland was aware that he was responsible for all deadlines in this case. His assertion that he is unsure whether the court addressed reports and orders to him or to Mr. Savola is at odds with his conduct as the attorney of record between December 2007 and April 2011. This mischaracterization of events does not convince me that his conduct was in any way excusable.

2. Transitioning to new office space.

Mr. Holland identified his move from the Ferraro Law Firm as a significant factor contributing to his failure to respond to my Orders of May 16 and June 22, 2011. Motion for Relief at 2-3. Mr. Holland, relying on *Pioneer,* asserts that his failure to respond to my orders is "excusable neglect." Reply, filed Jun. 5, 2012, at 1-2. He contends that the Supreme Court expanded the concept of excusable neglect in that case to include carelessness, and would have me hold that his conduct is excusable in light of *Pioneer*. *Id.* However, *Pioneer* is distinguishable from the present case. In *Pioneer,* the Court held that the neglect of counsel to meet a bankruptcy court filing deadline was excusable due to the "peculiar and inconspicuous placement of the bar date in a notice

regarding creditors' meeting." *Pioneer,* 507 U.S. at 398. Here, unlike in *Pioneer*, the court issued its orders in a manner consistent with previous orders to which Mr. Holland responded. Additionally, unlike *Pioneer*, where the deadline issued by the bankruptcy court was inconspicuous, here, the May 16, 2011 and June 26, 2011 orders listed petitioner's deadlines in a clear and conspicuous manner.[15]

It is apparent that Mr. Holland simply did not check his email, which contained the notices of filing for the two orders to which he failed to respond. Furthermore, he failed to update the court with his new email address when Ms. McIntosh informed him in January 2011 that the address on file with the court was incorrect and again when he changed offices or firms in the spring and summer 2011. *See* Email # 5.[16] His failure to see my orders resulted not from any lack of clarity about deadlines, but from his own carelessness.

Notably, in *Pioneer*, the Supreme Court also indicated that, "[i]n assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time." *Pioneer,* 507 U.S. at 398. Likewise, I give little weight to Mr. Holland's excuse that he was moving from the Ferraro Law Firm. As the attorney of record, Mr. Holland is required to keep the court updated with his current email address. *See* Vaccine Rule 14(b)(2) ("The attorney of record must . . . promptly file with the clerk and serve on all other parties a notice of any change in the attorney's contact information.") (emphasis added).

Mr. Holland, relying on the *Pioneer* factors for excusable neglect determinations, argues that there is no danger of prejudice to the respondent, that the length of delay in this case is "de minimis," and that by bringing the matter to the attention of the court as soon as he became aware of it, he acted in good faith. Reply at 1-2; *see Pioneer,* 507 U.S. at 385. Mr. Holland does not address the third *Pioneer* factor, "whether the delay was beyond the reasonable control of the person whose duty it was to perform." *Pioneer,* 507 U.S. at 385. Mr. Holland claims that he was unaware of my Orders of May 2011 and June 2011. He does not address that his lack of awareness stems from his own failure to receive or to open email notifications of filings.[17] Mr. Holland could have checked the court docket himself or had another person check the docket for him. He could have promptly informed the court of his new contact information. He could have

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[15] Other courts have distinguished *Pioneer* on similar grounds. *See In re President Casinos, Inc.*, 391 B.R. 20, 23-24 (Bankr. E.D. Mo. 2008) ("Here, this Court entered its Order on the Omnibus Objection referring Creditor to mediation and directing Creditor to file a Mediation Statement . . . . Unlike *Pioneer,* notice of the filing deadline was clear."), *aff'd,* 397 B.R. 468 (B.A.P. 8th Cir. 2008); *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995) (denying a Rule 60(b)(1) motion because "[u]nlike *Pioneer,* there is simply no dramatic ambiguity in this case which would mandate such an extraordinary determination").

[16] Email # 5 was filed on January 11, 2013, as Court Exhibit # 6.

[17] Electronic case filings are governed by Appendix E of the RCFC. "A filing by the court under this Appendix has the same force and effect as a paper copy entered on the docket in the traditional manner." RCFC Appendix E 22(b). Mr. Holland, like all other attorneys, was required to pass a Case Management/Electronic Case Filing ["CM/ECF"] certification test before he could use the online system, and therefore has notice of the rules governing electronic filings.

maintained the proffered informal contact with court staff, discussing how best to resolve his cases. He failed to do any of the actions expected of an attorney and officer of the court. Instead, he neglected his obligations. Certainly, there was neglect in this case. But based on *Pioneer*, I cannot find his neglect to be excusable.

B. Lack of a Meritorious Claim.

Petitioner claims that he has "sufficient medical evidence" to prove that Sarah's injuries were caused by her vaccinations. Motion for Relief at 2. However, he failed to give any details concerning this medical evidence and does not explain why it has not been filed. Additionally, a thorough review of the medical records which were filed showed no reliable evidence that Sarah's vaccinations caused her injuries.

1. Sarah's Medical History.

Sarah was born on February 12, 1998, weighing seven pounds, twelve ounces. Pet. Ex. 3, pp. 8, 10. Sarah's Apgar scores were 8 at one minute and 9 at five minutes after birth. *Id.* Delivery was induced due to preeclampsia but otherwise her birth was unremarkable.[18] Pet. Exs. 3, p. 8; 6, p. 3.

When Sarah was one day old, she received her first hepatitis B vaccination while still in the hospital. Pet. Exs. 2, p. 2; 5, p. 52. There is no indication of a reaction to the vaccination in medical records covering this time period. On March 12, 1998, Sarah received her second hepatitis B vaccination when she was one month old at her pediatrician's office. *Id.* Again, the medical records covering this time period do not contain evidence of a reaction to the vaccination.

The medical records do contain a prescription, dated April 1, 1998, for amoxicillin. Pet. Ex. 5, p. 49. Since it is followed by an undated entry recording that antibiotics were prescribed for an upper respiratory infection ["URI"], it appears that Sarah suffered from a URI on April 1, 1998. *See id.*, pp. 49-50. In that entry, it is noted that Sarah had a green nasal discharge, was gagging when nursing, and felt warm to the touch. *Id.*, p. 50.

On May 26, 1998, Sarah received the following vaccinations: diphtheria-tetanus-acellular pertussis ["DTaP"], inactive polio vaccine ["IPV"], and Haemophilus influenza type b ["Hib"] at her pediatrician's office. Pet. Exs. 2, p. 2; 5, p. 52. As with her earlier vaccinations, there is nothing in the medical records covering this time period which indicates that Sarah suffered a reaction to these vaccinations. There is a prescription dated July 17, 1998, which contains a notation to evaluate and treat either P.T. or D.T.

[18] An entry in the birth history section of Sarah's September 13, 2002 evaluation indicates that she was jaundiced at birth. Pet. Ex. 6, p. 36. Supporting this medical history is an entry reflecting a test for bilirubin four days after her birth on February 16, 1998. Pet. Ex. 3, p. 2. Bilirubin is "a yellow bile pigment," a high concentration of which "may result in jaundice." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (32nd ed. 2012) ["DORLAND'S"] at 215.

Pet. Ex. 5, p. 51. The next entry is dated November 6, 1998, and records that Sarah was diagnosed with a viral cold. *Id*., p. 50.

On January 5, 1999, Sarah saw Dr. Carole Fleener for a well baby check-up ["WBC"]. Dr. Fleener noted that she was a "well baby" but appeared to have macrocephaly.[19] Pet. Ex. 8, p. 2. Dr. Fleener ordered a head computed tomography ["CT"] scan[20] and magnetic resolution imaging ["MRI"][21] and referred Sarah to pediatric neurology for evaluation. *Id.* Sarah was given a head CT scan on January 12, 1999, the results of which were normal. Pet. Ex. 8, p. 36. "No craniosynostosis [was] identified." *Id.*

On January 19, 1999, Sarah was seen by pediatric neurologist, Dr. Joseph A. Casadonte. Pet. Ex. 6, p. 3. Dr. Casadonte noted that Sarah had macrocephaly but was "otherwise healthy." *Id.* In the past medical history section of his report, Dr. Casadonte noted that Sarah was crawling, pulling herself up, babbling, and reaching for and transferring objects. *Id.* He added that Sarah's family history was negative for macrocephaly but that her brother had PDD.[22] *Id.* Upon examining Sarah, Dr. Casadonte determined her to be alert, with a head circumference above the ninetieth percentile, a slightly flattened posterior region, height at the seventy-fiftieth percentile, full movements, equal and reactive pupils, symmetric face, and age appropriate tone, strength, and reflexes. He concluded that Sarah had "[m]acrocephaly without signs of increased intracranial pressure and reportedly[23] a normal CT scan." *Id.* He recommended that Sarah's progress be monitored and that a follow-up appointment be scheduled in several months (sooner if "deterioration in her condition or significant findings on her CT scan"). *Id.,* p. 4.

Over the next few months, Sarah was seen by her pediatricians on several occasions due to a cold or ear infection. *See, e.g.,* Pet. Ex. 5, p. 48. She had her fifteen month WBC on May 18, 1999. At that visit, Sarah's mother discussed Sarah's immunizations, diet, and bowel movements with her pediatrician. Pet. Exs. 5, p. 54; 8, p. 3. She declined Sarah's vaccinations, preferring "to defer all the shots." *Id.*

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[19] Macrocephaly is an "unusually large size of the head." DORLAND'S at 1092.

[20] A CT scan produces a three-dimensional view of body structures by "passing x-rays through the body organs at many angles through 360 degrees." MOSBY'S MANUAL OF DIAGNOSTIC AND LABORATORY TESTS ["MOSBY'S"] at 1030 (4th ed. 2010).

[21] "MRI is a noninvasive diagnostic technique that . . . is based on how hydrogen atoms behave in a magnetic field when disturbed by radiofrequency signals." MOSBY'S at 1166.

[22] PDD or pervasive developmental disorder is the umbrella term used in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 4th ed. text revision 2000) ["DSM-IV-TR"] at 69, for disorders on the autism spectrum.

[23] Dr. Casadonte did not have a copy of the report or films himself. Pet. Ex. 6, p. 3.

On July 26, 1999, Sarah was referred to the Early Intervention Program ["EIP"]. Pet. Ex. 6, p. 9. Her intake date was July 29, 1999, and an evaluation was performed on August 17, 1999. *Id.* The reasons for the referral were listed as a loss of speech, Sarah's inability to tolerate someone in her face, and fleeting eye contact. *Id.,* pp. 9-10. However, diarrhea and hand flapping also were listed as present concerns. *Id.,* p. 10. Sarah was noted to be a picky eater, currently on a dairy and gluten free diet. Pet. Ex. 13, p. 7. She was described as a happy child who was hyperactive.[24] *Id.* During her August 17, 1999 evaluation, Sarah was noted to be walking well, using some vowels and at least two consonants but no real words. *Id.*, p. 9. She was not interested in performing the mental skills challenges suggested and was observed to be spinning at the end of the evaluation. *Id.* It was recommended that Sarah receive occupational therapy and speech therapy, an audiology evaluation, and follow-up with a neurologist. *Id.*

Sarah was seen again by her neurologist, Dr. Casadonte, on October 13, 1999. He noted that he had seen Sarah in January 1999, for macrocephaly but that "her family did not keep a scheduled follow-up appointment." Pet. Ex. 6, p. 21. Dr. Casadonte recorded that Sarah's mother indicated she was doing well but had "language delay and some behavior abnormalities." *Id.* In particular, Sarah's mother indicated that she did not make eye contact and had experienced a loss of language. *Id.* Sarah's mother explained that Sarah had been experiencing "sudden staring spells" which had been seen by Sarah's teachers, Sarah's therapists, and herself. *Id.* Dr. Casadonte examined Sarah, noting that her head circumference indicated "a stable rate of growth" since January 1999. *Id.* During the examination, Dr. Casadonte observed Sarah to be spinning, an activity which Sarah's mother reported that she generally does not do. *Id.*

As part of Dr. Casadonte's evaluation, Sarah underwent an electroencephalogram ["EEG"],[25] the results of which were normal. Pet. Ex. 6, pp. 18, 21. Dr. Casadonte opined that although a normal EEG "does not rule out an epileptic process, . . . it is possible that [Sarah] may be withdrawing from excessive stimulation." *Id.*, p. 21. He observed that Sarah had trouble focusing and had some "pervasive developmental problems." *Id.*, p. 22. He noted that Sarah would be receiving tubes in her ears "because of significant hearing loss" and he would reassess her condition in several months, considering "more prolonged EEG monitoring and possibly an MRI" at that time. *Id.*

Sarah underwent surgery to place tubes in her ears on October 22, 1999, at Sarasota Memorial Hospital. Pet. Ex. 4, pp. 4-5. During a follow-up appointment at the Tampa Bay Hearing and Balance Center, Sarah was thought to have hearing loss. Pet.

[24] The "comments" section contains a note, "screaming in the middle." *Id.* This entry could refer to the middle of the night as there are later references to Sarah waking at 2 or 3 AM but could also refer to play time, school, or some other activity. Pet. Ex. 4, pp. 36-37. Since there is not a later reference to Sarah screaming, it is impossible to surmise what the missing portion should say.

[25] "The EEG is a graphic recording of the electrical activity of the brain." MOSBY'S at 573. It is used in the investigation of epileptic states. *Id.*

Ex. 10, p. 2. It was noted that her brother "is also a worry for hearing loss" and "is thought to have autism based on reaction to various vaccines." *Id.*, p. 1. This information is contained in the "History of Illness" section and most likely originated from one of her parents. According to the medical records, Sarah's mother also reported that Sarah has significant levels of aluminum and mercury in her blood from immunizations and that she plans to take Sarah to California for "heavy metals detoxification." *Id.,* p. 4.

Sarah was seen again at the Tampa Bay Hearing and Balance Center on November 24, 1999 by Dr. Loren J. Bartels. Pet. Ex. 6, p. 25. Dr. Bartels indicated that Sarah appeared to have auditory neuropathy but referred her to Charles Berlin, Ph.D. in New Orleans or Edward Cohen, M.D. in Nebraska. *Id.*, pp. 25-26. Dr. Bartels had been unable to fully sedate Sarah for her audiology test, but found the results intriguing. *Id.*, p. 26.

It appears that Sarah began seeing Dr. Jeff Bradstreet on November 2, 1999 when he prescribed 1.5 mg of oral immunoglobulin.[26] Pet. Ex. 4, p. 1. Doctor Bradstreet diagnosed Sarah as having "autistic neuritis" caused by the hepatitis B vaccine. *E.g., id*, p. 6. From December 7, 1999 until July 20, 2000, Dr. Bradstreet admitted Sarah to the "Infusion Center" on approximately six occasions for oral and intravenous treatments. These treatments often required an overnight stay. *E.g., id.*, pp. 2-3. Sarah initially was administered either Risperdal,[27] Motrin, and/or Benadryl. *E.g., id.*, pp. 7, 25. She then received intravenous immunoglobulin or "IVIG," usually Gamimune.[28] *E.g., id.*, p. 7. On at least one occasion, Sarah received secretin[29] as well. *Id.*, p. 6. Occasionally, it was noted that Sarah was crying, agitated, or experienced redness at the injection site, but otherwise she tolerated these treatments. *Id.*, pp. 3, 14. Sarah often was sent home with instructions to administer Pepcid AC and additional oral immunoglobulin. *E.g., id.*, p. 10. On November 15, 2000 (and possibly September 7, 2000 as well), Dr. Bradstreet prescribed chelation therapy for Sarah. *Id.*, pp. 33-34.

These treatments prescribed by Dr. Bradstreet are the same methods that he used to treat the minor child in Theory 1 test case, *Snyder*. *See Snyder,* 2009 WL 332044, at *173-81. As explained in the *Snyder* case, these treatments were not medically accepted. Although secretin was thought to have some positive effect on bowel problems, it was not shown effective in treating autism. *Id.* at *175. In at least one study, children who received a saltwater placebo "did slightly better than the children receiving secretin." *Id.* In the *Snyder* case, Dr. Bradstreet "could not explain

[26] Immunoglobulin is "any of the structurally related glycoproteins that function as antibodies." DORLAND'S at 919.

[27] Risperdal is the trademark name for risperidone, a drug administered orally as an antipsychotic agent. DORLAND'S at 1650.

[28] Gamimune is a "trademark for preparations of immunoglobulin intravenous." DORLAND'S at 757.

[29] Secretin is a "strongly basic polypeptide hormone secreted by the mucosa of the duodenum and upper jejunum." DORLAND'S at 1685.

why IVIG therapy was effective in treating" the minor child. *Id.* at *180. Several of respondent's experts opined that they "were highly skeptical of Dr. Bradstreet's treatment rationale and its efficacy." *Id.* at *179. One expert, Dr. Zweiman, commented that "the American Academy of Pediatrics have found insufficient data to support the use of IVIG in treating autism." *Id.* Another expert, Dr. Wiznitzer "noted that [the minor child's] developmental pattern was consistent with the natural history of autism," attributing the minor child's improvements to that natural progression rather than Dr. Bradstreet's treatments. *Id.* at *181.

On December 21, 1999, Sarah again saw Dr. Casadonte for her staring spells. Dr. Casadonte noted that Sarah has macrocephaly, "[s]ensory neural hearing loss of unclear etiology," and "some self stimulatory mannerisms." Pet. Ex. 6, p. 54. He discussed "issues related to autism spectrum disorder" with Sarah's mother but added that her social and appropriate play and affectionate manner suggested that Sarah did not meet the diagnostic criteria for autism. *Id.,* p. 55. He ordered a video EEG and MRI. *Id.* During the video EEG, performed on March 21, 2000, Sarah had multiple staring episodes. *Id.,* p. 57. The episodes were brief and involved jerking of the extremities but no loss of consciousness. *Id.* Dr. Casadonte concluded the episodes "demonstrated no electrographic changes, indicating that they were not epileptic in origin." *Id.*

On January 5, 2000, Sarah saw a pediatric gastroenterologist, Dr. Daniel T. McClenathan. Pet. Ex. 7, p. 9. Dr. McClenathan noted that Sarah, like her brother, had suffered from chronic diarrhea since she was six months old. *Id.* He proposed that a "malabsorption and infectious workup" be performed. *Id.* He added that "Dad is worried that vaccinations may have been a key part of this problem, especially the measles vaccine"[30] and that he would need to "work that up in the future." *Id.* The "malabsorption" workup was performed from February 9 to 15, 2000. *Id.,* pp. 2-8. All results were normal. *Id.*

Dr. McClenathan saw Sarah again on August 29, 2000. Pet. Ex. 7, p. 1. He noted that the results of the "malabsorption" test were normal and that Sarah's diet revealed she was "drinking a lot of juices." *Id.* He theorized that Sarah probably was not consuming much fat which would help alleviate her diarrhea. *Id.* He added that he would recommend a sweat test as it was "[t]he only thing that was not done." *Id.* He noted that Sarah's parents "are still concerned that her vaccinations and specifically her MMR [vaccination] are part of her problems." *Id.*; *but see supra* note 30 (indicating Sarah never received the MMR vaccine). He concluded that his "suspicion is that there is no significant GI Pathology from [his] standpoint." *Id.*

On February 1, 2000, Sarah was seen by Dr. Charles Berlin and underwent testing which showed that her "auditory neuropathy" had resolved. Pet. Ex. 11, p. 1. He opined that "[w]e have seen this form of remission before especially in children with

[30] I note that Sarah never received the measles vaccine or the combined measles, mumps, and rubella ["MMR"] vaccine. *See* Pet. Exs. 2, pp.1-2; 5, pp. 52-53; 8, p. 1.

histories of mild hyperbilirubinemia[31] and/or toxic reactions to vaccines." *Id.* He expressed interest "in documenting Sarah's further recovery." *Id.*

Sarah continued to be treated by Dr. Bradstreet and to receive occupational and speech therapy from other providers. *See, e.g.,* Pet. Ex. 8, p. 14. In July 2000, she began to be homeschooled with her brother. Pet. Ex. 4, p. 35. Although it is not clear when she was diagnosed with PDD, entries in September 2002 and April 2007 indicate that she received this diagnosis at some point. Pet. Exs. 6, p. 36; 19, p. 2.

2. Analyzing Petitioner's Claims.

The medical records which were filed indicate that Sarah began experiencing developmental delays when she was between fifteen and eighteen months of age, approximately one year after she received her last vaccination. Therefore, it is clear that she did not suffer a "Table Injury".[32]

Despite this gap of time, Sarah's parents appear convinced that her vaccinations caused her developmental delays. They shared this belief with her treating physicians on several occasions. However, the majority of Sarah's treating physicians did not concur. Instead, they simply recorded what Sarah's parents told them but did not alter their treatment of Sarah or further address this possibility. On at least two occasions, petitioner informed Sarah's pediatric gastroenterologist, Dr. McClenathan, that the measles or MMR vaccine caused Sarah's developmental delays; an impossibility since Sarah never received this vaccination. Pet. Exs. 2, pp. 1-2; 7, pp. 1, 9.

On these facts, the likelihood that petitioner could establish vaccine causation of Sarah's PDD is extremely low. Sarah's last vaccines were administered on May 26, 1998. Thereafter, she continued to develop normally, albeit her head size was at the upper end of normal.[33] She had a CT scan on January 12, 1999, the results of which were normal. Pet. Ex. 8, p. 36. Some fourteen months after her last vaccinations, Sarah began displaying symptoms of autism spectrum disorders. Sarah saw pediatric neurologist, Dr. Casadonte, who did not attribute her neurologic condition to vaccinations.

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[31] Hyperbilirubinemia means "excessive bilirubin in the blood, which may lead to jaundice." DORLAND'S at 886.

[32] If a petitioner can prove a "Table Injury" causation is presumed. *See* § 11(c)(1)(C)(i). However, in order to prove a "Table Injury" a petitioner must show that the first symptom or manifestation of onset or of significant aggravation occurred within the time period set forth in the Vaccine Table. *See* 42 C.F.R. 100.3(a)(2011) (For example, encephalopathy must occur within seventy-two hours of receiving the DTaP or Hib vaccine to qualify as a Table Injury).

[33] I note that evidence in the Theory 2 OAP test cases indicated that many children with autism spectrum disorders have heads of normal size or smaller than normal at birth, but head circumference increases disproportionally between birth and one year of age. The disproportionate increase in brain circumference of children with autism was attributed to an elaboration of neural interconnections at a time when the brains of typically developing children are not experiencing the same elaboration. *Dwyer v. Sec'y, HHS*, No. 03-1201, 2010 WL 892250, at *44 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

At best, there are two treating physicians whose statements in Sarah's medical records reflect a connection between vaccines and an injury. Doctor Berlin (who holds a Ph.D, rather than a medical degree) obliquely attributed a resolved "auditory neuropathy" to hyperbilirubinemia and/or toxic reaction to vaccines. However, it does not appear that Sarah was ever definitively diagnosed with auditory neuropathy. Dr. Bartels thought Sarah "appeared" to have the condition, but his testing was incomplete because Sarah was not well sedated. He referred Sarah to Dr. Berlin, whose testing did not show audio neuropathy. And, there is no evidence in Sarah's records concerning a "toxic" reaction after any of her vaccines. There is evidence that Sarah had hyperbilirubinemia shortly after birth. *See supra* notes 18, 31. If this reference even suggests causation, it appears to be based on Sarah's parents' reports.

Dr. Bradstreet diagnosed Sarah with "autistic neuritis" caused by the hepatitis B vaccine. "Autistic neuritis" is not a PDD spectrum diagnosis. There is no ICD-10[34] code for such a disorder. Moreover, Dr. Bradstreet's opinions on autism causation were focused on "heavy metal toxicity" or a measles-caused encephalopathy, theories which were litigated in the OAP test cases, where the evidence established that Dr. Bradstreet's conclusions and research were flawed.

## IV. Conclusion.

Petitioner has failed to demonstrate, as a precondition to relief under RCFC 60(b), a likelihood of success on the dismissed claim. As I indicated in dismissing the claim in the first instance, petitioner had not only failed to respond to court orders, the record failed to reflect evidence of vaccine causation. Decision, filed Jul. 26, 2011, at 3. Assuming, *arguendo,* that petitioner could somehow make a case for vaccine causation – highly doubtful under the facts of this case – petitioner has still failed to establish excusable neglect for the failure to respond to court orders.

In light of the above, I find that petitioner has failed to establish an adequate basis for vacating judgment in this case. Therefore, I **DENY** petitioner's motion for relief from judgment pursuant to RCFC 60(b)(1).

**IT IS SO ORDERED.**

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

[34] ICD refers to the International Classification of Diseases. ICD-10 "was endorsed by the Forty-third World Health Assembly in May 1990 and came into use in WHO [World Health Organization] Member States as from 1994." http://www.who.int/classifications/icd/en/; *see also* http://www.cdc.gov/nchs/icd/icd10.htm.