

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-0283V

Filed: 28 February 2007

\* \* \* \* \*
GERALD DEMPSEY, as parent and
legal representative of LIAM DEMPSEY,
a minor,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

\* \* \* \* \*

PUBLISHED

ORDER<sup>1</sup>

The Court conducted a status conference at the request of Respondent on 20 February 2007, at which appeared Mr. Milmo for Respondent, Mr. Homer, and Mr. Shoemaker for Mr. Meyers.

According to the Court's last written Order in this case, Respondent was to submit any objections to the attorney fee applications tendered by Messrs. Ron Homer and Peter Meyers by the close of business on 9 February 2007. Mr. Homer and Mr. Meyers had tendered those applications on 12 October 2006 and 17 November 2006, respectively, and both applications certified service made upon Respondent. Furthermore, Respondent has stipulated that the same had been received.

At the last status conference, held on 5 January 2007 and memorialized by written Order filed 9 January 2007, the Court decreed that, "If Respondent has any other legal objections on the issue of whether or how much should be awarded in fees and costs, any such objections must be filed by close of business 9 February 2007," adding that "Otherwise the Court will go forward with a decision." (emphasis in original). It is worth noting that at that time, Respondent stipulated that any objections would be levied upon the amount of reasonable compensation for fees, and not the standing of those attorneys to file such applications per se, as such was assented to by the

<sup>1</sup> Because this Order contains a reasoned explanation for my action in this case, it may be published or posted to the Court of Federal Claims website. Therefore, Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), Petitioner has 14 days from the date of this Order within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b).

Respondent. In that Order the Court also set a briefing schedule in the event that Respondent filed timely objections to the fee applications.

In the latter portion of the afternoon on Friday, 9 February 2007, Counsel for Respondent called by telephone, attempting to contact Mr. Homer, Mr. Meyers, and the Court, via my law clerk; none of these attempts were successful. Counsel for Respondent left voice mail messages in each instance to request an enlargement of time in which to file the above-referenced objections. Nothing was filed with the Court, and nary was sent so much as a facsimile transmission; Respondent's motion was made orally to the several voicemail accounts on 9 February 2007, without actual reception of service on any of the parties called. In fairness to Respondent's Counsel, he had suffered a serious health condition in the weeks immediately previous, and the attorney filling in for him at Respondent's office was then addressing health issues within his own household. Therefore, the Court takes into account the physical circumstances attending Counsel for Respondent.

Between the late afternoon on Friday, 9 February 2007 and mid-morning on Monday, 12 February 2007, Counsel for Respondent heard back from the parties to whom calls had been placed. Mr. Meyers did not then object to Respondent's oral motion for enlargement of time; however, Mr. Homer did. The Court then convened a status conference on 20 February in order to resolve the issue and rule on Respondent's motion.

At the status conference the Court noted the above-quoted verbiage of the foregoing Order, particularly the use of the word "must" instead of "shall", the word more typically used in scheduling orders. The Court considered that Respondent has been aware of the attorney fee applications for months, yet waited until the day objections were due before requesting additional time. Perhaps most problematic, however, is the absence of written filing of the motion, considering its late occasion. Had Counsel for Respondent actually made telephone contact with a representative of the Court and the other affected parties, written notice of the motion might not have been necessary. Had the motion been made any day prior to the due date, voicemail messages may have been appropriate to communicate the motion's contents to all concerned. Certainly, written notice at any point would have sufficed, and, given an emergent circumstance, immediate notice by facsimile would have bolstered such an application. Nevertheless, none of these circumstances obtain in this case. Respondent's motion was not reasonably calculated to provide timely notice to the Court or anyone else affected thereby. This lapse operated as a waiver of Respondent's right to object to both fee applications at issue.

Wherefore, Respondent's motion for enlargement of time in which to file objections to the attorney fee applications is **denied**. Based on this denial, the Respondent's objections are waived by default, and further briefing is unnecessary. The Court shall consider the applications and will rule on the applications in due time.

**The Clerk is instructed to serve the parties of record in this case, as well as the offices of Mr. Homer and Mr. Meyers.**

**IT IS SO ORDERED.**

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**Richard B. Abell**  
Special Master