

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

No. 07-135V

Filed: August 31, 2007

Not for Publication

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STEVEN ZWICK, \*  
\*  
Petitioner, \* Prior Civil Settlement;  
\* Motion to Dismiss  
v. \*  
\*  
SECRETARY OF THE DEPARTMENT \*  
OF HEALTH AND HUMAN SERVICES, \*  
\*  
Respondent. \*  
\*\*\*\*\*

Steven Zwick, Esq., Pro Se  
Lisa A. Watts, Esq., U.S. Department of Justice, Washington, DC, for Respondent.

VOWELL, Special Master

**DECISION<sup>1</sup>**

On February 28, 2007, Mr. Steven Zwick, pro se,<sup>2</sup> filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C.

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in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). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete 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 delete such material from public access.

<sup>2</sup> Mr. Zwick's petition indicates that he is an attorney. Petition, p. 5. See also, Petitioner's Exhibit ["Pet. Ex."] 13, pp. 536-38, a deposition of Mr. Zwick taken in his civil suit against Aventis Pasteur, Inc., discussed *infra*.

§300aa-10, *et seq.*,<sup>3</sup> [the “Vaccine Act” or “Program”] alleging that a trivalent influenza vaccination he received on October 18, 1999, caused him to develop anterior ischemic optic neuropathy in his left eye, leaving him legally blind.<sup>4</sup> Petition [“Pet.”], ¶ 3.

The petition also asserted that Mr. Zwick had previously filed a lawsuit stemming from the loss of sight in his left eye and that the suit was settled for the “costs of suit only.” Pet., ¶ 8. During the initial status conference on April 20, 2007, I raised the issue of whether Mr. Zwick’s prior civil suit settlement barred his petition. Mr. Zwick explained that at the time he filed his civil suit against the vaccine manufacturer, Aventis Pasteur, Inc., for his eye injury, the influenza vaccine was not one of the vaccines listed on the Vaccine Injury Table [“Table”].<sup>5</sup> He explained that § 300aa–11(a)(9) meant that § 300aa–11(a)(7) did not prohibit his petition because he was not “qualified” to file a petition at the time his suit was settled. To clarify the nature of Mr. Zwick’s prior lawsuit and its settlement, I ordered petitioner to file a copy of the complaint and any documents pertaining to settlement. Responsive documents, Pet. Exs. 15 and 16, were filed on May 16, 2007.

In lieu of a report under Vaccine Rule 4(c), on June 14, 2007, respondent filed a motion to dismiss the petition [“Motion to Dismiss”], asserting that § 300aa–11(a)(7) barred Mr. Zwick’s petition, because he had settled with the vaccine manufacturer in his civil suit.<sup>6</sup> Alternatively, in footnote 4 of the Motion to Dismiss, respondent also argued that, “petitioner is unable to make out a prima facie case for compensation under 42 U.S.C. § 300aa–13(a)(1)(A),” because he cannot demonstrate that he has not previously collected a settlement of a civil action. Petitioner responded on June 28, 2007 [“Opp. to Motion to Dismiss”]. Respondent filed a reply brief on July 6, 2007 [“Res. Reply Brief”]. No petitioner’s reply brief was filed. The Motion to Dismiss is now ripe for decision. For the reasons outlined below, I grant respondent’s motion and dismiss this petition for lack of jurisdiction.

## **I. Facts Relied Upon for Purposes of the Motion to Dismiss**

The exhibits filed with the petition and those filed in response to my order

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<sup>3</sup> Hereinafter, for ease of citation, all “§” references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

<sup>4</sup> The petition asserts that Mr. Zwick lost most of the vision in his right eye approximately 18 years earlier. Pet., p. 2.

<sup>5</sup> The Vaccine Injury Table is found at 42 C.F.R. § 100.3. The 2005 addition of the influenza vaccine to the Vaccine Injury Table is addressed, *infra*.

<sup>6</sup> In footnote 1 of the Motion to Dismiss, respondent requested that I address this motion prior to requiring a Rule 4(c) report. In the initial status conference on April 20, 2007, I indicated that I would not require a Rule 4(c) report until I resolved the issue of whether the petition was barred by Mr. Zwick’s settlement of his prior lawsuit.

establish that Mr. Zwick received an influenza vaccination on October 18, 1999.<sup>7</sup> Pet. Ex. 2. Thereafter, he was diagnosed with left anterior ischemic optic neuropathy. Pet. Ex. 9, p. 243. On November 8, 2000, Mr. Zwick and his wife filed suit in Superior Court, Orange County, California, against Mission Community Hospital, Aventis Pasteur, Inc., and Does 1 to 100, based upon, *inter alia*, negligence and products liability claims stemming from the administration of the influenza vaccination on October 18, 1999. Pet. Ex. 15.

Many of the exhibits filed by petitioner are depositions of various witnesses from this civil suit. See Pet. Exs. 3, 4, 6, 10, 11, and 13. On December 27, 2001, petitioner executed a settlement agreement with Aventis Pasteur, Inc., in which he and his wife agreed to accept a sum of money in exchange for releasing Aventis Pasteur, Inc. from liability for his injury. Pet. Ex. 16, p. 1. In accordance with the terms of the settlement agreement, on January 18, 2002, petitioner requested that the Orange County Superior Court dismiss his suit with prejudice. Pet. Ex. 14. The settlement agreement did not include any provision indicating that the lump sum payment was intended to cover only the costs of the lawsuit.

## II. Applicable Law and Discussion

In *Amendola v. Sec’y, HHS*, 989 F.2d 1180, 1182 (Fed. Cir. 1993), the Federal Circuit commented upon the complexity of the Vaccine Act and the difficulty of interpreting a specific subsection without reference to the Act as a whole. The court opined that the gate-keeping provisions of §11(a)—delineating who may file a claim—were particularly problematic, calling them “both overbroad and too narrow” and noting that “when read in isolation, they can be applied to the same fact pattern with different outcomes.” 989 F.2d at 1183. Thus, a brief discussion of the Vaccine Act, some of the specific provisions of 300aa–11(a), and decisions interpreting those provisions, will aid in resolving the instant motion.

The Vaccine Act<sup>8</sup> is a no-fault compensation program established by Congress to provide an alternative to traditional tort litigation for persons injured by certain vaccines. *Amendola*, 989 F.2d at 1181. The legislative history indicates that one of the major reasons for the Vaccine Act was to reduce the number of tort suits filed against vaccine manufacturers. The Vaccine Act prohibits anyone from filing suit against a vaccine manufacturer or administrator for any vaccine-related injury or death, unless

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<sup>7</sup> The petition states that Mr. Zwick received a “Fluzone” vaccination, but Pet. Ex. 2 does not identify the vaccine. Fluzone is the trade name for vaccine manufacturer Aventis Pasteur’s trivalent influenza vaccine <http://www.fluzone.com> (last visited August 29, 2007). The complaint in Mr. Zwick’s civil suit identifies the vaccine as “Fluzone.”

<sup>8</sup> The Vaccine Act was first enacted in 1986. Pub.L.No. 99-660, §§ 301 et seq., 100 Stat. 3743, 3755 (1986), and was amended the following year. Pub.L.No. 100-203, §§ 4306-07, 101 Stat. 1330-225 (1987). The Act became effective on October 1, 1988.

that person first files a petition for compensation with the Court of Federal Claims. Not all vaccines are covered by the Program; for those that are, any vaccine-related injury must first be considered under the Program.<sup>9</sup>

Unlike plaintiffs in traditional tort suits, a Vaccine Act petitioner is not required to prove negligence in administration or manufacture of the vaccine. Instead, petitioners may establish entitlement to compensation in one of two ways. First, a petitioner may demonstrate that an injury or death is one in which a presumption of causation exists—a so-called “Table” injury.<sup>10</sup> Second, a petitioner may prove that the person who was injured or died: (1) received a vaccine set forth in the Vaccine Injury Table; (2) received the vaccine in the United States;<sup>11</sup> (3) experienced an injury caused or significantly aggravated by a vaccine; (4) suffered the residual effects of the injury for more than six months, or died, or required inpatient hospitalization and surgical intervention for the injury; and (5) has not collected a previous award or settlement in a civil action. § 300aa–11(c). Mr. Zwick’s claim falls into the later category as there is no Table injury associated with the influenza vaccination.

The original Vaccine Injury Table was enacted as §300aa–14. Section 300aa–14(e)(2) delegated to the Secretary of Health and Human Services the authority to amend the Table to include vaccines which have been recommended for routine administration to children. On July 1, 2005, all trivalent influenza vaccines were added to the Table. This Table change included a “look back” provision permitting petitions for compensation to be filed by individuals who received a trivalent influenza vaccine within the eight years prior to the effective date of the vaccine’s addition to the Table. However, these look back petitions had to be filed by July 1, 2007. 42 C.F.R. 100.3(a)(XIV). Mr. Zwick’s petition was filed well within that deadline.

The look back provision for the influenza vaccine emulated the Vaccine Act’s original look back provisions, which permitted some persons who received vaccines administered before October 1, 1988, to file claims for vaccine-related injuries. The Vaccine Act divided these original look back petitioners into four broad categories: (1) those who had previously filed civil actions in state or federal courts for vaccine injuries and whose suits were denied or dismissed with prejudice (§ 300aa–11(a)(4)); (2) those

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<sup>9</sup> The Vaccine Act requires resolution of the petition within 240 days, a period of time that may be extended upon motion of a party. Section 300aa–12(d)(3)(A)(ii). If at the conclusion of the statutory period, the special master has not rendered a decision, petitioners may elect to leave the Vaccine Program and file a civil suit. Sections 300aa–12(g) and 300aa–21(b). If a judgment is issued, petitioners may reject the judgment and file a civil suit. Section 300aa–21(a).

<sup>10</sup> A “Table” injury is a specific injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified. If a petitioner can demonstrate that the injury occurred within the time frame specified, a rebuttable presumption of causation is established.

<sup>11</sup> There are certain limited exceptions to the requirement of receiving the vaccine in the United States that are not relevant to the instant case.

with pending civil suits on October 1, 1988, who chose to dismiss those suits before judgment (§ 300aa–11(a)(5)(A)); (3) those who brought civil suits for vaccine-related injuries after November 15, 1988, (§ 300aa–11(a)(6)) or who had civil suits pending on October 1, 1988, and who did not dismiss them (§ 300aa–11(a)(5)(B)); and (4) those who had previously received a court judgment or settlement for a vaccine-related injury (§ 300aa–11(a)(7)).<sup>12</sup> Those in categories (1) and (2) were permitted to file Vaccine Act petitions. Those in categories (3) and (4) were not eligible to file petitions under the Vaccine Act.

Litigation in the early days of the Vaccine Act often focused on the interpretation of these various gate-keeping provisions of §300aa-11(a). In *Amendola*, the Federal Circuit interpreted subsections 11(a)(4) and (a)(5) to preclude the Amendolas' petition because their 1985 lawsuit against the doctor who administered their son's vaccination went to judgment (against the Amendolas) in 1989, after the effective date of the Vaccine Act. The court reached this result based on the plain language of subsection 11(a)(5)(B), notwithstanding the petitioners' argument that a literal reading of subsection 11(a)(4) would authorize their petition, because their civil suit had been unsuccessful. The court rejected petitioners' appeals to interpret the Act's provisions in light of its remedial nature, relying instead on Congress' clear intent, "that litigation prior to pursuing the compensation remedy be discouraged." 989 F.2d at 1183, 1185.

Although the Federal Circuit was interpreting the provisions of subsections 11(a)(4) and (5), and not subsections 11(a)(7) and (9) which are at issue in Mr. Zwick's case, the *Amendola* opinion is instructive. The Amendolas argued for a broad reading of the Act, "to permit their claim to thread its way through the language gaps left by the draftsmen." 989 F.2d at 1183. The court found the Congressional purpose to be clear and evidenced in the statutory language, when section 11(a) was read as a whole. 989 F.2d at 1184.

An earlier (albeit more abbreviated) Federal Circuit opinion, *Wiggins v. Sec'y, HHS*, 898 F.2d 1572 (Fed. Cir. 1990), interpreted subsection 11(a)(7), one of the two subsections at issue in the instant case. Michael Wiggins received a vaccination in 1982, and developed serious injuries thereafter. His mother filed a civil suit on his behalf against both the vaccine manufacturer and the vaccine administrator (the family physician). The suit against the manufacturer, the state of Michigan, was dismissed based on sovereign immunity. In February 1987, the suit against the administrator was

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<sup>12</sup> The complete text of § 300aa-11(a)(7) follows:

If in a civil action brought against a vaccine administrator or manufacturer for a vaccine-related injury or death damages are awarded under a judgment of a court or a settlement of such action, the person who brought such action may not file a petition under subsection (b) of this section for such injury or death.

settled for an amount considerably less than the full measure of Michael's damages.<sup>13</sup> At the time of the settlement, the text of subsection 11(a)(7) did not include language prohibiting petitions filed on behalf of those who had settled civil suits involving vaccine administrators. By the time the petition on Michael's behalf was filed in January 1989, amendments to the Vaccine Act (made before the effective date of the Act) added vaccine administrators to subsection 11(a)(7) of the statute. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 4306, 101 Stat. 1330, 1330-224 (1987). The court upheld the Claims Court's determination that the petition was improperly filed, saying, "recovery for past injury is governed by the provisions of the Act on its effective date." *Wiggins*, 898 F.2d at 1573. The court concluded that a damage award or a settlement of a civil action, "will bar access to the Act's compensation program." *Wiggins*, 898 F.2d at 1574.

The Federal Circuit's interpretation of subsection 11(a)(7) in *Wiggins* in 1990 is equally applicable to Mr. Zwick's case today. Mr. Zwick argues<sup>14</sup> that when he received his influenza vaccine, filed his civil suit against the vaccine manufacturer, and settled his suit, the influenza vaccine was not covered by the Vaccine Act. Therefore, he concludes that, under subsection 11(a)(9), he was not a person "qualified to file a petition for compensation under the Program" at any relevant time. Thus, he claims that § 300aa-11(a)(7)'s prohibition against petitions filed by persons who have previously settled vaccine injury claims does not apply to him. This argument circumvents the plain reading of subsection 11(a)(7) and decisions interpreting subsection 11(a)(9).

Although there are only a few decisions interpreting subsection 11(a)(9), none of those decisions read that subsection to mean what Mr. Zwick contends that it does. In *Salceda v. Sec'y, HHS*, 30 Fed. Cl. 316 (1994), the Court of Federal Claims considered the issue of whether a petition for a child's vaccine-related injury was barred by a pending civil suit for negligence in post-vaccination care. Remanding the case to the special master, the court observed that, "[t]he focus of Section 11(a)(6) is on the 'person' who sustained the vaccine related injury or death and not on the individual who happens to represent the interests of that person in the litigation," citing subsection 11(a)(9). 30 Fed. Cl. at 319.

In *Head v. Sec'y, HHS*, 26 Cl. Ct. 546 (1992), the Claims Court also indicated

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<sup>13</sup> These facts are taken from the Claims Court decision. See *Wiggins v. Sec'y, HHS*, 17 Cl. Ct. 551, 552 (1989).

<sup>14</sup> Mr. Zwick's argument is not clearly set forth in his response to the Motion to Dismiss, which is a document almost entirely devoid of citation to legal authority for his opposition to the motion. Mr. Zwick's brief discusses only the Federal Circuit decision in *Martin v. Sec'y, HHS*, 63 F.3d 1403 (Fed. Cir. 1995), addressed, *infra*. In keeping with the more informal nature of Vaccine Act litigation, I am addressing the arguments Mr. Zwick raised at our initial status conference about the applicability of 11(a)(7)'s provisions to his petition.

that subsection 11(a)(9) meant that subsection 11(a)'s focus is on the vaccine-injured person, and not on any person representing that injured person's interest. The petitioner, Cynthia Head, brought a petition for compensation on behalf of her deceased daughter, Janet, in her capacity as the representative of Janet's estate. Her petition was dismissed, based on the 1982 settlement of a prior civil suit against the vaccine administrators. In the civil suit, Cynthia Head had sued in both her individual capacity and as her daughter's legal representative. The settlement of both claims involved the payment of a lump sum to Cynthia, but nothing to Janet. A Texas court approved the settlement of Janet's claim, despite the fact that no funds were received on her behalf. 26 Cl. Ct. at 546-48. In dicta,<sup>15</sup> the court observed that subsection 11(a)(7)'s prohibition on bringing a Vaccine Act petition after settlement of a civil suit was focused on the person who suffered the vaccine-related injury or death, not on who brought the suit. The court cited subsection 11(a)(9)'s language in support of its reasoning. 26 Cl. Ct at 550-52.

The court interpreted similar statutory language a year later in *Benedict v. Sec'y, HHS*, 29 Fed. Cl. 587 (1993). The question raised in *Benedict* was whether a prior civil action, brought on behalf of a minor plaintiff by his parents for a vaccine-related injury, barred a petition under the Vaccine Act, subsection 11(a)(6).<sup>16</sup> Citing *Head's* reference to subsection 11(a)(9), the court found that the prior civil action was an action on the minor child's behalf, and thus barred the filing of a Vaccine Act petition. 29 Fed. Cl. at 591. See also, *Brown v. Sec'y, HHS*, 34 Fed. Cl. 663, 666 (1995) (interpreting subsection 11(a)(9) to define "person" as the individual who sustained the vaccine-related injury).

Considering the statutory interpretation principles found in *Toibb v. Radloff*, 501 U.S. 157, 161-63 (US 1991), *Amendola*, and *Johns-Manville Corp. v. U.S.*, 855 F.2d. 1556, 1557 (Fed. Cir. 1988), Mr. Zwick's proposed reading of subsection 11(a)(9) is contrary to the obvious bar to his petition interposed by subsection 11(a)(7). When the trivalent influenza vaccine was added to the Vaccine Injury Table on July 1, 2005, those who had received an influenza vaccine-related injury (or death) in the eight years prior to that date were permitted to file petitions under the Vaccine Act. However, the addition of the influenza vaccine did nothing to modify subsection 11(a)(7)'s bar prohibiting those who had previously settled civil suits for a vaccine-related injury or death from filing petitions under the Act. Mr. Zwick is a person who filed and settled a previous civil action against a vaccine manufacturer. He therefore falls under §

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<sup>15</sup> Since the special master dismissed the petition based on other grounds, the court declined to reach the issue of how to interpret subsection 11(a)(7). 26 Cl. Ct. at 552.

<sup>16</sup> Both subsections 11(a)(6) and (7) contain bars to filing Vaccine Act petitions by persons who have previously filed civil actions for vaccine-related injuries or deaths. Subsection 11(a)(6) contains a time provision (civil suits filed after November 15, 1988, based on a vaccine administered before that date). Subsection 11(a)(7) contains no time provision.

300aa–11(a)(7)'s jurisdictional bar.

In a footnote in *Amendola*, the Federal Circuit suggested that subsection 11(a)(7) could be read to apply only to pre-Act cases. 989 F.2d at 1184, n. 6. This language is clearly dicta. In making this observation, the court did not consider the effect of adding new vaccines to the Table. More compelling than this passing observation is the plain language of subsection 11(a)(7), which contains no time restriction. Numerous cases interpreting subsection 11(a)(7) have concluded that the words mean what they appear to mean: Congress did not intend for a petitioner to obtain both a settlement from a manufacturer and compensation from the Program. See, e.g., *Wiggins*, 898 F.2d at 1574; *Snowden v. Sec'y, HHS*, 27 Fed. C. 434, 435 (1993).

Mr. Zwick's statement in his petition that his prior suit was settled for "costs" only is both disingenuous and irrelevant. *Aventis Pasteur, Inc.* did not agree to pay Mr. Zwick's costs; the company merely agreed to pay Mr. Zwick a lump sum in exchange for dismissing his suit. The adequacy of the prior settlement is not a consideration in determining whether Mr. Zwick's petition must be dismissed. *Head*, 26 Cl. Ct. at 550; *Snowden*, 27 Cl. Ct. at 435; and *Wiggins*, 17 Cl. Ct. at 558.

The one case petitioner cites in his Opp. to Motion to Dismiss is *Martin v. Sec'y, HHS*, 62 F.3d 1403 (Fed. Cir. 1995). He attempts to distinguish *Martin* by arguing that the vaccine at issue in that case was covered by the Vaccine Act at the time the Martins filed their civil suit. He argues that, because the trivalent influenza vaccine was not covered by the Vaccine Act until five years after Mr. Zwick's civil suit was filed, the interpretation of subsection 11(a) in *Martin* inapplicable to his case. Opp. to Motion to Dismiss, p. 2.

Citing *Snowden*, respondent argues in his Reply Brief that the plain language of subsection 11(a)(7) bars the instant petition. In *Snowden*, the Court of Federal Claims held that a settlement in a civil suit against a vaccine administrator in 1974, years before the Vaccine Act's passage, nevertheless barred petitioner's claim under the Act. 27 Cl. Ct. at 435. Citing *Wiggins*, Judge Turner commented, "if a person has collected any amount whatsoever in judgment or settlement of a civil action for vaccine-related injuries, that person may not recover under the Vaccine Act." *Snowden*, 27 Cl. Ct. at 435. Mr. Zwick's petition presents precisely the same issue—a settlement reached before the Vaccine Act was applicable to his case.

Petitioner having failed to point to any legislative history supporting his reading of subsections 11(a)(7) and (9), I must give the statute's language its plain meaning. *Johns-Manville Corp.*, 855 F.2d at 1559. Mr. Zwick's petition is barred by the Act's gatekeeping provision in 300aa–11(a)(7).

The only issue that remains is the basis for my dismissal. Respondent claims that I lack jurisdiction because Mr. Zwick is not a proper petitioner. When faced with a

challenge to its jurisdiction, a court must first address that challenge. If it lacks jurisdiction, it may not take further action on matters pending before it. See, e.g., *O'Connell v. Sec'y, HHS*, 63 Fed. Cl. 49, 57 n.7 (2004). While *Snowden* suggests that a subsection 11(a)(7) bar is not jurisdictional, the Federal Circuit's reasoning in *Martin* interpreting subsection 11(a)(6) is compelling. As a waiver of sovereign immunity, the Vaccine Act's provisions must be strictly construed. *Brice v. Sec'y, HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001).

The "may not file" language found in subsection 11(a)(6) is identical to that found in subsection 11(a)(7). As the Federal Circuit pointed out, "the distinction between facts necessary to establish jurisdiction and those necessary to prove a claim is often a close one," 62 F.3d at 1406, citing *Spruill v. Merit Sys. Protection Bd.*, 978 F.2d 679, 687 (Fed. Cir. 1992). While there exists an alternate basis for concluding this case adversely to Mr. Zwick, based on subsection 11(c)(1),<sup>17</sup> I rule based on the jurisdictional challenge.

Sadly, Mr. Zwick has been ensnared by a "Catch 22."<sup>18</sup> Having been rendered blind by what he believed to be a vaccine-related injury, he filed suit against the manufacturer of the vaccine he received. At the time of his suit, he was not eligible to file a petition in the Program because the vaccine he received had not yet been added to the Vaccine Injury Table. By the time the trivalent influenza vaccine was added to the Table, he was no longer a proper petitioner under the Vaccine Act because he had settled his civil suit.

The motion to dismiss is GRANTED and the petition is dismissed.<sup>19</sup>

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<sup>17</sup> Based on the evidence before me, petitioner cannot establish a *prima facie* case. Even if I accepted Mr. Zwick's argument that § 300aa-11(a)(9) permits consideration of his petition, Mr. Zwick still faces an insurmountable hurdle. Section 300aa-11(b) is entitled "Petitioners." Subsection 300aa-11(b)(1)(A) defines a petitioner as, *inter alia*, "any person who has sustained a vaccine-related injury" who "meets the requirements of subsection (c)(1) of this section." Subsection (c)(1) requires, in pertinent part, that the petition shall contain an affidavit and supporting documentation demonstrating that the injured party "has not previously collected an award or settlement of a civil action for damages for such vaccine-related injury or death." § 300aa-11(c)(1)(E). Persons who demonstrate "by a preponderance of the evidence the matters required in the petition by section 300aa11(c)(1) of this title" are entitled to compensation under the Program. § 300aa-13(a)(1)(A). In order to prevail in his petition, Mr. Zwick must establish that he has not received a settlement in a civil action for a vaccine-related injury. Clearly, he cannot do so, for his own evidence conclusively establishes he has accepted a settlement from a vaccine manufacturer for the injury that is the subject of the instant petition.

<sup>18</sup> Referring to the title of the 1961 novel by Joseph Heller, the phrase "Catch 22" is now commonly used to refer to any "no win" situation.

<sup>19</sup> This document constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of this Court shall enter judgment in accord with this decision.

**IT IS SO ORDERED.**

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**Denise K. Vowell**  
Special Master