

In the United States **ORIGINAL** Federal Claims

FILED  
OCT 30 2003  
U.S. COURT OF  
FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: October 30, 2003)

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IN RE: CLAIMS FOR VACCINE INJURIES \*  
RESULTING IN AUTISM SPECTRUM \*  
DISORDER OR A SIMILAR \*  
NEURODEVELOPMENTAL DISORDER \*  
VARIIOUS PETITIONERS, \*  
v. \*  
SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*  
Respondent. \*  
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AUTISM MASTER FILE

ORDER CONCERNING SUBPOENA REQUEST RE MERCK

A. Background

This proceeding, conducted pursuant to the National Vaccine Injury Compensation Program (hereinafter "the Program"<sup>1</sup>) and known as the "Omnibus Autism Proceeding," is a special proceeding devised for the purpose of processing several thousand individual Program claims, each of which alleges that a person's condition known as "autism" was caused by one or more childhood vaccinations.<sup>2</sup> In this Omnibus Autism Proceeding, the petitioners, represented by the Petitioners' Steering Committee (hereinafter the "Committee"), are attempting to demonstrate factually that

<sup>1</sup>The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 et seq. (2000 ed.). Hereinafter, all "§" references will be to 42 U.S.C. (2000 ed.).

<sup>2</sup>For a discussion concerning the history and purpose of the Omnibus Autism Proceeding, see *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." That file may be viewed at the Clerk's office, or viewed on this court's Internet website at [www.uscfc.uscourts.gov/osm/osmautism.htm](http://www.uscfc.uscourts.gov/osm/osmautism.htm).

autism can be caused by the measles-mumps-rubella ("MMR") vaccination and/or by vaccinations that contain a preservative known as "thimerosal."

### ***B. The current issue***

In the course of this Omnibus Autism Proceeding, on October 7, 2003, the Committee filed a "Motion to Issue Third Party Subpoena." Attached thereto was a "Request for the Production of Documents: Merck & Company Incorporated." The motion asked that I authorize the Committee to issue a subpoena to Merck requesting the production of certain documents. The motion was discussed at an unrecorded telephonic status conference pertaining to the Omnibus Autism Proceeding on October 21, 2003. At that conference, I noted that certain parts of the Request for Production seemed ambiguous, and that certain parts sought documents of questionable relevance to the Omnibus Autism Proceeding. The Committee agreed to draft a revised Request for Production. The Committee's revised Request for Production was provided to Merck's counsel, as well as to respondent and myself, via fax, and then was discussed at another unrecorded telephonic status conference held on October 28, 2003. Counsel participating in the latter conference included Michael Williams, Thomas Powers, and Ghada Anis for the Committee; Vincent Matanoski, Mark Raby, Ann Donohue, and Traci Manning for respondent; and Dino Sangiamo and Michael Hecht for Merck. At that conference, Merck's counsel noted that Merck, having reviewed the Committee's revised production request, opposes the request. Merck's counsel requested that I allow Merck to present argument, on the issue of whether any discovery from Merck is appropriate, *prior* to authorizing the Committee to issue a subpoena. The Committee's attorneys responded that I should first approve issuance of the subpoena, then allow Merck to present argument after Merck objects to the subpoena and the Committee moves to compel production.

### ***C. Ruling on procedural issue***

As to the procedural dispute concerning at what stage I should entertain Merck's argument, I note first that in my view the dispute has relatively little *practical* importance. Of course, I will inevitably hear complete argument from both Merck and the Committee<sup>3</sup> before finally determining whether to order Merck to produce documents. Therefore, it seems to make little difference, as a practical matter, whether I entertain Merck's argument and the Committee's response either (1) before I authorize the Committee to issue a subpoena, or (2) after the issuance of the subpoena at the point when Merck formally objects thereto.

After consideration, I find it appropriate to hear argument *before* authorizing issuance of the subpoena, for several reasons. First, this approach seems to comport with the basic difference in the procedures for formal discovery between (1) Program cases before special masters, and (2) non-Program cases before judges of the Court of Federal Claims. In non-Program cases, a party is automatically authorized to issue a subpoena, even to a non-party, and the presiding judge in a case

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<sup>3</sup>The respondent has elected not to take formal position concerning the discovery request concerning Merck.

will become involved in the discovery process only if the person receiving a subpoena objects thereto. (See RCFC 45(a)(3); RCFC 45(c)(2)(B).<sup>4</sup>) In Program cases, in contrast, a party may not issue a subpoena, or employ other formal discovery tactics, without first receiving permission to do so from the special master. (See Vaccine Rule 7.) Because discovery in the Program is to be controlled by the special master in this fashion, and because I am aware at this time that the non-party to be subpoenaed in this instance is opposed to the proposed discovery, it seems to be consistent with the Congressional intent concerning discovery in the Program that I hear Merck's argument *before* authorizing even the initial step of subpoena issuance.

Second, this is an issue of first impression under the Program. I am unaware of any cases in which Program petitioners have sought formal discovery from a vaccine manufacturer. In this circumstance, it seems prudent to proceed cautiously.

Third, while I agree with the Committee that I should proceed as quickly as possible to resolve the issue of whether I should compel Merck to comply with a subpoena, I do not see that hearing argument before authorizing subpoena issuance will delay final resolution of that issue in any significant way. My intent is that, in the course of the briefing and argument described below, the two sides shall address not only whether I have the authority to, and whether I should, *authorize the issuance of a subpoena* to Merck, but also whether I have the authority to, and whether I should, *compel Merck to comply* with that subpoena assuming that Merck files an objection to it. Therefore, after the briefing and argument described below, if I decide that I have authority to compel the requested document production and that it is appropriate for me to do so, I should then be in a position not only to authorize the issuance of the subpoena but also to quickly rule upon a motion to compel production; briefing and argument on that motion will, in effect, already have occurred.

#### ***D. Briefing procedure***

Subsequent to the discussion at the status conference on October 28, 2003, the Committee formally filed, on October 29, 2003, a "Motion to Issue Revised Third-Party Subpoena;" attached to that motion was the revised Request for Production from Merck. The litigants should now brief the issues described in the previous paragraph, as discussed at the October 28 conference.

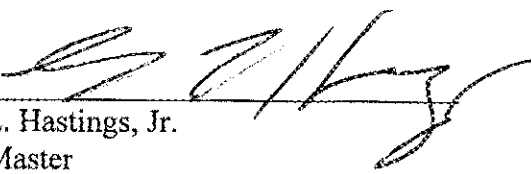
The litigants should adhere to the following briefing schedule. Merck's opening brief is to be filed by November 14, 2003; the Committee's responsive brief is to be filed by December 3, 2003; Merck's reply brief is to be filed on December 15, 2003.<sup>5</sup> Oral argument will be scheduled shortly afterward (Merck and the Committee should promptly telephonically report to my office

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<sup>4</sup>"RCFC" references are to *main body* of the Rules of the U.S. Court of Federal Claims. "Vaccine Rule" references are to the separate set of rules for Program cases contained at Appendix B of the Rules of the U.S. Court of Federal Claims.

<sup>5</sup>Briefs should be faxed to the special master (202-504-2007) and to all parties, as well as filed with the court and served on all parties in paper format.

concerning their attempts to agree on a date for that argument). After the briefing and argument, I will promptly rule.

  
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George L. Hastings, Jr.  
Special Master