APPENDIX A

United States Court of Appeals
for the Federal Circuit

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

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93 F.4th 1228
2022-2119

Appeal from the United States Court of Federal Claims in No. 1:21-vv-01342-KCD,
Judge Kathryn C. Davis

Decided: February 21, 2024

W.J., Staten Island, NY, pro se.

CASEN ROSS, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, ABBY CHRISTINE

WRIGHT; C. SALVATORE D'ALESSIO, LARA A. ENGLUND, HEATHER LYNN PEARLMAN, SARAH BLACK RIFKIN, Torts Branch, Civil Division, United States Department of Justice, Washington, DC.

ANGELA M. OLIVER, Haynes and Boone, LLP, Washington, DC, argued as amicus curiae counsel.

Before LOURIE, DYK, and STARK, *Circuit Judges.*

PER CURIAM.

This is a case brought under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300a-1 to -34, as amended ("the Vaccine Act"). R.J. and A.J., acting on behalf of appellant W.J. ("Appellant"), their son, and appearing without counsel, appeal from a decision of the United States Court of Federal Claims denying their petition for review and affirming a special master's grant of a motion to dismiss as untimely under the Vaccine Act's statute of limitations. We affirm.

I

W.J. was born on February 4, 2004. Although he is now over the age of 18, his parents, R.J. and A.J. ("Parents"), remain his legal guardians, a role they have held throughout his life. W.J. was administered a Measles, Mumps, and Rubella ("MMR") vaccine on

February 24, 2005. About a year later, on March 7, 2006, W.J. was diagnosed with a speech delay. Another year later, on January 5, 2007, W.J. was diagnosed with autism. In the years that followed, W.J. experienced several bouts of immune-related blood disorders, including at least one resulting in hospitalization. After genetic testing in February 2019, Parents were informed that W.J. had been born with a chromosomal aberration known as an Xq28 duplication.

On May 7, 2021, Parents filed a petition on behalf of W.J. requesting compensation under the Vaccine Act for chronic encephalopathy and immunodeficiency issues caused either by the MMR vaccine or by its significant aggravation of pre-existing injuries relating to W.J.'s chromosomal abnormality. Parents argued that due to W.J.'s Xq28 chromosomal duplication, the MMR vaccine was inappropriately administered to him in contravention of the vaccine's warnings.

Parents filed the petition in the Court of Federal Claims without the assistance of counsel. As is required by the Vaccine Rules, the petition was assigned to a special master. *See* Vaccine Rule 3(a); *see also* 42 U.S.C. § 300aa-12(d)(l). On June 3, 2021, the special master held an initial status conference, largely focusing on the petition's request for equitable tolling. During the conference, the following exchange occurred:

> [Special Master]: Okay. So I know you probably are aware of this based on the petition, there is a statute of limitations issue that we will need to

address since that's a threshold issue, that is, if the statute of limitations has expired, then the case will be dismissed because it can no longer be brought. And I think that is something we probably need to deal with sooner rather than later so that we don't use a lot of your time, energy, and money and the Court's time and energy litigating a case where the statute of limitations has expired.

And by talking about this I'm not diminishing in any way the experiences and the difficulty that your family has had. I just don't want to lead you to have any unrealistic expectations about how the case may proceed.

So I think the best course of action, [Government Counsel], is probably for the Government to file a Rule 4 report with any motion to dismiss or other legal filing with regard to the statute of limitations. And then I can ask [R.J.] to file any reply or response which he may [wish] to do so, and then I can rule on that issue.

[Government Counsel], what are your thoughts about that plan?

[Government Counsel]: Yes, Special Master, that sounds like an appropriate plan.

[Special Master]: [R.J.], does that plan – is that plan acceptable with you?

[R.J.]: That sounds fair. Yes.

App'x 68-69 at 4:6-5:9.

On August 2, 2021, the Secretary of the Department of Health and Human Services ("Secretary") filed a motion to dismiss the petition as untimely. Parents responded to the motion, arguing that equitable tolling was appropriate due to fraudulent concealment and/or extraordinary circumstances.

Upon review, the special master noted that the latest possible time at which any timely claim could have been filed, based on the dates of manifestation asserted in the petition, was in April 2017, with many of the other claims having become untimely a decade earlier.[1] The special master found that Parents' petition, which was not filed until May 7, 2021, thus exceeded the Vaccine Act's 36-month statute of limitations. The special master rejected Parents' equitable tolling arguments on the grounds that (1) W.J.'s mental incapacity did not qualify as an extraordinary circumstance because Parents failed to plead facts demonstrating that they, as W.J.'s legal guardians, were unable to file a claim on his behalf; and (2) Parents failed to demonstrate that the government's alleged fraudulent concealment prevented them from timely pursuing compensation. Accordingly, the special master granted the

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[1] Parents alleged that W.J. suffered (1) an encephalopathy Table injury, (2) a chronic encephalopathy injury, (3) a variety of immunodeficiency issues, and (4) significant aggravation of pre-existing cerebral and immunological damage. These different alleged injuries had different dates of manifestation.

Secretary's motion and dismissed the case as untimely.

Parents then filed a motion for review of the special master's decision in the Court of Federal Claims, arguing that the special master inappropriately raised the statute of limitations issue sua sponte, relied on an incorrect legal standard to reject their equitable tolling arguments, and impermissibly ruled on the merits of their claims. The court affirmed the special master's decision and denied the motion for review, rejecting Parents' arguments and finding that the special master acted within her discretion, properly applying both the correct standard of review and precedent governing equitable tolling.

Parents, continuing to act pro se and on behalf of W.J., timely appealed to us. We appointed amicus counsel ("Amicus") to elaborate on certain issues in this appeal, and she has done so admirably.[2]

We have jurisdiction under 28 U.S.C. § 1295(a)(3) and 42 U.S.C. § 300aa-12(f).

II

The Court of Federal Claims may only set aside a special master's findings of fact or conclusions of law if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 300aa-12(e)(2)(B). Findings of fact receive

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[2] The court expresses its gratitude to Angela Oliver, who accepted the amicus representation and, in that capacity, filed three briefs and delivered oral argument.

deferential review under an "arbitrary and capricious" standard, legal conclusions are reviewed de novo under the "not in accordance with the law" standard, and discretionary rulings are reviewed for "abuse of discretion." *Munn v. Sec'y of Health & Human Servs.*, 970 F.2d 863,870 n.10 (Fed. Cir. 1992). We apply the same legal standards when reviewing a Court of Federal Claims judgment affirming that of a special master. *See id.* at 870. "That is, we may not disturb the judgment of the [Court of Federal Claims] unless we find that judgment to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

It is within a special master's discretion to weigh evidence. *See id.* at 871. For this and other reasons, "reversible error is extremely difficult to demonstrate" unless the special master has failed to consider the relevant evidence of record, drawn implausible inferences, or failed to provide a rational basis for the decision. *Lampe v. Sec'y of Health & Human Servs.*, 219 F.3d 1357, 1360 (Fed. Cir. 2000) (internal quotation marks omitted); *see also Munn,* 970 F.2d at 870 (noting that arbitrary and capricious standard is "well understood to be the most deferential possible").

A motion to dismiss for failure to state a claim upon which relief may be granted "is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States,* 295 F.3d 1252, 1257 (Fed. Cir. 2002). A complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

This appeal concerns numerous issues, most raised by Parents but others introduced by Amicus or raised sua sponte by the court. We address each in turn below.

III

Before turning our attention to the arguments initially raised by Parents and Amicus, we address two questions that arose as this case proceeded before us: (i) whether a non-lawyer may proceed pro se in pressing an appeal of a Vaccine Act claim that was filed in the Court of Federal Claims on behalf of another person, and (ii) whether the general statute of limitations and tolling provision set out in 28 U.S.C. § 2501 applies to Vaccine Act claims.

A

R.J. and A.J., the parents of W.J., are not lawyers. In the Court of Federal Claims, they filed a petition setting out a Vaccine Act claim on behalf of W.J. and proceeded to prosecute that claim pro se in front of the special master and then again before a judge. Doing so is, at present, expressly authorized by the Rules of the Court of Federal Claims ("RCFC"), *see* RCFC 83.1(a)(3) ("An individual who is not an attorney may represent oneself or a member of one's immediate family."), and Vaccine Rule 14(a)(2) (same).[3] The

[3] The Vaccine Act directed the Court of Federal Claims to promulgate procedural rules for Vaccine Act cases to "provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions." 42 U.S.C. § 300aa-12(d)(2)(A).

Court of Federal Claims held in *Kennedy v. Sec'y of Health and Human Servs.*, 99 Fed. Cl. 535, 542 n.7 (Fed. Cl. May 16, 2011), *aff'd,* 485 F. App'x 435 (Fed. Cir. 2012), that because the Vaccine Act "authorizes parents to *file* petitions on behalf of their offspring it also authorizes parents to *prosecute* those cases once filed" (citing 42 U.S.C. § 300aa-ll(b)(l)(A)) (emphasis added).

When the panel reviewed the appellate briefing submitted by Parents and the Secretary, we determined we would benefit from appointment of Amicus counsel to address the issue of equitable tolling. When Amicus and the Secretary appeared at oral argument,[4] we inquired, sua sponte, as to whether pro se representation by one family member of another is permitted in federal courts. *See* Oral Arg. at 1:01-2:26.[5] Our inquiry was based on 28 U.S.C. § 1654, which provides that in all United States courts "parties may plead and conduct their own cases personally or by counsel," which other circuit courts have interpreted as prohibiting non-lawyer parents from "litigat[ing] the claims of their minor children in federal court." *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005); *see also* 28 U.S.C. § 2503(a) ("Parties to any suit in the United States Court of Federal Claims may appear before a judge of that court in person or by attorney."). It is also true

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[4] Parents did not participate in oral argument but did submit a memorandum in lieu of oral argument. *See* ECF No. 58.

[5]Available at https://oralarguments.cafc.us courts.gov/default.aspx?fl=22-2119_09262023.mp3.

that Fed. Cir. R. 47.3 provides that "[a]n individual ... may choose to be represented by counsel or to proceed without counsel but may not be represented by a non-member of the bar of this court," and our court has on at least one occasion applied this rule to deny parents the opportunity to represent their child in appealing denial of a Vaccine Act claim. *See Brice v. Sec'y of Health & Human Servs.*, 358 F.3d 865, 866 (Fed. Cir. 2004) ("[C]iting Federal Circuit Rule 47.3, the Clerk of Court informed [the minor Vaccine Act claimant]'s parents that they could not represent their son's interests ... in this court."). Moreover, the Vaccine Act includes a provision for reimbursement of attorney's fees, which permits courts to award attorney's fees and costs even for unsuccessful petitions "brought in good faith" and prohibits attorneys from charging their clients more than the fees that are awarded. *See* 42 U.S.C. § 300aa-15(e); *see also Sebelius v. Cloer*, 569 U.S. 369, 373-74 (2013).

Following argument, the court ordered supplemental briefing on the representation question. *See* ECF No. 60. Having reviewed the supplemental briefing, we have determined that this case does not require us to answer our own question. As we have already noted, no party raised this issue. Even after we ordered supplemental briefing, the government does not ask us to dismiss this appeal based on lack of a proper representative for Appellant. Additionally, in permitting Parents to proceed before us pro se, we are acting consistent with some of our own non-precedential decisions. *See, e.g., Miles v. Sec'y of Health & Human Servs.*, 769 F. App'x 925, 925 (Fed. Cir. 2019); *Rogero v. Sec'y of Health & Human Servs.*, 748 F. App'x 996, 997 (Fed. Cir. 2018); *Padmanabhan*

v. Sec'y of Health & Human Servs., 638 F. App'x 1013, 1013 (Fed. Cir. 2016). Moreover, it would be highly inefficient, and we think unfair to Parents – who proceeded precisely as the Vaccine Rules and RCFC prescribe, and then proceeded here in a manner we have previously permitted, all without objection from the government – to dismiss this now fully briefed and argued appeal, especially as it relates to a petition filed nearly three years ago (based on injuries allegedly suffered beginning more than 17 years ago).

We are aware that at least one judge of the Court of Federal Claims has recently suggested that the RCFC permitting this type of pro se representation may need to be reexamined. *See Ricks v. United States,* 159 Fed. Cl. 823,824 n.1 (Fed. Cl. May 6, 2022) (contending that RCFC 83.l(a)(3) "creates a disturbing uncertainty, i.e., whether [a claimant] consents to [a family member's] representation," and consequently advocating that "[t]he Court's Rules Committee should examine and potentially reform RCFC 83.l(a)(3)"). Nevertheless, for the reasons we have given above, we do not find it appropriate in this case to decide the representation question we alone injected into this appeal.

B

A question first raised in Parents' memorandum in lieu of oral argument is whether the tolling provision of 28 U.S.C. § 2501, which sets out the statute of limitations that applies generally in the Court of Federal Claims, has applicability in Vaccine Act cases. *See* Memorandum in Lieu of Oral Argument of Appellant W.J., ECF No. 58 at 1-2 (Sep. 6, 2023). We

received post-argument briefing on this subject as well. Because resolution of this issue could be dispositive, and it presents a pure question of law, we will resolve it. We decide that § 2501's statute of limitations and tolling provision are not applicable here.

Section 2501 sets forth the general statute of limitations, and a tolling provision, for claims filed in the Court of Federal Claims. It provides that:

> [1] Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues ....
>
> [2] ...
>
> [3] A petition on the claim of a person under legal disability ... at the time the claim accrues may be filed within three years after the disability ceases.

28 U.S.C. § 2501 (numbers added). Paragraph [1] sets the statute of limitations at six years after the claim accrues, but not for a person under legal disability at the time his claim accrues; paragraph [3] permits such a person to file his claim as late as three years after his disability ceases, a time which could be far longer than six years after it accrues. If paragraph [3], the tolling provision of § 2501, is applicable here, Appellant's claim is timely because it is undisputed that W.J. still suffers from a legal disability and has at all pertinent times. We conclude, however, that

neither § 2501's statute of limitations nor its tolling provision applies to Vaccine Act petitions.

As an initial matter, paragraphs [1] and [3] go along with one another, such that claims subject to the six-year statute of limitations are also subject to the three-year tolling provision. Likewise, *only* claims that are governed by paragraph [1] are also governed by paragraph [3]. Paragraphs [1] and [3] are directly related to one another. Although in isolation paragraph [3] may appear as if it applies broadly to all claims filed in the Court of Federal Claims, in context it is clear that paragraph [3] only applies to claims with statutes of limitations established by paragraph [1]. These conclusions about the relationship between paragraphs [1] and [3] are confirmed by the statutory history leading up to the present version of § 2501.

Initially, the tolling provision appeared in § 1069 of the Revised Statutes of the United States as a proviso that was plainly linked to the six-year statute of limitations set out in that same section. *See United States v. Greathouse,* 166 U.S. 601, 602-06 (1897) (discussing former statute); *see also United States v. Morrow,* 266 U.S. 531, 534-35 (1925) ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation. Its grammatical and logical scope is confined to the subject-matter of the principal clause. And although sometimes used to introduce independent legislation, the presumption is that, in accordance with its primary purpose, it refers only to the provision to which it is attached.") (internal citations omitted). In

1911, the tolling provision was explicitly incorporated into the Tucker Act as a proviso to that statute's six-year statute of limitations. *See* Judicial Code of 1911, Pub. L. No. 61-475, § 156, 36 Stat. 1087, 1139 (1911). In 1926, when the statute of limitations was codified in the first version of the U.S. Code as 28 U.S.C. § 262 (1926 ed.), the proviso language was omitted. Finally, in 1948, the current version of 28 U.S.C. § 2501 incorporated the phrase "person under legal disability" but, consistent with the U.S. Code in 1926 (and the 1940 ed.), left out the proviso language. Pub. L. No. 80-773, § 2501, 62 Stat. 869, 976 (1948).

Notwithstanding the change in the codified language, we see no reason why the tolling provision in § 2501 should not still be read as a proviso to the six-year statute of limitations. The change in language between the Statute at Large and the U.S. Code in 1926, and thereafter, appears to be a purely editorial one. Furthermore, the parties have pointed to no authority nor any persuasive argument for reading the tolling provision of § 2501 independent from the six-year statute of limitations provision. Thus, the paragraph [3] tolling provision is inapplicable to any petition not governed by the paragraph [1] six-year statute of limitations.

Next, we conclude that § 2501's six-year statute of limitations does not apply to Appellant's Vaccine Act claim. In the Vaccine Act, Congress established a specific statute of limitations for claims based on vaccines (including MMR) set forth in the Vaccine Injury Table: 36 months after "the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." 42 U.S.C. §

300aa-16(a)(2). The Vaccine Act contains no tolling provision. As we have previously explained, § 2501's general provisions may be superseded by specific statutes setting out different periods for particular types of claims. *See, e.g., Adams v. United States,* 350 F.3d 1216, 1229 (Fed. Cir. 2003) (holding that two- or three-year statute of limitations under Fair Labor Standards Act ("FLSA") governs FLSA violation claims brought in Court of Federal Claims); *InterCoastal Xpress, Inc. v. United States,* 296 F.3d 1357, 1367-68 (Fed. Cir. 2002) (holding that three-year filing period under Interstate Commerce Act ("ICA"), rather than six year period of § 2501, governs all actions brought under ICA); *Pathman Constr. Co. v. United States,* 817 F.2d 1573, 1580 (Fed. Cir. 1987) ("Once a contractor elects to proceed under the Disputes Act, the six-year statute of limitations in 28 U.S.C. § 2501 is not applicable."). As specific statutes typically control over more general ones, *see, e.g., First Nationwide Bank v. United States,* 431 F.3d 1342, 1348 (Fed. Cir. 2005), it follows that the specific limitations provision in the Vaccine Act governs Vaccine Act claims and the general provision of § 2501 does not.

Since § 2501's six-year statute of limitations does not apply to Vaccine Act claims, the tolling provision of § 2501 is equally inapplicable. To be timely, then, Parents must have filed the petition no later than 36 months after the "occurrence of the first symptom or manifestation of onset or of the significant aggravation of W.J.'s MMR vaccine related injuries.

IV

We now turn to the principal arguments raised by Parents and Amicus. We begin with equitable tolling, which is the focus of this appeal, and then address additional issues pressed by Parents.

A

Parents and Amicus argue that the statute of limitations should have been equitably tolled, which would result in their petition being treated as having been timely filed. As we have already noted, Section 16(a)(2) of the Vaccine Act governs claims resulting from vaccines administered after October 1, 1988, and reads:

> if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

42 U.S.C. § 300aa-16(a)(2). This statute of limitations begins to run from "the first symptom or manifestation of an alleged vaccine injury," regardless of whether or not that symptom is sufficient for diagnosis. *See Carson v. Sec'y of Health & Human Servs.*, 727 F.3d 1365, 1369 (Fed. Cir. 2013).

Parents and Amicus assert that the petition filed on behalf of W.J. was timely because of equitable tolling. Equitable tolling pauses or "tolls" a statutory limitations period, serving to extend otherwise

explicit time limitations on filing set by Congress. *See Arellano v. McDonough,* 598 U.S. 1, 6 (2023). Such tolling is generally available "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano v. Alvarez,* 572 U.S. 1, 10 (2014). We have previously found that a court may equitably toll the Vaccine Act's limitations period, *Cloer v. Sec'y of Health & Human Servs.,* 654 F.3d 1322, 1344 (Fed. Cir. 2011) (en banc), and that mental incapacity may be a basis for equitable tolling, *K.G. v. Sec'y of Health & Human Servs.,* 951 F.3d 1374, 1381 (Fed. Cir. 2020). The doctrine of fraudulent concealment may also toll a statute of limitations. *See, e.g., Simmons Oil Corp. v. Tesoro Petroleum Corp.,* 86 F.3d 1138, 1142 (Fed. Cir. 1996).

Parents and Amicus assert that equitable tolling is warranted here based on (1) W.J.'s mental incapacity and inability to communicate, creating an extraordinary circumstance, (2) W.J.'s minority status, and (3) the government's fraudulent concealment of a connection between the vaccine and autism. We address each argument in turn.

1

In support of their contention that W.J.'s mental incapacitation warrants equitable tolling, Parents and Amicus point to *K.G. v. Sec'y of Health & Human Servs.,* 951 F.3d at 1382, in which we held that equitable tolling may be available to mentally incapacitated individuals under the Vaccine Act even if they had an appointed legal guardian during their incapacitation. There, K.G., an adult petitioner, had

suffered from alcoholism, anxiety, depression, and memory loss so severe that it ultimately resulted in a stay at an in-patient facility for three years. *See id.* at 1377. K.G. was also found to have had such a strained and incommunicative relationship with her sister, her then-acting legal guardian and conservator, that the sister ultimately withdrew from those roles. K.G.'s cognitive function ultimately improved and her conservatorship was terminated, after which she filed a petition for compensation under the Vaccine Act. The Court of Federal Claims initially affirmed the special master's denial of equitable tolling on the basis that the petitioner, K.G., had an acting legal guardian at the time of her mental incapacitation. On appeal, we declined to adopt a "per se rule" that the presence of a legal guardian alone foreclosed equitable tolling. *Id.* at 1381-82. We then remanded for the special master to determine whether equitable tolling was appropriate in light of "all relevant facts and circumstances." *Id.* In doing so, we explained that the special master would have to "analyze the facts to determine whether [the] legal guardianship alleviated the extraordinary circumstance" of the petitioner's mental incapacity. *Id.* at 1381.

K.G. further establishes that, in considering whether equitable tolling may be appropriate, the fact that "a mentally incapacitated individual has a legal representative is just one of many factors that may further inform the diligence inquiry." *Id.* at 1382. We also held:

> [t]he significance of a legal guardian may depend on a number of factors, including: the nature and sophistication of the guardian

> (parent, lawyer, family member, or third-party), the timing of the institution of the guardianship (before or after the vaccination, for example), the nature of the guardian's rights and obligations under state law, the extent to which the claimant's mental incapacity interferes with her relationship and communication with her guardian, the quality and nature of the guardian's relationship with the claimant, and any conflicts of interest that would inhibit the guardian from bringing a Vaccine Act claim on the claimant's behalf.

Id.

Parents and Amicus contend that, here, the special master applied a per se rule, directly contrary to our holding in *K.G.* We disagree. Instead, in her decision, the special master compared W.J.'s circumstances to those presented in *KG.*, correctly distinguishing them:

> Unlike K.G., W.J. was an infant at the time of his vaccination, and the petitioners, W.J.'s parents, were capable of filing a claim on his behalf. W.J.'s parents have not filed any evidence to suggest that they were incapacitated in any way during any time frame relevant to their petition. While the Court in *K.G.* confirmed an equitable tolling right for incapacitated individuals, nothing in the decision negated a legal representative's rights and responsibilities under the Vaccine Act .... [P]etitioners had the right and responsibility to bring a timely claim on W.J.'s behalf ....

> W.J.'s "mental incapacity" does not serve as an "extraordinary circumstance." Petitioners, as W.J.'s legal representatives [and] his parents, had the ability to file a petition 36 months from the onset of the earliest symptom or manifestation of W.J.'s injury. The same is true for all petitions brought on behalf of all minors. Parents or other legal representatives must file the petition on behalf of a minor within the applicable statute of limitations.

App'x 38.

This analysis amounts to more than application of the per se rule we declined to adopt in *K.G.* The special master did not simply invoke the presence of legal guardians and, as a consequence, decline to apply equitable tolling. Instead, in compliance with our instruction in *K.G.*, the special master considered whether W.J.'s mental incapacity constituted an extraordinary circumstance notwithstanding Parents' guardianship and found, based on a lack of evidence, that it did not. We find the special master's extraordinary circumstance findings, and the subsequent affirmance by the Court of Federal Claims, were not an abuse of discretion.

Furthermore, we agree that the facts here do not support equitable tolling. R.J. and A.J. are the parents and legal guardians of W.J. and have been throughout W.J.'s life, including when he received the MMR vaccine. As W.J.'s parents and legal guardians, Parents were expressly authorized to bring a claim on W.J.'s behalf. *See* 42 U.S.C. § 300aa-11(b)(l)(A)

(permitting legal representatives of minors or disabled individuals to file petitions on their behalf); 42 U.S.C. § 300aa-33(2) (defining "legal representative" to include "a parent or an individual who qualifies as a legal guardian under State law"). Unlike in *KG.*, here, Parents have not shown any reason why they, as legal guardians, could not have filed the petition within the statutory timeframe, despite W.J.'s mental incapacitation. Indeed, Parents made other medical decisions on behalf of W.J. throughout this exact timeframe. *See, e.g.*, App'x 180-84. There is no suggestion that Parents have a strained relationship with their son or that there are any conflicts of interest that would have dissuaded them from filing a petition earlier. Although, as we held in *KG.*, mental incapacity of an individual with a legal guardian *may* still merit equitable tolling, it does not always.

Therefore, we agree with the Court of Federal Claims and the special master that Parents failed to plead facts establishing that W.J.'s mental incapacitation constituted extraordinary circumstances warranting equitable tolling.

2

Amicus argues that minority tolling should apply, contending that the statutory purposes underlying the Vaccine Act demonstrate Congress' intent for a child's minority status to qualify as a per se extraordinary circumstance warranting tolling. We are unpersuaded.

The plain language of the Vaccine Act does not include, or even suggest, minority tolling, and Amicus does not contend otherwise. Instead, Amicus points to legislative history to demonstrate the pro-child and pro-claimant nature of the Act. But the passages on which Amicus relies only support Congress' general intent to compensate injured children or its consideration of staying co-pending state law actions during the pendency of Vaccine Act claims. *See generally* H.R. Rep. No. 99-908 (1986). Even assuming legislative history could make up for a lack of statutory text (a dubious proposition we need not reach), Amicus points to no statements by any individual legislator specifically contemplating minority tolling. Given that Congress created the Vaccine Act to "protect [the Nation's] *children,"* H.R. Rep No. 99-908, at 4 (1986) (emphasis added), and set forth an explicit statute of limitations for filing petitions, we conclude that the lack of any statutory provision providing for minority tolling is conclusive proof that Congress did not intend to provide for such tolling.

3

Fraudulent concealment may toll a statute of limitations where, "assuming due diligence on the part of the plaintiff ... the misconduct in question has been concealed, or is of such character as to conceal itself." *Simmons,* 86 F.3d at 1142 (internal quotation marks omitted). "[A] mere failure to come forward with facts that would provide the plaintiff with a basis for suit does not constitute fraudulent concealment." *Id.* at 1143.

Parents argue they have shown that the government "fostered and promoted the scientific finding" that there is no link between the MMR vaccine and autism. App'x 19 (internal quotation marks omitted). In this way, they contend, the government concealed the evidence Parents needed to file their petition in a more timely manner. Even reading Parents' petition in the light most favorable to W.J., it defeats their contention of fraudulent concealment. By Parents' own account, their petition includes "hard evidence of a link between vaccines and autism," including reference to over 5,100 cases filed by parents seeking compensation for their child's autism on the basis of a vaccine related injury. App'x 19, 41; *see also* App'x 39, 58, 102-04. Hearings for these cases took place between 2007 and 2009, confirming that evidence of the type Parents contend was fraudulently concealed by the government was available in the timeframe when W.J.'s petition would have been timely. Parents have failed to adequately allege that their exercise of reasonable diligence could not have revealed to them the basis for their claim at that time.

Parents have additionally failed to plead any facts to suggest intentional concealment by the government; indeed, to the contrary, they have disavowed any allegation that the government engaged in intentional fraud. App'x 59 ("[Appellants] do not explicitly claim that these denials of any connection between vaccines and autism by the federal government and the vaccine manufacturers are intentionally fraudulent."). But equitable tolling is only warranted when the "fraud has been concealed" and the party alleging concealment has

exercised due diligence "in coming to the knowledge of the fraud." *Bailey v. Glover*, 88 U.S. 342, 349 (1874); *see also Simmons*, 86 F.3d at 1142.

For these reasons, fraudulent concealment cannot serve as a basis for equitable tolling in this case.

B

Parents assert additional errors by the special master, some of which we discuss below. None has merit.

Parents argue that Congress declined to authorize special masters to entertain or rule upon Rule 12(b)(6) motions to dismiss. They point to Section 300aa-12(d)(2)(C) of the Vaccine Act, which specifically entrusts special masters with the power to rule on summary judgment motions but does not refer to motions to dismiss. However, the language of the statute is merely exemplary, pointing to procedural rules that may be adopted *"includ[ing]* the opportunity for summary judgment." 42 U.S.C. § 300aa-12(d)(2)(C) (emphasis added). The Vaccine Rules reiterate this inclusiveness, explaining that "[t]he special master may decide a case on the basis of written submissions without conducting an evidentiary hearing," and that "[s]ubmissions *may include* a motion for summary judgment." Vaccine Rule 8(d) (emphasis added). Nothing in this language, nor any other provision of the Vaccine Act, excludes 12(b)(6) motions to dismiss.

Additionally, "[t]he statute and the Vaccine Rules give the special masters broad authority in conducting proceedings under the Act." *Simanski v.*

Sec'y of Health & Human Servs., 671 F.3d 1368, 1371 (Fed. Cir. 2012). This broad authority is embodied in, for example, Vaccine Rule l(b), providing that "[i]n any matter not specifically addressed by the Vaccine Rules, the special master may regulate applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide the case promptly and efficiently." Moreover, Vaccine Rule l(c) provides that the RCFC, which include RCFC 12(b)(6), apply to the extent that they are consistent with the Vaccine Rules. That these authorities all contemplate and certainly do not prohibit motion to dismiss practice is confirmed by the long experience of special masters entertaining such motions in countless proceedings.

We therefore find that special masters have jurisdiction to rule on motions to dismiss.

2

The doctrine of separation of powers did not bar the special master from dismissing W.J.'s claims. As an initial matter, we do not agree with Parents that the special master raised the statute of limitations issue sua sponte. Instead, as the special master observed during the initial status conference, the possible untimeliness of W.J.'s claims is evident on the face of the petition. *See* App'x 68. The petition alleges that W.J. received his first MMR vaccine in 2005. As the petition was not filed until 2021, 17 years later, the special master – who, after all, solely handles cases arising under the Vaccine Act – noticed that the question of whether W.J.'s claims were timely was an obvious

concern.

In any event, special masters, just like judges, have wide latitude in managing their docket. *See Landis v. N. Am.* Co., 299 U.S. 248, 254-55 (1936) ("[E]very court [has inherent power] to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). This broad discretion is explicitly outlined in the statute and the Vaccine Rules. *See, e.g.,* 42 U.S.C. § 300aa-12(d)(2)(A) (stating that Vaccine Rules shall "provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions"); Vaccine Rule 3(b) ("The special master is responsible for ... conducting all proceedings ... [and] endeavoring to make the proceedings expeditious, flexible, and less adversarial."). Special masters, like judges, can prioritize potentially case dispositive issues at the start of a case, in an exercise of their discretion. *See, e.g., Vivid Tech., Inc. v. Am. Sci. & Eng'g, Inc.,* 200 F.3d 795, 803-04 (Fed. Cir. 1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.").

Here, the special master acted well within her discretion in identifying a concern regarding the statute of limitations at the outset of the case. That the government happened to be the party filing the motion to dismiss, which they very likely would have filed regardless of the special master's inquiry and which Parents had the opportunity to oppose, does not convert the special master's routine case management action into a separation-of-powers issue.

Parents next argue that the trial court and special master erred in dismissing their fraudulent concealment claim because they misapplied the *Iqbal/Twombly* pleading standard and considered material outside the pleadings. We disagree. Rather, the court and special master merely, and appropriately, found that the facts pleaded in the petition did not provide the support necessary to adequately allege fraudulent concealment. The court and special master properly evaluated Parents' petition, including by assuming all pleaded facts to be true, and reached the conclusion that the petition did not state a fraudulent concealment claim on which relief could be granted, a conclusion we have reviewed and now uphold.

We therefore affirm the Court of Federal Claims' conclusion that equitable tolling was not appropriate and, thus, that Appellants' petition was not timely filed under 42 U.S.C. § 300aa-16(a)(2).

V

We have considered Parents' remaining arguments but find them unpersuasive. For the foregoing reasons, we *affirm* the judgment of the Court of Federal Claims.

AFFIRMED

COSTS

No costs.

APPENDIX B

United States Court of Appeals
for the Federal Circuit

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

2022-2119

Appeal from the United States Court of Federal Claims in No. 1:21-vv-01342-KCD,
Judge Kathryn C. Davis

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

February 21, 2024
Date

Jarrett B. Perlow
Clerk of Court

APPENDIX C

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

2022-2119

Appeal from the United States Court of Federal Claims in No. 1:21-vv-01342-KCD,
Judge Kathryn C. Davis

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES,

STOLL, CUNNINGHAM, and STARK, Circuit Judges.[1]

PER CURIAM.

O R D E R

W.J. filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue May 15, 2024.

FOR THE COURT

May 8, 2024
Date

Jarrett B. Perlow
Clerk of Court

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[1] Circuit Judge Newman did not participate.

APPENDIX D

United States Court of Appeals
for the Federal Circuit

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

2022-2119

Appeal from the United States Court of Federal Claims in No. 1:21-vv-01342-KCD,
Judge Kathryn C. Davis

MANDATE

In accordance with the judgment of this Court, entered February 21, 2024, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

May 15, 2024
Date

Jarrett B. Perlow
Clerk of Court

APPENDIX E

United States Court of Federal Claims

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

Case No. 21-1342V

Judge Kathryn C. Davis

MEMORANDUM OPINION AND ORDER

Filed: June 21, 2022

Reissued: July 7, 2022[1]

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[1] The Court issued this opinion under seal on June 21, 2022, and directed the parties to file any proposed redactions by July 6, 2022. On July 5, 2022, Petitioners requested the Court redact the case caption, as approved by the Special Master, but did not propose further redactions. *See* ECF No. 42. As such, the Court reissues the opinion publicly in full, with revisions to the case

Petitioners R.J. and A.J. seek review of a decision dismissing their request for vaccine injury compensation on behalf of their child, W.J. Petitioners filed their petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et seq.* (the "Vaccine Act"), alleging W.J. suffered chronic encephalopathy (a Table injury) and immunodeficiency issues, including immune-related blood disorders, eczema, and allergies, as a result of receiving the measles, mumps, and rubella ("MMR") vaccine in February 2005. Petitioners claim the vaccine either directly caused the asserted injuries or significantly aggravated W.J.'s pre-existing cerebral and immunological damage. The Special Master dismissed the claims as untimely under the Vaccine Act's statute of limitations.

For the reasons discussed below, the Special Master's decision to grant Respondent's Motion to Dismiss was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Court **DENIES** Petitioners' Motion for Review.

I. BACKGROUND

A. Factual History

Petitioners alleged that W.J. was born a healthy, full-term infant on February 4, 2004, without significant neonatal problems. Pet. Ex. 1 at 1, ECF No. 1-2. He received routine vaccinations throughout his

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caption and first sentence of the text to protect the identity of Petitioners.

childhood, including influenza, hepatitis B, diphtheria-tetanus-acellular pertussis, Haemophilus influenzae type B, pediatric pneumococcal, polio, and MMR. Pet. Ex. 2 at 1, ECF No. 1-2. His MMR vaccines were administered on February 24, 2005, and March 15, 2008, without record of adverse reactions. *Id.*

On March 7, 2006, at the age of two, doctors diagnosed W.J. with a speech delay. Pet. Ex. 6 at 13, ECF No. 1-2. W.J.'s blood tests showed high platelet levels and low lymphocyte levels. Pet. Ex. 9 at 1, ECF No. 1-2. Subsequent audiologic evaluation in June 2006 revealed adequate hearing. *Id.* The following year, on January 5, 2007, doctors diagnosed W.J. with autism and pervasive developmental delay. Pet. Ex. 39 at 17, ECF No. 20-1. Pediatric neurologists determined that W.J.'s developmental delays and language disorder required intensive therapeutic programs. Pet. Ex. 13 at 1, ECF No. 1-2.

Over the next 15 years, W.J. presented to doctors for various physical and psychological ailments. From June 22 to 25, 2007, he was hospitalized with a fever and swollen glands consistent with a bacterial infection. Pet. Ex. 12 at 11, ECF No. 1-2. On February 20, 2012, he was assessed by doctors for "unstable atopic dermatitis" and tested for lead poisoning. Pet. Ex. 7 at 7, ECF No. 1-2. On February 19, 2014, he returned for treatment of severe eczema and rhinitis, conditions that the treating physician noted had gone untreated over the objections of W.J.'s healthcare providers. *Id.* at 10. W.J.'s behavioral problems, including irritability, mood swings, and poor sleep, prompted doctors to perform a comprehensive psychiatric evaluation on July 19, 2018. Pet. Ex. 71 at 59,

ECF No. 1-2. Following this evaluation, doctors attempted to manage W.J.'s behaviors over the next three years with antipsychotic medications. *Id.* at 3. In February 2019, genetic testing revealed that W.J. has an MTHFR homozygous A1298C mutation and duplication of the Xq28 chromosome of uncertain clinical significance. Pet. Ex. 11 at 4, 6, 8, ECF No. 1-2; Pet. Ex. 14 at 1, ECF No. 1-2.

Based on a review of the medical records, the Special Master found that at no point did doctors diagnose W.J. with encephalopathy or immunodeficiency disorder. *See* Decision Den. Comp. at 8, ECF No. 29.

B. Procedural History

On May 7, 2021, Petitioners filed a claim for vaccine injury compensation on behalf of W.J. *See* Pet., ECF No. 1. According to Petitioners, the MMR vaccine was inappropriately administered to W.J. in contravention of the vaccine's warnings because of W.J.'s Xq28 chromosomal duplication. *Id.* ¶ 17. As a result, Petitioners contend that W.J. has chronic encephalopathy and immunodeficiency issues caused either directly by the vaccine or by its significant aggravation of the pre-existing damage related to his chromosomal abnormality. *Id.* ¶ 19. They further contend these injuries led to several bouts of immune-related blood disorders and an infection resembling mumps that resulted in hospitalization. *See id.* ¶¶ 21–64.

On June 3, 2021, the Special Master held an initial status conference, during which she raised the issue of the statute of limitations. *See* Order dated June 3, 2021, at 1, ECF No. 14. Before addressing the merits

of the claims, she directed Respondent to file a Rule 4(c) Report and Motion to Dismiss. *Id.* at 4–5. In accordance with this direction, Respondent moved to dismiss, contending Petitioners filed their claims beyond the 36-month statute of limitations and that no basis for equitable tolling applied. *See* Resp't's Mot. to Dismiss, ECF No. 16. Respondent asserted that W.J.'s injuries, if they did exist, began to manifest by March 2006 when he was diagnosed with a speech delay. *See* Resp't's Rule 4(c) Report at 8, ECF No. 15. Accordingly, Respondent argued that the Vaccine Act required Petitioners to file a claim by no later than March 2009. *Id.*

The Special Master granted Respondent's Motion to Dismiss for failure to file a timely action under the Vaccine Act. ECF No. 29 at 2. Although the Special Master discussed the merits of Petitioners' claims throughout the decision, she dismissed the claims solely on the basis of the statute of limitations. *Id.* at 21. The Special Master explained that even if Petitioners were able to establish a viable Table Claim, cause-in-fact injury, or significant aggravation injury, their petition was filed beyond the Vaccine Act's 36-month filing period, which begins to run upon "the first symptom or manifestation of onset or of the significant aggravation of such injury." *Id.* at 8–9 (citing 42 U.S.C. § 300aa-16(a)(2)). Because Petitioners based their Table Claim on the MMR vaccine administered on February 24, 2005, and a Table Claim must manifest within 15 days of vaccination, the Special Master found they were required to file that claim no later than March 11, 2008. *Id.* at 12. Likewise, if W.J.'s speech delay—the alleged first manifestation of his chronic encephalopathy—was diagnosed on

March 7, 2006, Petitioners were required to file the claim for a cause-in-fact injury by March 7, 2009.[2] *Id.* at 13. Similarly, the Special Master found that Petitioners were required to file a cause-in-fact injury claim related to any immunodeficiency issues by March 9, 2009, at the earliest, or April 8, 2017, at the latest. *Id.* at 14–15 (calculating 36-month filing period based on abnormal blood tests on March 9, 2006, and April 13, 2007; unstable atopic dermatitis diagnosis on February 20, 2012; hospitalization on June 22–24, 2007; and high mumps count on April 8, 2014). She applied the same standard to the significant aggravation claim, finding it time-barred for the same reasons. *Id.* at 15.

The Special Master also rejected Petitioners' equitable tolling arguments. *Id.* at 16, 17–18. Although W.J. was an infant when he received the MMR vaccine, she held Petitioners, as his parents, retained the ability to file a claim on his behalf. *Id.* at 16. The Special Master therefore concluded that W.J.'s mental incapacity was not an extraordinary circumstance warranting equitable tolling. *Id.* She also determined that the doctrine of fraudulent concealment did not apply because Petitioners failed to plead facts demonstrating Respondent's alleged fraudulent conduct prevented them from timely pursuing compensation. *Id.* at 17–18.

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[2] The Special Master also noted that if W.J.'s autism diagnosis on January 5, 2007, was a first symptom or manifestation of the alleged chronic encephalopathy, the filing period expired on January 5, 2010. ECF No. 29 at 13.

On March 14, 2022, Petitioners filed a Motion for Review of the Special Master's decision. *See* Pet'rs' Mot. for Review, ECF No. 36; Pet'rs' Mem. of Obj., ECF No. 36-1. Petitioners challenge several aspects of the decision, including that the Special Master raised the statute of limitations issue sua sponte during the initial status conference and applied a purportedly incorrect legal standard to the motion. ECF No. 36-1 at 6. On April 14, 2022, Respondent responded to Petitioner's motion. *See* Resp't's Resp. to Pet'rs' Mot. for Review, ECF No. 39. It argues that the Special Master acted within her discretion by addressing timeliness as a potential threshold bar to recovery and properly applied both the standard of review and the case law governing equitable tolling. *Id.* at 12, 14.

II. LEGAL STANDARDS

A. Review of a Special Master's Decision

This Court has jurisdiction to review a special master's decision upon the timely request of either party. 42 U.S.C. § 300aa-12(e)(2). Under the Vaccine Act, a court deciding a motion for review may:

> (A) uphold the findings of fact and conclusions of law of the special master's decision, (B) set aside any findings of fact and conclusions of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or (C) remand the petition to the special master for further action in accordance with the court's direction.

Id. §§ 300aa-12(e)(2)(A)–(C). The Court employs "a highly deferential standard" when reviewing a special master's decision. *Hines v. Sec'y of Health & Hum. Servs.*, 940 F.2d 1518, 1528 (Fed. Cir. 1991); *Munn v. Sec'y of Health & Hum. Servs.*, 970 F.2d 863, 870 n.10 (Fed. Cir. 1992) (holding that findings of fact receive "great deference" under an "arbitrary and capricious" standard, legal conclusions are reviewed under the "not in accordance with law" standard, and discretionary rulings are reviewed for "abuse of discretion"). If the special master has "considered the relevant evidence of record, drawn plausible inferences[,] and articulated a rational basis for the decision," reversible error will be "extremely difficult" to demonstrate. *Lampe v. Sec'y of Health & Hum. Servs.*, 219 F.3d 1357, 1360 (Fed. Cir. 2000); *see Hayman v. United States*, No. 02-725V, 2005 WL 6124101, at *2 (Fed. Cl. May 9, 2005).

On a motion for review, it is not the Court's role "to reweigh the factual evidence." *Doe 93 v. Sec'y of Health & Hum. Servs.*, 98 Fed. Cl. 553, 565 (2011) (citing *Lampe*, 219 F.3d at 1360). Rather, "the probative value of the evidence [and] the credibility of the witnesses . . . are all matters within the purview" of the special master as fact finder. *Id.* The Court should not substitute its judgment for that of the special master even though it may have reached a different conclusion. *Johnson v. Sec'y of Health & Hum. Servs.*, 33 Fed. Cl. 712, 720 (1995). This deference notwithstanding, when the matter for review is whether the special master's decision was in accordance with law—*i.e.*, when a question of law is at issue—the court reviews

the decision de novo. *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1277–78 (Fed. Cir. 2005).

B. Motion to Dismiss Standard

A motion to dismiss for failure to state a claim upon which relief may be granted "is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). It is well established that a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). A "plausible" complaint "does not need detailed factual allegations," but rather only enough "to raise a right of relief" beyond mere speculation. *Twombly*, 550 U.S. at 555. When reviewing a motion to dismiss for failure to state a claim, the Court may consider all allegations in the complaint and may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (citation omitted); *see Terry v. United States*, 103 Fed. Cl. 645, 652 (2012). "[A]ll well-pled factual allegations" should be assumed by the court as true and "all reasonable inferences [should be made] in favor of the nonmovant." *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327–28 (Fed. Cir. 2006). But "[t]hread bare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to prevent dismissal. *Iqbal*, 556 U.S. at 678.

In assessing motions to dismiss in the Vaccine Program, special masters have concluded that they "need only assess whether the petitioner could meet the Act's requirements and prevail, drawing all inferences from the available evidence in petitioner's favor." *Herren v. Sec'y of Health & Hum. Servs.*, No. 13-1000V, 2014 WL 3889070, at *2 (Fed. Cl. Spec. Mstr. July 18, 2014); *see also Warfle v. Sec'y of Health & Hum. Servs.*, No. 05-1399V, 2007 WL 760508, at *2 (Fed. Cl. Spec. Mstr. Feb. 22, 2007).

III. DISCUSSION

Petitioners raise nine objections to the Special Master's decision dismissing Petitioners' claims as untimely under the statute of limitations. These objections fall roughly into three categories. First, Petitioners contend the Special Master violated separation-of-powers principles by sua sponte ordering Respondent to file a motion to dismiss at the initial status conference. ECF No. 36-1 at 6. Second, they allege the Special Master erred in rejecting their equitable tolling arguments because she allegedly applied the wrong legal standard for reviewing a motion to dismiss. *Id.* at 10–11. Petitioners base this argument on the Special Master's alleged disbelief and rejection of their pleaded facts, which they argue demonstrate extraordinary circumstances and fraudulent concealment that warrants the tolling of the statute of limitations. *Id.* Finally, Petitioners contend the Special Master's decision went beyond the scope of Respondents' dismissal request and improperly ruled on the merits of Petitioners' claims. *Id.* at 8.

Having considered the arguments and record, the Court rejects Petitioners' objections and finds the Special Master acted rationally, within her discretion, and in accordance with law in finding Petitioners' claims time-barred by the statute of limitations. The issue of timeliness was apparent from the face of the Petition, and the Special Master did not force Respondent to adopt a particular legal strategy or position. Further, the Special Master applied the correct legal standard for a motion to dismiss by rejecting legal conclusions and determining that the pleaded facts, even accepted as true, did not justify equitable tolling. Moreover, regardless of whether the Special Master's decision included merits-type rulings, the sole basis of the decision was properly limited to the statute of limitations question. Accordingly, the Special Master's decision is upheld.

A. The Special Master Did Not Violate Separation of Powers.

Petitioners first object to the Special Master raising the statute of limitations sua sponte during the initial status conference. *Id.* at 6. They contend that by directing the parties to brief the issue of timeliness, the Special Master violated the separation of powers or, at the least, created the appearance of impropriety by ordering Respondent to take a particular legal position and preemptively endorsing that position. *Id.* at 8. Respondent responds that there is nothing improper about a judge or special master raising a threshold, dispositive issue before reaching the merits of a party's claim. ECF No. 39 at 8.

The relevant exchange at the initial status conference is brief enough to reproduce in full. On June 3, 2021, the Special Master addressed the parties as follows:

> THE COURT: Okay. So I know you probably are aware of this based on the petition, there is a statute of limitations issue that we will need to address since that's a threshold issue, that is, if the statute of limitations has expired, then the case will be dismissed because it can no longer be brought. And I think that is something we probably need to deal with sooner rather than later so that we don't use a lot of your time, energy, and money and the Court's time and energy litigating a case where the statute of limitations has expired.
>
> And by talking about this I'm not diminishing in any way the experiences and the difficulty that your family has had. I just don't want to lead you to have any unrealistic expectations about how the case may proceed.
>
> So I think the best course of action . . . is probably for [Respondent] to file a Rule 4 report with any motion to dismiss or other legal filing with regard to the statute of limitations. And then I can ask [Petitioner] to file any reply or response which he may wish to do so, and then I can rule on that issue. [Respondent], what are your thoughts about that plan?

> [RESPONDENT'S COUNSEL]: Yes, Special Master, that sounds like an appropriate plan.
>
> THE COURT: [Petitioner], does that plan -- is that plan acceptable with you?
>
> [PETITIONER]: That sounds fair. Yes.

Tr. at 4:6–5:9, ECF No. 19. Following the initial status conference, the parties submitted full briefing, which the Special Master subsequently reviewed. ECF No. 29 at 2. In her decision, the Special Master noted that she "ordered" Respondent to file a Rule 4(c) Report and Motion to Dismiss on the issue of the statute of limitations. *Id.*

Petitioners characterize the exchange at the status conference as a significant violation of judicial propriety because it showed the Special Master's desire to dismiss the case. ECF No. 36-1 at 8. They argue that her decision "is irreparably tainted by . . . separation-of-powers concerns" because of the so-called general principle that "she who orders the motion to be filed must not adjudge that motion's merit." *Id.* However, based on the relevant portion of the transcript, there is no evidence that the Special Master acted improperly by ordering briefing on the statute of limitations. The issue of timeliness was originally raised by Petitioners—not the Special Master—in the equitable tolling section of the Petition. *See* ECF No. 1 ¶¶ 80–121. The Special Master did not abuse her discretion or act contrary to law by recognizing that a patent statute of limitations question could be outcome determinative and deciding that it would be prudent to

address the issue at as early a stage as possible. *Cf. Kreizenbeck v. Sec'y of Health & Hum. Servs.*, 945 F.3d 1362, 1366 (Fed. Cir. 2018) (endorsing use of summary judgment motion "at an early stage of the proceedings" where a party believes "that no material facts are in dispute and they will prevail as a matter of law"). By addressing the threshold timeliness issue before the merits, the Special Master efficiently used judicial resources to save the parties time, energy, and money litigating untimely claims, which is consistent with the goals of the Vaccine Act and applicable rules. *See* 42 U.S.C. § 300aa-12(d)(2)(A); *see* R. 3(b)(2), Rules of the U.S. Court of Federal Claims, app. B ("Vaccine Rules").

Nor does the transcript reflect that the Special Master ordered Respondent to take a particular position on the statute of limitations or otherwise display bias in favor of dismissal on that basis. The Special Master raised the issue at the status conference by explaining it was likely "the best course of action" for Respondent to file "any motion to dismiss or other legal filing with regard to the statute of limitations." ECF No. 19 at 4:22–25. Although the Special Master could have first inquired whether Respondent intended to raise a timeliness argument and then—having confirmed its intent—ordered briefing, that she reasonably anticipated Respondent's position does not rise to the level of an abuse of discretion. *See Cottingham on Behalf of K.C. v. Sec'y of Health & Hum. Servs.*, 971 F.3d 1337, 1345 (Fed. Cir. 2020) ("An abuse of discretion occurs if the decision is clearly unreasonable, arbitrary, or fanciful; is based on an erroneous conclusion of law; rests on clearly erroneous fact findings; or involves a record that contains no

evidence on which the [special master] could base [her] decision."). And the Special Master's "best course of action" statement most naturally indicates her determination that it was procedurally efficient to resolve the statute of limitations question first, as opposed to suggesting a particular legal argument would improve Respondent's chance of obtaining dismissal. Notwithstanding the briefing order, the substance and scope of the legal arguments Respondent eventually made was entirely up to it, including whether the statute of limitations barred the claims, equitable tolling was warranted, or some other issue should be addressed before or contemporaneous with the issue of timeliness. Moreover, the Special Master solicited any objections from Petitioners (they posed none), *id.* at 5:9, and afforded Petitioners ample opportunity to be heard in opposition to the motion. *See Kreizenbeck*, 945 F.3d at 1366 (holding that, in reviewing the method of adjudicating a petitioner's claim, the material inquiry is whether the special master "afford[ed] each party a full and fair opportunity to present its case and create a record sufficient to allow review of [her] decision"). The Special Master then considered the literature and evidence provided by Petitioners and based her decision squarely on the pleaded facts and relevant law. ECF No. 29 at 2.

As such, the Court finds that the Special Master did not abuse her discretion in directing the parties to brief the statute of limitations issue following the initial status conference. The Special Master's decision should not be overturned on this ground.

B. The Special Master Did Not Misapply the Legal Standard In Ruling on Petitioners' Equitable Tolling Arguments.

Petitioners next object to the Special Master's rejection of their equitable tolling arguments. ECF No. 36-1 at 14–19. They contend the Special Master erred by failing to accept the pleaded facts as true for purposes of ruling on the motion to dismiss. *Id.* at 5. According to Petitioners, had the Special Master properly construed all reasonable inferences in their favor, she would have determined that the statute of limitations should be tolled because of extraordinary circumstances and the doctrine of fraudulent concealment. *Id.* at 7. Respondent responds that although special masters may not disregard well-pleaded facts when ruling on a motion to dismiss, the rules do not require they accept legal conclusions as true purely because they are couched as factual assertions. ECF No. 39 at 15. Respondent argues that the role of the special master is to draw reasonable inferences from the provided evidence and to determine if a viable claim exists by applying the law to such evidence and inferences. *Id.*

Although the Vaccine Act and the Vaccine Rules contemplate case-dispositive motions, they do not expressly include a mechanism for a motion to dismiss. *See* 42 U.S.C. §§ 300aa-12(d)(2)(C)–(D); Vaccine R. 8(d) (providing that "[t]he special master may decide a case on the basis of a written motion[,] . . . [which] may include a motion for summary judgment," but not specifically mentioning a motion to dismiss). However, Vaccine Rule 1 provides that for any matter not specifically addressed by the Vaccine Rules, the

special master "may regulate applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide the case promptly and efficiently." *See* Vaccine R. 1(b). Vaccine Rule 1 also provides that the Rules of the United States Court of Federal Claims ("RCFC") may apply to the extent they are consistent with the Vaccine Rules. Vaccine R. 1(c). Accordingly, there is a well-established practice of special masters' entertaining motions to dismiss under RCFC 12(b)(6), which provides for dismissal based on "failure to state a claim upon which relief can be granted." *See, e.g.*, *Herren*, 2014 WL 3889070, at *1; *Bass v. Sec'y of Health & Hum. Servs.*, No. 12-135V, 2012 WL 3031505, at *5 (Fed. Cl. Spec. Mstr. June 22, 2012). This includes in cases where Respondent raised a statute of limitations argument. *See, e.g.*, *Clubb v. Sec'y of Health & Hum. Servs.*, 136 Fed. Cl. 255, 263 (2018); *J.H. v. Sec'y of Health & Hum. Servs.*, 123 Fed. Cl. 206, 215 (2015).

Section 300aa-16 of the Vaccine Act provides a limitations period for claims arising from vaccines administered after October 1, 1988. It reads:

> [I]f a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such[.]

42 U.S.C. § 300aa-16(a)(2). The Federal Circuit has held that the Vaccine Act's limitations period begins

to run from the onset of the "first event objectively recognizable as a sign of a vaccine injury by the medical profession at large," *Carson v. Sec'y of Health & Hum. Servs.*, 727 F.3d 1365, 1368 (Fed. Cir. 2013) (quoting *Markovich v. Sec'y of Health & Hum. Servs.*, 477 F.3d 1353, 1360 (Fed. Cir. 2007)), even if the symptom did not result in a diagnosis at the time or was not appreciated until after a doctor definitively diagnosed the injury, *id.* at 1369–70. Special Masters have regularly dismissed cases filed outside the limitations period, even if by only a single day. *See, e.g.*, *Spohn v. Sec'y of Health & Hum. Servs.*, No. 95-0460V, 1996 WL 532610 (Fed. Cl. Spec. Mstr. Sept. 5, 1996) (dismissing case filed one day beyond the limitations period), *aff'd*, 132 F.3d 52 (Fed. Cir. 1997); *Cakir v. Sec'y of Health & Hum. Servs.*, No. 15-1474V, 2018 WL 4499835, at *4 (Fed. Cl. Spec. Mstr. July 12, 2018) (dismissing case filed two months beyond the limitations period).

The Federal Circuit has held that the doctrine of equitable tolling can apply to Vaccine Act claims in limited circumstances. *See Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340–41 (Fed. Cir. 2011). To establish that equitable tolling is appropriate, claimants must prove: (1) they pursued their rights diligently; and (2) an extraordinary circumstance prevented them from timely filing their claim. *K.G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1379 (Fed. Cir. 2020) (citing *Menominee Indian Tribe v. United States*, 577 U.S. 250, 255 (2016)); *see Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."). Extraordinary circumstances exist when the "failure to

file was the direct result of a mental illness or disability that rendered [the claimant] incapable of rational thought, incapable of deliberate decision making, incapable of handling [his or her] own affairs, or unable to function in society." *K.G.*, 951 F.3d at 1381. But "[a] medical diagnosis alone or vague assertions of mental problems are insufficient" to establish extraordinary circumstances. *Id.* at 1381–82. To determine whether a mentally incapacitated claimant has demonstrated reasonable diligence, the Court must consider "all relevant facts and circumstances," including whether he or she had a legal guardian and the significance of that relationship. *Id.* at 1382 (holding that a court should evaluate the significance of a legal guardian based on a number of factors, including "the nature and sophistication of the guardian (parent, lawyer, family member, or third-party), the timing of the institution of the guardianship (before or after the vaccination, for example), . . . the extent to which the claimant's mental incapacity interferes with her relationship and communication with her guardian, [and] the quality and nature of the guardian's relationship with the claimant . . . .").

The doctrine of fraudulent concealment may also toll a statute of limitations where, "assuming due diligence on the part of the plaintiff . . . the misconduct in question 'has been concealed, or is of such character as to conceal itself.'" *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1142 (Fed. Cir. 1996) (citing *Bailey v. Glover*, 88 U.S. 342, 349–50 (1874)). However, "a mere failure to come forward with facts that would provide the plaintiff with a basis for suit does not constitute fraudulent concealment." *Id.* The Court has not located any caselaw applying this

doctrine to a petition for compensation brought pursuant the Vaccine Act, nor do Petitioners cite cases on the matter of whether it applies in this context.

Petitioners argue that the Special Master misapplied the legal standard on a motion to dismiss by disregarding several of their factual assertions "simply because she didn't believe them." ECF No. 36-1 at 10. As an example, they note their allegation that W.J. has been unable to communicate for much of his life and is cerebrally incapacitated, which prevented them from fully assessing his injury from the MMR vaccine in time to file a claim. *Id.* at 14–15. They also reference at length the facts surrounding the Omnibus Autism Proceeding ("OAP") as evidence that Respondent concealed the link between the MMR vaccine and autism, which they assert discouraged them from filing a claim. *Id.* at 15–18. The Special Master ultimately rejected their arguments on equitable tolling, finding that "W.J.'s 'mental incapacity' does not serve as 'an extraordinary circumstance,'" ECF No. 29 at 16, and that the fraudulent concealment claim failed due to lack of evidence, *id.* at 18. Petitioners point to the Special Master's statement that she formed "inferences *from the available evidence*" as an example of her alleged legal error because, according to Petitioners, "[e]vidence should not be a factor" when determining whether a party states a viable claim for relief at the pleadings stage. ECF No. 36-1 at 11.

The record reflects that the Special Master acted in accordance with law in dismissing Petitioners' equitable tolling arguments. The basis for Petitioners' disagreement on this issue apparently stems from a

misunderstanding of the role of a special master in ruling on a motion to dismiss. When determining if a petition states a viable claim for relief, special masters are not bound to accept legal conclusions as true. Only well-pleaded facts are presumed to be true. *See Hill v. Sec'y of Health & Hum. Servs.*, No. 19-384V, 2020 WL 7231990, at *2 (Fed. Cl. Spec. Mstr. Nov. 13, 2020) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *United Pac. Ins.*, 464 F.3d at 1327–28. A petition need only state a plausible claim for relief to survive a motion to dismiss, and special masters are tasked with applying the law to the pleaded facts to determine whether a case should move forward. *Iqbal*, 556 U.S. at 678. Although Petitioners may have alleged that extraordinary circumstances existed because of W.J.'s inability to communicate and that Respondent concealed information by contesting the link between vaccines and autism, the Special Master concluded that the sum of these alleged facts did not *as a matter of law* warrant equitable tolling. In reaching her decision, she assessed "all inferences from the available evidence" but, as Petitioners fail to note, she did so "*in petitioner's favor*." ECF No. 29 at 15 (emphasis added).

First, in considering whether the statute of limitations should be tolled because of extraordinary circumstances, the Special Master rejected Petitioners' arguments because—as a minor—the law required W.J.'s parents to file a claim on his behalf regardless of his mental capacity. The Special Master distinguished the circumstances of the instant case from those presented in *K.G.* In *K.G.*, the Federal Circuit held that equitable tolling may apply in a case involving a vaccine injury suffered by an adult claimant who

subsequently became incapacitated due to alcoholism, hospitalization, and amnesia. *K.G.*, 951 F.3d at 1379. The Special Master explained that, although *K.G.* "confirmed an equitable tolling right for incapacitated individuals, nothing in the decision negated a legal representative's rights and responsibilities under the Vaccine Act." ECF No. 29 at 16 (citing *K.G.*, 951 F.3d at 1379). Put another way, the Special Master accepted Petitioners' facts as true—that W.J. had a mental incapacity—but still concluded that these facts did not amount to extraordinary circumstances under the legal principles elucidated in *K.G.* because Petitioners retained the right to sue on his behalf. *See id.* This is not an erroneous application of the standard of review for a motion to dismiss pursuant to RCFC 12(b)(6).

Petitioners argue that an injured party's relationship to their legal guardian is only one factor to be considered under the extraordinary circumstances analysis. ECF No. 36-1 at 15 (citing *K.G.*, 951 F.3d at 1382). According to Petitioners, even if they were required to sue on W.J.'s behalf, they were unable to because his mental capacity and inability to communicate interfered with their ability to assess the basis of the claim. *Id.* Petitioners correctly state the law but, as Respondent noted in its Rule 4(c) Report, the Special Master must "analyze[] the facts to determine whether [the] legal guardianship alleviated the extraordinary circumstance" of the petitioner's mental incapacity. ECF No. 15 at 9 (quoting *K.G.*, 951 F.3d at 1381). In this case, even though Petitioners attempt to thread their argument through W.J.'s speech delay, the Special Master considered all facts in the record and found that this did not amount to extraordinary

circumstances. *See K.G.*, 951 F.3d at 1382 ("[T]he reasonable diligence inquiry must also be based on a consideration *of all relevant facts and circumstances*." (emphasis added)). The Special Master found that, as in any vaccine case involving a child, "[t]he Vaccine Act expressly permits a legal representative to file a petition for compensation on behalf of a minor," and W.J.'s injuries objectively manifested prior to the expiration of the statute of limitations. ECF No. 29 at 16. Given the "great deference" afforded to the Special Master in applying the law to the facts of the case, the Court does not find that her ruling on extraordinary circumstances (or the lack thereof) was arbitrary and capricious. *Munn*, 970 F.2d at 870.

Second, in considering whether the statute of limitations should be tolled under the doctrine of fraudulent concealment, the Special Master rejected Petitioners' arguments because the facts (accepted as true) did not demonstrate how the alleged fraud prevented them from seeking compensation. Petitioners argued that Respondent "fostered and promoted the scientific finding" that there is no link between the MMR vaccine and autism. ECF No. 1 ¶ 100. Petitioners assert that they included "hard evidence of a link between vaccines and autism" in the form of recent cases involving families who obtained compensation for their child's autism on the basis of a vaccine injury. ECF No. 36-1 at 12. But the framing of this narrow issue is important. For purposes of the Motion to Dismiss, the relevant question before the Special Master was not whether there is a link between vaccines and autism. The relevant question was whether Petitioners alleged facts demonstrating they were misled by Respondents such that equitable tolling is

appropriate because Respondent engaged in fraud. *See Holmberg v. Armbrecht,* 327 U.S. 392, 396–97 (1946) (noting that fraudulent concealment requires the claimant be misled "without any fault or want of diligence").

Accepting the pleaded facts as true, the Special Master observed that during the period in which Petitioners contended they were misled by Respondent, over 5,100 petitions alleging that vaccines caused autism were filed under the Vaccine Act in the OAP. ECF No. 29 at 19. In other words, their argument was significantly undercut by the fact that Respondent's position to the contrary did not dissuade or prevent thousands of other claimants with similar claims from filing suit. Fraud also typically requires a showing of intent on behalf of the defrauder to make a false or misleading statement. *See XpertUniverse Inc. v. Cisco Sys., Inc.*, 597 F. App'x 630, 635 (Fed. Cir. 2015). The fact that a special master awarded compensation, or Respondent agreed to settle, a vaccine-related injury claim involving autism does not raise such an inference. Indeed, the Petitioner disavowed any allegation that Respondent engaged in intentional fraud. ECF No. 1 ¶ 103. Based on these facts, as well as evidence that the first symptom or onset of W.J.'s injury occurred at the earliest in 2006 (again, accepting Petitioners' allegations as true), the Special Master properly concluded that Petitioners had sufficient time both before and after the OAP to seek compensation.[3] *Id.*

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[3] In their response to the Motion to Dismiss, Petitioners argued that they did not discover Respondent's fraud until they received W.J.'s genetic testing results in March 2019 and were put on notice of the potential claim. Pet'rs' Mem. of Law in Opp'n to

Lastly, the Court need only briefly address Petitioners' arguments regarding the Fourteenth Amendment.[4] Petitioners claim that denying equitable tolling in this case would be discriminatory against W.J. on the basis of his disability because courts have not denied such relief to other individuals who suffered from drug- and alcohol-based mental incapacity (for example, in *K.G.*).[5] ECF No.1¶114. The Special Master disagreed, holding that Petitioners—who as W.J.'s parents had the right and responsibility to seek compensation on his behalf—did not demonstrate they were members of a protected class of persons. ECF No.29 at 20. Moreover, the Special Master correctly noted that the Vaccine Act's limitations period does not establish any classifications (suspect or otherwise) but rather treats all vaccine-injury claimants equally. *Id.* (citing *Cloer v. Sec'y of Health & Hum. Servs.*, 85 Fed. Cl. 141, 151–52 (2008), *rev'd on other*

Resp't's Mot. to Dismiss at 17, ECF No. 22. The Special Master correctly characterized this argument as raising the discovery rule. ECF No. 29 at 17. She also correctly rejected it. The Federal Circuit made clear in *Cloer* that a claim under the Vaccine Act accrues when the first symptom or manifestation of onset occurs, not when the petitioner learned of the alleged cause of his or her injury. 654 F.3d at 1338.

[4] Although Petitioners listed an objection based on this ground, they did not include any substantive argument in their Motion for Review.

[5] It should be noted that the Federal Circuit did not hold that equitable tolling in fact applied in K.G.'s case. Rather, the Court remanded the case to the special master "to consider all of the relevant facts in the first instance, with the purposes of theVaccine Act in mind," "under the standard set out in this opinion." *K.G.*, 951 F.3d at 1382.

grounds, 603 F.3d 1341. Whether a claimant has established that equitable tolling applies is likewise not dependent on any particular classification of claimants. *See K.G.*, 951 F.3d at 1382. That the Special Master found the facts and circumstances of this case not to warrant equitable tolling and to be distinguishable from *K.G.* does not amount to an equal protection violation. Petitioners' argument on review is squarely a disagreement with the Special Master's application of the established case law. The Special Master did not "disbelieve" pleaded facts on this point; she merely rejected Petitioners' interpretation of the law. *Id.*

In sum, the Court finds that the Special Master correctly applied the legal standard for a motion to dismiss under RCFC 12(b)(6) in denying equitable tolling of Petitioners' claims. Thus, there is no cause for reversal on this ground.

C. Any Merits-Type Rulings Do Not Provide a Basis to Set Aside the Decision.

Petitioners' final objection relates to the scope of the Special Master's decision. They claim the Special Master went beyond the stated grounds of the Motion to Dismiss (*i.e.*, the statute of limitations question) by finding that Petitioners had not proven their factual allegations of injury. ECF No. 36-1 at 9–10. The Court agrees with Respondent that to the extent the Special Master made rulings on the merits of Petitioners' underlying claims, those rulings did not serve as a basis for her dismissal decision. *See* ECF No. 39 at 14. Rather, the decision repeatedly held that—even if Petitioners were able to establish their claims—the

Petition was time-barred and that no equitable tolling applied. *See* ECF No. 29 at 12–13, 14, 15, 16, 18. And it in no uncertain terms concluded that the case must be "dismissed for failure to timely file the petition within the statute of limitations." *Id.* at 21. Accordingly, as the rulings were not necessary to the Special Master's statute-of-limitations analysis and did not affect the stated basis for dismissal, Petitioners have not shown that any legal error resulted.[6]

IV. CONCLUSION

For the reasons set forth above, Petitioners have not shown that the Special Master's decision dismissing their claims on the basis of the statute of limitations was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Special Master's decision is affirmed, and Petitioners' Motion for Review (ECF No. 36) is **DENIED**. Under Vaccine Rule 30(a), the Clerk is directed to enter judgment accordingly.

SO ORDERED.

Dated: June 21, 2022

/s/ Kathryn C. Davis
KATHRYN C. DAVIS
Judge

[6] As such, the Court need not address whether the substance of these rulings were arbitrary and capricious because such a determination would not save Petitioners' otherwise untimely claims.

APPENDIX F

United States Court of Federal Claims
Office of Special Masters

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

Case No. 21-1342V

Special Master Nora Beth Dorsey

DECISION[1]

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[1] Because this Decision contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services). **This means the Decision will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioners have 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, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access.

Filed: March 30, 2022

R.J. and A.J., pro se, Staten Island NY,
for Petitioners

Sarah B. Rifkin,
U.S. Department of Justice
Washington, DC, for Respondent

I. INTRODUCTION

On May 7, 2021, R[redacted] and A[redacted] J[redacted] ("petitioners") filed a petition, on behalf of their minor child, W.J., pursuant to the National Vaccine Injury Compensation Program ("Vaccine Act" or "the Program"), 42 U.S.C. § 300aa-10 et seq. (2012).[2] Petitioners generally allege that their minor child, W.J., suffered from a chronic encephalopathy Table claim and/or a cause-in-fact or significant aggravation of pre-existing cerebral and immunological damage, including immune-related blood disorders, severe eczema, and many other allergies as a result of a measles, mumps, and rubella ("MMR") vaccination administered on February 24, 2005. Petition at 1 (ECF No. 1).

[2] The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 to -34 (2012). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

Respondent filed a Motion to Dismiss in conjunction with his Rule 4(c) Report on August 2, 2021, stating, "[t]he petition in this case was [] filed beyond the relevant statutory limitations period, and petitioners have not provided a basis for the extraordinary remedy of equitable tolling," and therefore the petition should be dismissed. Respondent's Rule 4(c) Report ("Resp. Rept."), filed Aug. 2, 2021, at 12 (ECF No. 15); Resp. Motion to Dismiss ("Resp. Mot."), filed Aug. 2, 2021 (ECF No. 16). The undersigned agrees. Petitioners have failed to provide evidence to show why their case should not be dismissed.

Based on the reasons set forth below, the undersigned **GRANTS** respondent's motion to dismiss and **DISMISSES** petitioners' case for failure to file a timely action pursuant to Section 16(a)(2) of the Vaccine Act.

II. PROCEDURAL HISTORY

Petitioners filed their claim on May 7, 2021, on behalf of their minor child, W.J. Petition at 1. Petitioners alleged W.J. suffered from chronic encephalopathy and immunological issues as a result of an MMR vaccination administered on February 24, 2005. Id. Petitioners filed a compact disc of medical records along with the petition. Petitioners' Exhibits ("Pet. Exs.") 1-29.

On May 13, 2021, the case was assigned to the undersigned. Notice of Reassignment dated May 13, 2021 (ECF No. 9). An initial status conference was held on June 3, 2021, and the undersigned raised the threshold question of the statute of limitations. Order

dated June 3, 2021, at 1 (ECF No. 14). The undersigned ordered respondent to file a Rule 4(c) Report and Motion to Dismiss, and to set a briefing schedule for petitioners to file a response. Id.

Respondent filed a Motion to Dismiss and Rule 4(c) Report on August 2, 2021. Resp. Rept.; Resp. Mot. In September and October 2021, petitioners filed medical records, medical literature, and a response to respondent's motion to dismiss. Pet. Exs. 30-72; Pet. Response to Resp. Mot. ("Pet. Response"), filed Sept. 30, 2021 (ECF No. 22). Respondent filed a reply to petitioners' response on October 28, 2021. Resp. Reply, filed Oct. 28, 2021 (ECF No. 27).

This matter is now ripe for adjudication.

III. PARTIES' CONTENTIONS

A. Petitioners' Contentions

Petitioners first allege that the MMR vaccine was inappropriately administered to W.J. in contravention of the vaccine's warnings due to W.J.'s Xq28 chromosomal duplication. Petition at 3. Petitioners contend "[m]any chromosomal aberrations cause immunodeficiencies" and the MMR vaccine was contraindicated for individuals with "[p]rimary and acquired immunodeficiency states." Id. The MMR vaccine insert also cautions against vaccination "to persons with a history of cerebral injury." Id. Petitioners state the MMR vaccine "significantly aggravated [W.J.'s] preexisting immunodeficiency, stemming from his Xq28 duplication." Id. Additionally, petitioners allege that W.J.'s "chronic encephalopathy and

immunodeficiency issues were either directly caused by the administration of the MMR vaccine, or that the MMR vaccine significantly aggravated pre-existing cerebral and immunological damage caused by [W.J.'s] chromosomal aberration." Id. at 3-4, 11.

Second, petitioners allege W.J. suffered from thrombocytosis,[3] lymphocytopenia,[4] lymphocytosis,[5] monocytosis,[6] granulocytopenia,[7] severe eczema, and "many other allergies" that his "physicians offered no cause or diagnosis for." Petition at 4-8. They state "[o]ver the course of some seven years that followed

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[3] Thrombocytosis is "an increase in the number of circulating platelets; called also thrombocythemia." Thrombocytosis, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=49877 (last visited Feb. 3, 2022).

[4] Lymphocytopenia is the "reduction in the number of lymphocytes in the blood." Lymphocytopenia, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=29030 (last visited Feb. 3, 2022).

[5] Lymphocytosis is the "excess of normal lymphocytes in the blood or in any effusion." Lymphocytosis, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=29034 (last visited Feb. 3, 2022).

[6] Monocytosis is the "increase in the proportion of monocytes in the blood." Monocytosis, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=31969 (last visited Feb. 3, 2022).

[7] Granulocytopenia is the "reduction in the number of granular leukocytes in the blood." Granulocytopenia, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=20930 (last visited Feb. 3, 2022).

the administration of [W.J.'s] MMR vaccine, [W.J.'s] immune system struggled with no less than four immuno-related blood disorders . . . and a several years long battle with severe eczema, and many other allergies." Id. at 8. Petitioners state that because W.J.'s physicians found no cause for his conditions, "in the absence of any evidence to the contrary, [] the many immuno-related adverse events were caused by the MMR vaccine administration to [W.J.] on February 24, 2005." Id. at 20.

Third, petitioners allege W.J. had an extremely high mumps antibody count on April 18, 2014, which "may be indicative of an unusual and chronic allergic reaction to the MMR vaccine." Petition at 8.

Petitioners also allege that W.J. was admitted to the emergency room on June 22, 2007, for a swollen jaw and face, and a high fever. Petition at 8. His blood test showed a high white blood cell count and high lymphocyte, monocyte, and granulocyte counts. Id. at 9. Petitioners state W.J.'s "symptoms during this hospitalization were very similar to mumps, which may point to some adverse chronic reaction to the MMR vaccine." Id.

Fifth, petitioners contend W.J. suffered from an encephalopathy Table injury after MMR vaccine administration. Petition at 10. "Prior to the administration of the MMR vaccine on February 24, 2005, [W.J.'s] medical records indicate no developmental delays or any other indication of mental incapacitation." Id. Petitioners allege that "[a]fter the administration of the MMR vaccine, [W.J.'s] developmental delays soon began to surface." Id. "The table injury timeframe for

[W.J.'s] MMR injury is the fifteen days between February 24, 2005 and March 11, 2005." Id. at 11.

Sixth, petitioners allege equitable tolling of the statute of limitations is warranted. Petition at 12. Petitioners state W.J.'s encephalopathy is an "extraordinary circumstance" that tolls the statute of limitations in cases under the Vaccine Act and cite K.G. v. Secretary of Health & Human Services, 951 F.3d 1374 (Fed. Cir. 2020) for support. Petitioners contend the Federal Circuit in K.G. held "that equitable tolling under the Vaccine Act applied to an adult who was mentally incapacitated for some five years. . . . It stands to reason, then, that the same should apply to a minor with permanent brain damage." Id. at 13. Petitioners also state they exercised reasonable diligence in bringing this matter. Id. at 14. W.J. was diagnosed with autism and they "had no basis for questioning" his diagnosis. Id. at 15. However, petitioners state "that vaccines do sometimes cause or enhance autism-like symptoms." Id. at 16. Petitioners cite Paluck v. Secretary of Health & Human Services, 786 F.3d 1373, 1379 (Fed. Cir. 2015) where "K.P. won a favorable judgment based on his parents' amply supported allegation that he was a child 'suffering from both a mitochondrial disorder and autism who experienced developmental regression following vaccination.'" Id.

Petitioners discovered W.J.'s genetic aberration on March 19, 2019 and "soon came to the conclusion that because of the Xq28 duplication, [W.J.], in spite of his autism-like symptoms, either might not be autistic at all or that the Xq28 duplication is a cause of his autism." Id. at 17. They allege that they realized in light

of the genetic mutation, the MMR vaccine should not have been administered, and that the MMR vaccine caused W.J.'s permanent injury. Id. at 18. W.J.'s parents assert that they exercised reasonable diligence and "the statute of limitations in this matter began to toll no earlier than March 19, 2019, when [W.J.'s] parents were first informed of his Xq28 duplication." Id.

Petitioners also allege "[t]o consider equitable tolling for K.G.'s drug and alcohol induced mental incapacity, but not for [W.J.'s] congenital genetically-caused mental incapacity, would be disability discrimination in violation of [W.J.'s] Fourteenth Amendment rights." Petition at 18. Petitioners cite Justice Marshall's concurring in part opinion in City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985) for support.

Finally, petitioners allege that the K.G. standard—"that the proper analysis of equitable tolling based on mental incapacity in the Vaccine Act context must consider both extraordinary circumstances and diligence"—applies in this matter. Petition at 19.

B. Respondent's Contentions

Respondent contends petitioners filed their claim for compensation "after the expiration of the statutorily prescribed limitations period set forth in Section 16(a)(2) of the Vaccine Act." Resp. Reply at 1. Further, respondent asserts that "petitioners have not demonstrated the extraordinary circumstances necessary to equitably toll the Act's statute of limitations." Id.

Specifically, respondent states "[s]ymptoms of W.J.'s alleged injury began to manifest before March 2006, when W.J. was diagnosed with a speech delay. Therefore, to comply with Section 16(a)(2) of the Vaccine Act, petitioners needed to file a petition on W.J.'s behalf by March 2009." Resp. Reply at 2. Respondent states that petitioners argue for the application of the discovery rule, "suggesting that the Act's statute of limitations should not have begun running until March 2019, when they conceived of a possible connection between W.J.'s autism and the MMR vaccine. The Federal Circuit has held that there is no explicit or implied discovery rule under the Vaccine Act." Id. at 3. "Accordingly, [respondent contends that] the statutory filing period began to run in 2006, when W.J. experienced the first symptoms of his autism spectrum disorder—not in 2019, when petitioners devised a purported connection between W.J.'s symptoms and the MMR vaccine." Id.

Regarding equitable tolling, respondent states, "petitioners have not shown a diligent pursuit of W.J.'s rights or extraordinary circumstances." Resp. Reply at 4. "The Federal Circuit has expressly held that equitable tolling is not a substitute for the discovery rule and is not available simply because the application of the statute of limitations would otherwise deprive a petitioner of his claim." Id. "W.J.'s age and incapacity are not bases for equitable tolling." Id. Respondent claims K.G. does not support petitioners' position. First, "K.G. was an incapacitated adult." Id. at 5. "Her relationship with her appointed guardian became strained and was later terminated." Id. "Accordingly, during the relevant time period, K.G. had no one to act on her behalf and was incapable of filing a claim

under the Vaccine Act; for this reason, the Court found that equitable tolling was appropriate in her case." Id. Respondent alleges, "[u]nlike K.G., W.J. was an infant at the time of his vaccination, and his parents (the petitioners) were entirely capable of filing a claim on his behalf." Id. Respondent also argues that "[t]aken to its logical conclusion, petitioners' equitable tolling argument would essentially mean that the three-year statute of limitations is irrelevant in all cases involving young children who cannot file claims on their own behalf. This is not what the Vaccine Act contemplates." Id.

Lastly, the respondent asserts that petitioners have not provided a procedural basis for their assertions. "Procedurally, petitioners have not demonstrated a basis for equitable tolling, and their claim should be dismissed as untimely." Resp. Reply at 6. To the extent that petitioners are asserting an injury based on their child's condition of autism, the respondent points out that "[s]ubstantively, it is important to note that the theory of MMR vaccines causing autism has been thoroughly evaluated and repeatedly rejected by the courts." Id.

IV. FACTUAL SUMMARY[8]

W.J. was born on February 8, 2004. Pet. Ex. 1 at 1. He was a healthy, full-term infant, with no significant neonatal problems apart from meconium which was suctioned at birth. Pet. Ex. 5 at 1; Pet. Ex. 13.

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[8] The factual summary is abbreviated to provide relevant information. Additionally, complete medical records were not filed. The records that have been filed, however, are sufficient for the purposes of this Decision.

W.J. received several childhood vaccinations, including influenza ("flu") vaccines from Dr. Stephen Borchman. Pet. Ex. 2 at 1. W.J. received his first hepatitis B vaccine on February 8, 2004, his second hepatitis B vaccine on May 12, 2004, and his third hepatitis B vaccine on August 23, 2004. Id. He also received his diphtheria-tetanus-acellular pertussis ("DTaP") vaccinations in April, June, and August 2004, August 2005, and February 2009. Id. The Haemophilus influenzae type B ("hib") vaccines were given at the same time as DTaP in April, June, and August 2004. Id. W.J. received his pediatric pneumococcal ("PCV7") and polio ("IPV") vaccinations in 2004, 2005, and 2009. Id. MMR vaccinations were administered on February 24, 2005 and March 15, 2008. Id. Flu vaccines were given in 2007, 2008, and 2010. Id. No adverse reaction to any of the vaccines was noted in the medical records.

On March 7, 2006, Dr. Ann Marie Abbondante examined W.J. and diagnosed him with a "speech delay." Pet. Ex. 6 at 13. W.J. then underwent an audiology evaluation on June 26, 2006, which revealed adequate hearing. Pet. Ex. 8 at 1. Dr. Abbondante ordered a blood test performed on March 9, 2006 that showed high platelet levels (424, normal range is 140-400) and low lymphocyte levels (3,276, normal range is 4,400-10,500). Pet. Ex. 9 at 1. Dr. Abbondante did not diagnose W.J. with encephalopathy or any immunodeficiencies.

On January 5, 2007, W.J. was diagnosed with Autism and Pervasive Developmental Delay following a psychological evaluation at Words 'N Motion Pediatric Multi-Disciplinary Diagnostic Evaluation and

Treatment Center by Psychologist D. Jeanne Romeo. Pet. Ex. 39 at 17.

W.J. presented to Dr. John Wells, pediatric neurologist, for a neurologic evaluation on January 24, 2007. Pet. Ex. 13 at 1. Dr. Wells stated W.J.'s developmental delays and language disorder required intensive therapeutic programs. Id. At that time, Dr. Wells considered ordering an MRI and genetic testing depending on W.J.'s progress. Id. Dr. Wells did not diagnosis W.J. with encephalopathy.

From June 22 to June 25, 2007, W.J. was hospitalized with a fever and swollen glands. Pet. Ex. 12 at 11. W.J. presented in the emergency room with swelling in the jaw and neck, runny nose, and a moderately-sore throat. Id. at 9. His white blood cell count was consistent with a bacterial infection, and he was admitted to the hospital with a diagnosis of cervical lymphadenitis.[9] Id. at 11, 18. Three days later, he was discharged with antibiotics. Id. at 11. Bloodwork performed on July 3, 2007, showed W.J. had an elevated white blood count (11.9, normal range is 4.8-10.8), elevated platelet count (548), as well as high monocyte (0.6, normal range is 0.11-0.59) and lymphocyte numbers (5.9, normal range is 1.2-3.4). Pet. Ex. 10 at 7. W.J. was not diagnosed with encephalopathy at any time during this hospitalization. Additionally, W.J. was not diagnosed with any immunodeficiencies.

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[9] Cervical lymphadenitis is the "enlarged, inflamed, and tender cervical lymph nodes, seen in certain infectious diseases of children, such as acute infections of the throat." Cervical Lymphadenitis, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=87515 (last visited Feb. 3, 2022).

W.J. attended yearly follow-up visits with Dr. Borchman from February 2009 to February 2014. Pet. Ex. 7 at 3-11. On February 21, 2011, W.J. presented to Dr. Borchman for a follow up of strep throat. Id. at 5. Dr. Borchman noted W.J.'s moderate to severe autism diagnosis. Id. W.J. also received his first hepatitis A vaccine. Id. No adverse reaction to the vaccine was noted. During these years, W.J. was not diagnosed with encephalopathy or immunodeficiencies.

On February 20, 2012, W.J. returned to Dr. Borchman for atopic dermatitis. Pet. Ex. 7 at 7. Dr. Borchman again noted W.J.'s moderate to severe autism, and a past history of lead poisoning. Id.; Pet. Ex. 10 at 9. Dr. Borchman assessed W.J. for "unstable atopic dermatitis" and ordered heavy metal testing to rule out lead poisoning, plus allergy testing. Pet. Ex. 7 at 7. Dr. Borchman explained to petitioners there was a lack of data associating autism spectrum disorders with diet. Id. W.J.'s blood work showed he had numerous abnormal reactions to a variety of allergens and had an elevated platelet count (496). Pet. Ex. 10 at 11.

On February 19, 2014, W.J. returned to Dr. Borchman for eczema and rhinitis. Pet. Ex. 7 at 10. W.J. had numerous environmental allergies, and Dr. Borchman documented that his parents "refuse[] any steroid nasal sprays" and medications. Id. Dr. Borchman also expressed his concern with W.J.'s mother's refusal to use prescription steroid creams or any medications to control W.J.'s allergies. Id. at 10-11. W.J.'s mother agreed to return to W.J.'s immunologist, Dr. Russo, and to restart allergy and eczema medications.

She refused the diphtheria, pertussis, and tetanus ("DPT") vaccine. Id. at 11.

On April 4, 2014, W.J. underwent a variety of lab tests, including genetic screening, ordered by Dr. Maya Klein. Pet. Ex. 11 at 1-10. Testing showed a normal blood panel, normal platelet count, and normal levels of heavy metals. Id. at 1-3. W.J. exhibited high antibodies to the mumps virus (71.2, negative range <9.0), and the records noted that "[a] positive result generally indicates past exposure to Mumps virus or previous vaccination." Id. W.J. also had elevated antibodies to the Streptococcus B virus (210, negative range 0-170), herpes virus (17.66, negative range, <0.76), and pneumonia virus (118, indeterminate range 100-320), noting "[v]alues >100 may indicate a recent infection . . . and need to be confirmed." Id. at 4, 6, 8. Genetic testing revealed a MTHFR homozygous A1298C mutation.[10] Id. at 4, 6, 8.

W.J. presented to Dr. Maria Del Pilar Trelles-Thorne for a psychiatric evaluation on July 9, 2018. Pet. Ex. 71 at 59. Dr. Trelles-Thorne performed a comprehensive evaluation to help petitioners manage

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[10] MTHFR is "a common, autosomal recessive, inborn error of folate metabolism caused by mutation in the MTHFR gene (locus: 1p36.3), which encodes the enzyme. The chief biochemical finding is homocystinuria with normal levels of plasma methionine." Methylene Tetrahydrofolate Reductase (MTHFR) Deficiency, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=30976 (last visited Jan. 21, 2022). "Clinical manifestations, age of onset, and severity are highly variable; characteristics include signs of neurologic damage ranging from psychiatric symptoms to fatal developmental delay, microcephaly, ectopia lentis, and thrombosis." Id.

W.J.'s irritability, mood swings, and poor sleep. Id. Dr. Trelles-Thorne prescribed Risperdal.[11] Id. at 60.

W.J. returned to Dr. Trelles-Thorne on January 30, 2019, for medication management of irritability and disruptive behaviors. Pet. Ex. 71 at 32. Dr. Trelles-Thorne ordered a number of medications for W.J. and noted his autism spectrum disorder diagnosis. Id. at 33-34.

On February 22, 2019, W.J. underwent genetic testing that revealed he had a duplication on the Xq28 chromosome of "uncertain clinical significance—likely benign." Pet. Ex. 14 at 1.

On February 11, 2021, Dr. Trelles-Thorne saw W.J. for psychopharmacology evaluation. Pet. Ex. 71 at 2. W.J. was noted to have autism spectrum disorder and unspecified bipolar disorder. Id. Dr. Trelles-Thorne changed W.J.'s dosage of lithium.[12] Id. at 3. The records do not indicate that Dr. Trelles-Throne ever

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[11] Risperdal is a trademark name for risperidone, "a benzisoxazole derivative used as an antipsychotic agent." Risperdal, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=43964 (last visited Jan. 20, 2022); Risperidone, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=43965 (last visited Jan. 20, 2022).

[12] Lithium carbonate, the carbonate salt of lithium, is "used as a mood stabilizer in treatment of acute manic and hypomanic states in bipolar disorder and in maintenance therapy to reduce the intensity and frequency of subsequent manic episodes." Lithium Carbonate, Dorland's Online Med. Dictionary, https://www.dorlandsonline.com/dorland/definition?id=87087 (last visited Jan. 21, 2022).

diagnosed W.J. with encephalopathy or any immunodeficiency disorder.

Although the petitioners allege that the MMR vaccination administered to W.J. on February 24, 2005 caused encephalopathy as well as a number of immunodeficiencies, the medical records do not include a diagnosis of encephalopathy or immunodeficiency disorder. See Petition at 1.

V. LEGAL FRAMEWORK

A. Vaccine Act Statute of Limitations

Section 16(a)(2) of the Vaccine Act governs claims resulting from vaccines administered after October 1, 1988, and reads,

> if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

§ 16(a)(2). Therefore, claims resulting from vaccines administered after October 1, 1988 must be filed within 36 months of the first symptom or manifestation of onset of the alleged vaccine-related injury. The statute of limitations begins to run from the onset of the first objectively cognizable symptom, whether or not that symptom is sufficient for diagnosis. Carson v. Sec'y of Health & Hum. Servs., 727 F.3d 1365, 1369

(Fed. Cir. 2013). Special masters have appropriately dismissed cases that were filed outside the limitations period, even by a single day or two. See, e.g., Spohn v. Sec'y of Health & Hum. Servs., No. 95-0460V, 1996 WL 532610 (Fed. Cl. Spec. Mstr. Sept. 5, 1996) (dismissing case filed one day beyond the 36-month limitations period), aff'd, 132 F.3d 52 (Fed. Cir. 1997); Cakir v. Sec'y of Health & Hum. Servs., No. 15-1474V, 2018 WL 4499835, at *4 (Fed. Cl. Spec. Mstr. July 12, 2018).

B. Motion to Dismiss

Although the Vaccine Act and the Vaccine Rules contemplate case dispositive motions, the dismissal procedures included within the Vaccine Rules do not specifically include a mechanism for a motion to dismiss. See §§ 12(d)(2)(C)-(D); Vaccine Rule 8(d); Vaccine Rule 21. However, Vaccine Rule 1 provides that for any matter not specifically addressed by the Vaccine Rules, the special master may regulate applicable practice consistent with the rules and the purpose of the Vaccine Act. Vaccine Rule 1(b). Vaccine Rule 1 also provides that the Rules of the Court of Federal Claims ("RCFC") may apply to the extent they are consistent with the Vaccine Rules. Vaccine Rule 1(c).

Accordingly, there is a well-established practice of special masters entertaining motions to dismiss in the context of RCFC 12(b)(6), which allows the defense of "failure to state a claim upon which relief can be granted" to be presented via motion. See, e.g., Herren v. Sec'y of Health & Hum. Servs., No. 13-1000V, 2014 WL 3889070 (Fed. Cl. Spec. Mstr. July 18, 2014); Bass v. Sec'y of Health & Hum. Servs., No. 12-135V, 2012

WL 3031505 (Fed. Cl. Spec. Mstr. June 22, 2012); Guilliams v. Sec'y of Health & Hum. Servs., No. 11-716V, 2012 WL 1145003 (Fed. Cl. Spec. Mstr. Mar. 14, 2012); Warfle v. Sec'y of Health & Hum. Servs., No. 05-1399V, 2007 WL 760508 (Fed. Cl. Spec. Mstr. Feb. 22, 2007).

Under RCFC 12(b)(6), a case should be dismissed "when the facts asserted by the claimant do not entitle him to a legal remedy." Extreme Coatings, Inc. v. United States, 109 Fed. Cl. 450, 453 (2013) (quoting Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). In considering a motion to dismiss under RCFC 12(b)(6), allegations must be construed favorably to the pleader. Id. (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). However, the pleading must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Golden v. United States, 137 Fed. Cl. 155, 169 (2018) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); see also Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

"To determine whether a complaint states a plausible claim for relief, the court must engage in a context-specific analysis and 'draw on its judicial experience and common sense.'" Golden, 137 Fed. Cl. at 169 (quoting Iqbal, 556 U.S. at 679). However, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." Neitzke v. Williams, 490 U.S. 319, 327 (1989). Nonetheless, on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). In assessing motions to dismiss in the

Vaccine Program, special masters have concluded that they "need only assess whether the petitioner could meet the Act's requirements and prevail, drawing all inferences from the available evidence in petitioner's favor." Herren, 2014 WL 3889070, at *2; see also Warfle, 2007 WL 760508, at *2.

C. Doctrine of Equitable Tolling

The Federal Circuit has held that the doctrine of equitable tolling can apply to Vaccine Act claims in limited circumstances. See Cloer v. Sec'y of Health & Hum. Servs., 654 F.3d 1322, 1340-41 (Fed. Cir. 2011). The Federal Circuit determined equitable tolling on the basis of mental incompetence is available in Vaccine Act cases. K.G., 951 F.3d at 1381. However, lack of knowledge of an actionable claim is not a basis for equitable tolling. Id. at 1380 (citing Cloer, 654 F.3d at 1344-45).

To establish that equitable tolling of a statute of limitations is appropriate, a claimant must prove (1) he pursued his rights diligently and (2) an extraordinary circumstance prevented him from timely filing the claim. K.G., 951 F.3d at 1379 (citing Menominee Indian Tribe v. United States, 136 S. Ct. 750, 755 (2016). In K.G., the Federal Circuit determined "the proper analysis of equitable tolling based on mental incapacity in the Vaccine Act context must consider both extraordinary circumstances and diligence." Id. at 1381. All relevant facts and circumstances must be considered when determining whether a claimant pursued his rights diligently. Id. at 1382. "It is possible, for instance, that a reasonable amount of diligence for an individual with memory loss or

hallucinations would equate to no diligence for an able-minded individual." Id. Additionally, "[a] claimant need only establish diligence during the period of extraordinary circumstances to meet this test." Id. (citing Checo v. Shinseki, 748 F.3d 1373, 1380 (Fed. Cir. 2014)).

To show extraordinary circumstances, "a Vaccine Act claimant must show that [his] failure to file was the direct result of a mental illness or disability that rendered [him] incapable of rational thought, incapable of deliberate decision making, incapable of handling [his] own affairs, or unable to function in society." K.G., 951 F.3d at 1381. However, "[a] medical diagnosis alone or vague assertions of mental problems are insufficient" to establish extraordinary circumstances. Id. at 1381-82.

Under the provisions of the Vaccine Act, a petition seeking compensation on behalf of a minor may only be filed by the minor's "legal representative," § 11(b)(1)(A), a term which the Act defines as "a parent or an individual who qualifies as a legal guardian under State law." § 33(2).

D. Equal Protection Under the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment to the Constitution, and through the Due Process Clause of the Fifth Amendment, implicitly forbids most discriminations by the Federal Government against individuals. Bolling v. Sharpe, 347 U.S. 497 (1954). A potential violation of equal protection arises whenever the Government treats one group

differently than it treats another while it pursues some social goal. Black v. Sec'y of Health & Hum. Servs., 33 Fed. Cl. 546, 554 (1995), aff'd sub nom. Black v. Sec'y of Health & Hum. Servs., 93 F.3d 781 (Fed. Cir. 1996). Legislation, which classifies people into favored and nonfavored groups based upon race, is subject to "strict scrutiny." Palmore v. Sidoti, 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967); Anderson v. Martin, 375 U.S. 399 (1964).

However, under the Vaccine Program, the Vaccine Act's limitation period is rationally related to the dual legitimate legislative purposes undergirding the Vaccine Act: (1) the settling of claims quickly and easily, and (2) the protecting of manufacturers from uncertain liability making "production of vaccines economically unattractive, potentially discouraging vaccine manufacturers from remaining in the market." Cloer v. Sec'y of Health & Hum. Servs., 85 Fed. Cl. 141, 151-52 (2008) (quoting Brice v. Sec'y of Health & Hum. Servs., 240 F.3d 1367, 1368 (Fed. Cir. 2001)), rev'd on other grounds, 603 F.3d 1341 (Fed. Cir. 2010), aff'd on rehearing en banc, 654 F.3d 1322 (Fed. Cir. 2011).

VI. DISCUSSION

A. Applicable Statute of Limitations in the Vaccine Program

1. Alleged Injuries in the Petition

Petitioners allege that W.J. sustained injuries, including "chronic encephalopathy and immunodeficiency issues," resulting from adverse effects of the MMR vaccination received on February 24, 2005.

Petition at 3. Petitioners allege that W.J.'s "chronic encephalopathy and immunodeficiency issues were either directly caused by the administration of the MMR vaccine, or that the MMR vaccine significantly aggravated pre-existing cerebral and immunological damage caused by [W.J.'s] chromosomal aberration." Id. at 4. Petitioners also alleged that W.J. suffered from thrombocytosis, lymphocytopenia, lymphocytosis, monocytosis, granulocytopenia, severe eczema, and "many other allergies" that his "physicians offered no cause or diagnosis for;" an extremely high mumps antibody count on April 18, 2014, which "may be indicative of an unusual and chronic allergic reaction to the MMR vaccine;" and an emergency room visit for a swollen jaw and face and high fever, and "symptoms during this hospitalization were very similar to mumps, which may point to some adverse chronic reaction to the MMR vaccine." Petition at 4-9. Finally, petitioners allege W.J. suffered a chronic encephalopathy Table Claim. Id. at 11.

a. Petitioners' Table Claim

The Vaccine Injury Table defines chronic encephalopathy as a condition that "occurs when a change in mental or neurologic status, first manifested during the applicable Table time period as an acute encephalopathy or encephalitis, persists for at least 6 months from the first symptom or manifestation of onset or of significant aggravation of an acute encephalopathy or encephalitis." 42 C.F.R. § 100.3(d)(1)(i). Acute encephalopathy, for children less than 18 months of age, that presents without a seizure "is indicated by a significantly decreased level of consciousness that lasts at least 24 hours." 42 C.F.R. § 100.3(c)(2)(i)(A)(1).

Typical symptoms of encephalopathy include, but do not in themselves demonstrate an acute encephalopathy or a significant change in either mental status or level of consciousness, "[s]leepiness, irritability (fussiness), high-pitched and unusual screaming, poor feeding, persistent inconsolable crying, bulging fontanelle, or symptoms of dementia." 42 C.F.R. § 100.3(c)(2)(i)(C). Exclusionary criteria for encephalopathy include, "[a]n underlying condition or systemic disease shown to be unrelated to the vaccine (such as malignancy, structural lesion, psychiatric illness, dementia, genetic disorder, prenatal or perinatal central nervous system (CNS) injury)." 42 C.F.R. § 100.3(c)(2)(ii)(A). The time period for first symptom or manifestation of onset or of significant aggravation of encephalopathy is between 5 and 15 days after MMR vaccine administration. 42 C.F.R. § 100.3(a)(III)(B).

Petitioners alleged, "[p]rior to the administration of the MMR vaccine on February 24, 2005, [W.J.'s] medical records indicate no developmental delays or any other indication of mental incapacitation." Petition at 10. "After the administration of the MMR vaccine, [W.J.'s] developmental delays soon began to surface." Id. Petitioners cited W.J.'s March 7, 2006 doctor's appointment where he was diagnosed with speech delay as evidence of his developmental delays.

Petitioners claim,

> Given the before and after circumstantial evidence in the record, and based on the record as a whole, the Special Master should find that "the first symptom or manifestation of onset" of [W.J.'s] chronic

> encephalopathy, or the "significant aggravation" of a pre-existing encephalopathy, occurred within the fifteen-day time period described in the Vaccine Injury Table, "even though the occurrence of such symptom or manifestation within the time period was not recorded." 42 U.S.C. § 300aa-13(b)(2).

Petition at 11.

"The symptoms associated with an acute encephalopathy are neither subtle nor insidious." Blake v. Sec'y of Health & Hum. Servs., No. 03-31V, 2014 WL 2769979, at *6 (Fed. Cl. Spec. Mstr. May 21, 2014) (quoting Waddell v. Sec'y of Health & Hum. Servs., No. 10-316V, 2012 WL 4829291, at *6 (Fed. Cl. Spec. Mstr. Sept. 19, 2012)). Acute and chronic encephalopathy is a serious injury that can necessitate hospitalization. Miller v. Sec'y of Health & Hum. Servs., No. 02-235V, 2015 WL 5456093, at *37 (Fed. Cl. Spec. Mstr. Aug. 18, 2015).

W.J. has never been diagnosed with acute or chronic encephalopathy, nor have any of his treating physicians suspected the condition or noted either conditions as a differential diagnosis in the medical records. Therefore, in assessing all inferences from the available evidence in petitioner's favor, the undersigned finds that W.J. did not suffer from encephalopathy and does not fulfill the criteria for an encephalopathy Table claim.

However, even if petitioners were able to establish W.J. suffered an encephalopathy Table injury,

petitioners filed their claim beyond the statute of limitations. W.J. received the MMR vaccine on February 24, 2005. In order for the encephalopathy Table claim to apply, W.J.'s injury would have to have manifested between 5 and 15 days after MMR vaccine administration, or by March 11, 2005. Therefore, petitioners had 36 months from March 11, 2005 to file a Table claim in the Vaccine Program, or by March 11, 2008. Petitioners did not file their petition until May 7, 2021, and thus any Table claim is time-barred.

b. Cause-In-Fact Injuries

i. Chronic Encephalopathy

First, in regard to W.J.'s "chronic encephalopathy" claim, W.J. medical records do not include a diagnosis of or reference to encephalopathy or chronic encephalopathy by his treating physicians. W.J. was seen by multiple physicians to review his developmental progress, including Dr. Abbondante on March 7, 2006 who diagnosed him with speech delay, psychologist Romeo who diagnosed him with autism on January 5, 2007, and Dr. Wells who conducted a neurologic evaluation on January 24, 2007. None of W.J.'s treating physicians diagnosed or mentioned encephalopathy.

There is no evidence in W.J.'s medical records establishing that he was diagnosed with chronic encephalopathy. Thus, the undersigned finds that petitioners have failed to provide evidence with regard to the injury or condition of encephalopathy.

W.J. received the MMR vaccination at issue on February 24, 2005. W.J.'s medical records show W.J.

was diagnosed "speech delay" on March 7, 2006, and with autism spectrum disorder on January 5, 2007. Pet. Ex. 6 at 13; Pet. Ex. 39 at 17. Even if petitioners were able to establish W.J. suffered a chronic encephalopathy injury, petitioners filed their claim beyond the statute of limitations. Assuming the date of diagnosis for either condition (speech delay or autism spectrum disorder) was the first symptom or manifestation of the alleged vaccine-related injury, petitioners would have been required to file their petition prior to March 7, 2009 or January 5, 2010. Petitioners did not file their petition until May 7, 2021, and thus their claim is time-barred.

ii. Immunodeficiency Issues

In regard to W.J.'s "immunodeficiency issues" claim, petitioners alleged that W.J.'s blood tests on March 9, 2006, June 23, 2007, July 3, 2007, April 13, 2007, February 12, 2012, and April 8, 2014 "demonstrate[d] that his immune system suffered from irregularities for several years after the administration of the MMR vaccine." Petition at 4. However, the blood tests do not constitute evidence of a diagnosis of an immunodeficiency disorder. And the medical records do not contain any evidence that W.J. was diagnosed with an immunodeficiency disorder.

First, petitioners allege W.J. struggled with thrombocytosis. Petition at 4. Petitioners state W.J.'s blood sample collected on March 9, 2006 showed a high platelet count at 424 (normal range 140-400). Id. They state lab results were "indicative of a blood disorder known as thrombocytosis." Id. Petitioners then point to a blood samples drawn on July 3, 2007 and

February 20, 2012, which again showed a high platelet counts (548 and 469, respectively). However, on April 4, 2014, W.J. had a normal platelet count. W.J.'s abnormal platelet counts occurred during periods when he was ill. Further, none of W.J.'s physicians diagnosed him with thrombocytosis.

Similarly, from blood samples collected on March 9, 2006, April 13, 2007, and July 3, 2007, petitioners state these lab results showed an "indication" of blood disorders known as "lymphocytopenia or lymphopenia," "lymphocytosis," "monocytosis," and "granulocytopenia, a form of immunosuppression." Petition at 5-7. Again, these blood tests were drawn when W.J. was ill with a viral or bacterial infection. Most importantly, W.J.'s treating physicians did not diagnose W.J. with an abnormal immune illness due to these lab results.

Petitioners also alleged that W.J. suffered from eczema and "many other allergies," and stated "[t]here is research pointing to eczema as an autoimmune disease." Petition at 8. Additionally, petitioners stated W.J.'s April 2014 lab results indicated he had high mumps antibodies that "may be indicative of an unusual and chronic allergic reaction to the MMR vaccine." Id. However, the lab results state that "[a] positive result generally indicates past exposure to Mumps virus or previous vaccination." Pet. Ex. 11 at 3.

Finally, petitioners stated W.J.'s hospitalization on June 22, 2007 showed a high white blood count as well as high lymphocyte, monocyte, and granulocyte counts. Id. at 8-9. Petitioners allege that W.J.'s

"symptoms during this hospitalization were very similar to mumps, which may point to some adverse chronic reaction to the MMR vaccine." Id. at 9. However, the petitioners provide no evidence to suggest that W.J. had any adverse reaction to the MMR vaccine.

W.J. was never diagnosed with an immunodeficiency disorder and petitioners' own statements and beliefs are not evidence of a diagnosis of an immunodeficiency disease or disorder. W.J.'s physicians did not associate his illnesses with an immunodeficiency disorder or with the MMR vaccine, or any of W.J.'s vaccinations. During his hospitalization in June 2008, his physicians noted his white blood cell count was consistent with a bacterial infection and he was diagnosed of cervical lymphadenitis. However, W.J. was not diagnosed with an immunodeficiency disease or disorder. Overall, there is no evidence in W.J.'s medical records establishing that he was diagnosed with an immunodeficiency disorder.

Even if petitioners were able to establish W.J. suffered from an immunodeficiency disorder, petitioners filed their claim beyond the statute of limitations. The records show W.J. received a number of blood tests that showed, at various times, high platelet count (March 9, 2006), low absolute lymphocyte count (March 9, 2006), high lymphocyte count (April 13, 2007), high monocyte count (April 13, 2007), and low granulocyte count (April 13, 2007). Dr. Borchman diagnosed W.J. with unstable atopic dermatitis on February 20, 2012, and diagnosed eczema and rhinitis on February 19, 2014. Thus, petitioners' allegations that W.J.'s immune system struggled with "no less than

four immuno-related blood disorders: granulocytopenia, lymphocytopenia, lymphocytosis, and monocytosis, and a several years long battle with severe eczema, and many other allergies" is untimely.

In order to have filed a timely petition for thrombocytosis and lymphocytopenia, petitioners would have needed to assert these alleged injuries before March 9, 2009, 36 months after the 2006 blood test. For the lymphocytosis, granulocytopenia, and monocytosis allegations, petitioners would have needed to assert these alleged injuries before April 13, 2010, 36 months after the 2007 blood test. For the eczema and "many other allergies" claims, petitioners would have needed to assert these alleged injuries before February 20, 2015, 36 months after Dr. Borchman's exam and allergy testing. Assessing all inferences from the available evidence in petitioner's favor, petitioners' claims are time-barred.

Additionally, even if W.J.'s hospitalization on June 22-24, 2007 and high mumps count on April 8, 2014, were caused by the MMR vaccination, petitioners were required to file their petition prior to June 24, 2010 and April 8, 2017, respectively. Petitioners did not file their petition until May 7, 2021. As filed, the onset of W.J.'s claim, in order to be timely under the Vaccine Act, would have had to occur on or after May 7, 2018. Thus, their claim is time-barred.

c. Significant Aggravation Injuries

Petitioners argue W.J.'s "chronic encephalopathy and immunodeficiency issues were either directly caused by the administration of the MMR vaccine, or

the MMR vaccine caused 'significant aggravation' of pre-existing cerebral and immunological damage caused by [W.J.'s] Xq28 duplication, a chromosomal aberration." Petition at 2. As discussed above, petitioners failed to provide evidence that the MMR vaccine caused-in-fact W.J.'s alleged injuries.

As set forth earlier, there is no factual support in the contemporaneous medical records to support chronic encephalopathy or immunodeficiency disorder occurred after vaccination. Because there is no evidence, petitioners' significant aggravation claims fail as well.

Petitioners argue that the MMR vaccine caused significant aggravation of pre-existing cerebral and immunological damage caused by W.J.'s Xq28 duplication. However, petitioners have failed to provide any evidence to suggest vaccination or the Xq28 chromosomal duplication significantly or was any way associated with W.J.'s alleged injuries. Genetic testing on February 22, 2019, revealed the Xq28 chromosome duplication was "of uncertain clinical significance—likely benign." Pet. Ex. 14 at 1. None of W.J.'s physicians have documented that W.J.'s vaccinations or his genetic testing was associated with his alleged injuries.

Further, as discussed above, even if petitioners were able to establish the MMR vaccine significantly aggravated W.J.'s pre-existing injuries, petitioners filed their claim beyond the statute of limitations.

2. Equitable Tolling

The Vaccine Act required petitioners to file their claim on behalf of W.J. under the Vaccine Act within 36 months of the onset of the earliest symptom or manifestation of an injury. See Markovich v. Sec'y of Health & Hum. Servs., 447 F.3d 1353, 1357 (Fed. Cir. 2007) (holding that "either a 'symptom' or a 'manifestation' of onset of a vaccine-related injury is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large").[13]

The petition was filed on May 7, 2021. In order for petitioners' vaccine claim to be timely, W.J. would have had to experience the initial onset of his vaccine-related injuries, as pled in the petition, on or after May 7, 2018. Any claims for injuries that manifested prior to May 7, 2018, are time-barred.

However, petitioners assert equitable tolling of the statute of limitations is warranted in this matter. For equitable tolling to apply, petitioners must prove two elements: (1) they pursued their rights diligently, and (2) an extraordinary circumstance prevented them from timely filing the claim. K.G., 951 F.3d at 1379. In K.G., the court allowed equitable tolling for the period of K.G.'s mental incapacity and held equitable

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[13] For cases that have been dismissed for failure to file within the prescribed statute of limitations, see Villalobos ex rel. A.D. v. Sec'y of Health & Hum. Servs., No. 20-96V, 2020 WL 5797865 (Fed. Cl. Spec. Mstr. Sept. 2, 2020); Palencia ex rel. C.A.P. v. Sec'y of Health & Hum. Servs., No. 20-180V, 2020 WL 5798504 (Fed. Cl. Spec. Mstr. Sept. 2, 2020); Edoo v. Sec'y of Health & Hum. Servs., No. 13-302V, 2014 WL 1381341 (Fed. Cl. Spec. Mstr. Mar. 19, 2014); Boettcher v. Sec'y of Health & Hum. Servs., No. 17-1402V, 2018 WL 2925043 (Fed. Cl. Spec. Mstr. May 2, 2018).

tolling is available to mentally incapacitated individuals under the Vaccine Act. Id. In that case, petitioner, an adult, alleged the flu vaccine caused chronic inflammatory demyelinating polyneuropathy ("CIDP") in 2011. Id. at 1376. "During the same period, K.G. succumbed to alcoholism, spent months in the hospital, and developed amnesia. In Spring 2014, an Iowa state court declared K.G. incapable of caring for herself and, against K.G.'s will, appointed K.G.'s sister as her guardian." Id. K.G. regained her mental faculties by May 2016 and filed a claim in the Vaccine Program for her alleged vaccine injury in January 2018. Id.

Unlike K.G., W.J. was an infant at the time of his vaccination, and the petitioners, W.J.'s parents, were capable of filing a claim on his behalf. W.J.'s parents have not filed any evidence to suggest that they were incapacitated in any way during any time frame relevant to their petition. While the Court in K.G. confirmed an equitable tolling right for incapacitated individuals, nothing in the decision negated a legal representative's rights and responsibilities under the Vaccine Act. A legal representative is "a parent or an individual who qualifies as a legal guardian under State law." § 33(2). The Vaccine Act expressly permits a legal representative to file a petition for compensation on behalf of a minor. § 11(b)(1)(A). Therefore, petitioners had the right and responsibility to bring a timely claim on W.J.'s behalf. The decision in K.G. did not alter this provision.

W.J.'s "mental incapacity" does not serve as an "extraordinary circumstance." Petitioners, as W.J.'s legal representatives as his parents, had the ability to file

a petition 36 months from the onset of the earliest symptom or manifestation of W.J.'s injury. The same is true for all petitions brought on behalf of all minors. Parents or other legal representatives must file the petition on behalf of a minor within the applicable statute of limitations.

3. The Discovery Rule

Petitioners argue that it was not until genetic testing on March 19, 2019 which revealed that W.J. had a chromosomal aberration known as Xq28 duplication, that they believed that the MMR vaccine should not have been administered to him. Petition at 17-18. The petitioners assert "the statute of limitations in this matter began to toll no earlier than March 19, 2019, when [W.J.'s] parents were first informed of his Xq28 duplication." Id. at 18.

Essentially, petitioners argue for the application of a discovery rule, suggesting that the Act's statute of limitations should not have begun running until March 19, 2019. The Federal Circuit has held that there is no explicit or implied discovery rule under the Vaccine Act. Cloer, 654 F.3d at 1337. The date of the occurrence of the first symptom or manifestation of onset "does not depend on when a petitioner knew or reasonably should have known anything adverse about [the] condition." Id. at 1339. Nor does it depend on when a petitioner knew or should have known of a connection between an injury and a vaccine. Id. at 1338 ("Congress made the deliberate choice to trigger the Vaccine Act statute of limitations from the date of occurrence of the first symptom or manifestation of the injury for which relief is sought, an event that

does not depend on the knowledge of a petitioner as to the cause of an injury."); see also Markovich, 477 F.3d at 1358 ("Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act."). Accordingly, the statutory filing period was not tolled until March 19, 2019, when petitioners learned of W.J.'s test results.

4. Fraud

Petitioners claim they were unable to file a claim on behalf of W.J. because the government fraudulently concealed the connection between vaccines and autism. Petition at 17. However, the petitioners did not file any evidence to suggest that the government was fraudulently concealing the connection between vaccines and autism. Furthermore, petitioners failed to show how respondent's alleged concealment prevented them from filing a petition on behalf of W.J. At the time W.J. was vaccinated and later diagnosed with autism the Vaccine Program was conducting an Omnibus Autism Proceeding ("OAP"), which included more than 5,100 petitions filed under the Vaccine Act alleging that vaccines caused autism. See Snyder v. Sec'y of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *4 n.12 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 706 (2009). Petitioners could have filed a petition during that timeframe, but did not do so.

Petitioners also cite Paluck, 786 F.3d 1373 to emphasize that "that vaccines do sometimes cause or enhance autism-like symptoms." Petition at 16. The

Court in Paluck held that the parents of K.P. demonstrated "by preponderance of evidence that their son's existing mitochondrial disorder was significantly aggravated by his receipt of vaccines within medically acceptable time, and thus he was entitled to compensation under National Childhood Vaccine Injury Act." 786 F.3d at 1373. K.P. demonstrated significant developmental delays when he was nine months old and underwent evaluations that showed he had gross motor delays. Id. at 1375. K.P. received an MMR vaccine and pneumococcal vaccines at his one-year well baby visit, and two days later had a high temperature. Id. at 1376. After a series of tests and a three weeklong hospitalization, K.P. was subsequently diagnosed with an unspecified mitochondrial disorder "most likely present from the time of K.P.'s birth." Id. The petitioners in Paluck showed by preponderant evidence, the first sign of neurodegeneration was within 23 days of vaccines, and the findings of his pediatrician, neurologist, and speech therapist, as well as MRI exams, showed K.P.'s rapid, progressive neurodegeneration as predicted by his expert's medical theory. Id. at 1379.

Here, petitioners did not show W.J. has a mitochondrial disorder. W.J. was assessed with speech delay over a year after the MMR vaccine at issue was administered and was diagnosed with autism two years later. Petitioners failed to provide any evidence linking W.J.'s speech delay or autism diagnosis to the MMR vaccination, how the government contributed to obstructing petitioner's ability to file a petition on behalf of W.J., or how W.J.'s condition is similar to that of K.P.'s in Paluck. Additionally, the Paluck case did

not involve the issues of the statute of limitations or equitable tolling.

Petitioners have the burden of establishing the timely filing of their claim, and they have failed to provide evidence that their petition was filed within "36 months after the date of occurrence of the first symptom or manifestation of onset . . . of such injury" as required by the Vaccine Act. Because petitioners have alleged injury onset in 2006 (diagnosis of speech delay), and at the latest, 2012 (eczema and allergies), the undersigned, in assessing all inferences from the available evidence in petitioner's favor, finds it appropriate to dismiss the case for failure to establish that the petition was timely filed.

5. Petitioner's Autism Diagnosis

In the OAP, three special masters conducted separate proceedings in test cases involving the two theories of autism causation. All found petitioners had not provided preponderant evidence of causation. See Hazlehurst v. Sec'y of Health & Hum. Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd sub nom. Hazlehurst ex rel. Hazlehurst v. Sec'y of Health & Hum. Servs., 88 Fed. Cl. 473 (2009), aff'd sub nom. Hazlehurst v. Sec'y of Health & Hum. Servs., 604 F.3d 1343 (Fed. Cir. 2010); Cedillo v. Sec'y of Health & Hum. Servs., 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); Mead ex rel. Mead v. Sec'y of Health & Hum. Servs., No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King ex rel. King v. Sec'y of Health & Hum. Servs., No. 03-584V, 2010 WL 892296

(Fed. Cl. Spec. Mstr. Mar. 12, 2010); Dwyer ex rel. Dwyer v. Sec'y of Health & Hum. Servs., No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Snyder, 2009 WL 332044.

Here, petitioners state, "[b]ased on his symptoms and behaviors, [W.J.] was diagnosed by his physician as having autism. . . . Indeed, [W.J.] does have several autism-like symptoms." Petition at 15. Petitioners assert respondent's denial "of any connection between vaccines and autism can be misleading because they serve to obscure any connection between vaccines and injuries resulting in autism-like symptoms, if not autism proper, in children." Id. at 16. "Since the cause of autism is unknown, the postulation that vaccines may sometimes cause autism-like symptoms, rather than autism proper in children, cannot be ruled out." Id. 19

Petitioners further state respondent's "categorical denials have the effect of misleading and discouraging parents with children who have autism-like symptoms from even thinking that the symptoms might have been caused by a vaccine." Petition at 16. Petitioners argue that "[r]espondent's assertions that hard science has ruled out any connection between vaccines and autism-like symptoms can amount to a 'fraudulent defense' to any claims suggesting otherwise, warranting equitable tolling in some cases. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)."[14] Id.

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[14] Petitioners cite Holmberg v. Armbrecht, an equity case where shareholders and creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis sued the defendant for fraudulently concealing his shareholder interest, which delayed petitioners from bringing suit. 327 U.S. 392, 393 (1946).

> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.
>
> This equitable doctrine is read into every federal statute of limitation. Holmberg v. Armbrecht, 327 U.S. 392, 396-397 (1946) (Internal citations and quotation marks omitted).

Petition at 17.

Petitioners then assert that after genetic testing, a chromosomal aberration, Xq28 duplication, was discovered. Petition at 17. Petitioners believe the Xq28 duplication impaired [W.J.'s] immune system and caused his mental incapacities, and he "might not be autistic at all or that the Xq28 duplication is a cause of his autism." Id. Finally, petitioners state, "because of the Xq28 duplication, the MMR vaccine should not have been administered to [W.J.] at all, and that it

probably significantly aggravated his congenital chromosomal aberration." Id. at 18.

Petitioners, however, do not provide any evidence to support their contentions that respondent's actions prevented them from filing a timely claim in the thirty-six months after W.J. first began to show signs of autistic spectrum disorder or how the fraudulent defense pertains to this case. Around the time of W.J.'s vaccination and autism diagnosis, more than 5,100 petitions were filed under the Vaccine Act alleging that vaccines caused autism. See Snyder, 2009 WL 332044 at *4 n.12.

There is no evidence here to suggest that fraud or concealment prevented petitioners from timely filing claims on behalf of W.J. for allegations of autism following vaccination. Thus, the undersigned does not agree that respondent's "categorical denials" had the "effect of misleading and discouraging parents with children who have autism-like symptoms" from filing petitions, or that this claim warrants "equitable tolling" based on any assertion of fraud. Petition at 16. Therefore, in assessing all inferences from the available evidence in petitioner's favor, petitioners have failed to show respondent's actions prevented them from filing a timely petition.

6. Petitioner's Fourteenth Amendment Claim

Petitioners contend, "[t]o consider equitable tolling for K.G.'s drug and alcohol induced mental incapacity, but not for [W.J.'s] congenital genetically-caused mental incapacity, would be disability discrimination

in violation of [W.J.'s] Fourteenth Amendment rights." Petition at 18. Petitioners cite City of Cleburne, 473 U.S. 432, stating disparate treatment between neuro-normal and mentally incapacitated individuals violates the Fourteenth Amendment's Equal Protection clause. Id. "The equal protection clause of the Fourteenth Amendment dictates that [W.J.] receive the same consideration for equitable tolling that was offered to K.G." Id. at 19. But petitioners fail to comprehend that they, as parents and legal representatives of W.J., had the right and responsibility to timely file a petition. They have not asserted that they have any disability or mental incapacity. Thus, their argument based on the Fourteenth Amendment fails.

Further, under the Vaccine Program, the Vaccine Act's limitation period is rationally related to the dual legitimate legislative purposes undergirding the Vaccine Act: (1) the settling of claims quickly and easily, and (2) the protecting of manufacturers from uncertain liability making "production of vaccines economically unattractive, potentially discouraging vaccine manufacturers from remaining in the market." See Cloer, 85 Fed. Cl. 141 (2008) (quoting Brice, 240 F.3d at 1368).

Highlighting in Cloer that the "neutral" nature of the 36-month statute of limitations "treats all petitioners equally," the Federal Circuit appears to have affirmed, without overt discussion, the Court of Federal Claims' use of rational basis review to conclude that the statutorily prescribed limitations period is rationally related to the "legitimate legislative purposes undergirding the Vaccine Act." Cloer, 85 Fed.

Cl. at 151-52 (quoting Brice, 240 F.3d at 1368). See id. ("[T]here can be no question that applying the Vaccine Act's limitation period is rationally related to the dual legitimate legislative purposes undergirding the Vaccine Act: (1) the settling of claims quickly and easily, and (2) the protecting of manufacturers from uncertain liability [that makes the] 'production of vaccines economically unattractive, [and] potentially discourag[es] vaccine manufacturers from remaining in the market.'") (internal footnote omitted). The Court of Federal Claims further stated in Cloer that "Congress is not obligated to extend the coverage of the Vaccine Act . . . to all person[s] suffering a vaccine-related injury." Id. at 150 (citing Leuz v. Sec'y of Health & Hum. Servs., 63 Fed. Cl. 602, 608 (2005)).

The petitioners have not shown that they fall within a protected class of persons. The claims of all petitioners, regardless of the alleged injury, must be evaluated consistent with the terms of the Vaccine Act, provided the claimants have met the threshold requirement of filing the petition within the time limit prescribed by the statute. Here, petitioners have failed to file within the appropriate time frames set forth under the statute.

VII CONCLUSION

It is clear from the medical records that W.J. has struggled with illness, and the undersigned has great sympathy for what he and his parents have endured due to his illness. The undersigned's decision, however, cannot be decided based upon sympathy, but rather on the evidence and law.

Accordingly, for all the reasons stated above, in assessing all inferences from the available evidence in petitioner's favor, the undersigned **GRANTS** respondent's motion to dismiss and this case is dismissed for failure to timely file the petition within the statute of limitations. In the absence of a timely filed motion for review pursuant to Vaccine Rule 23, the Clerk of Court **SHALL ENTER JUDGMENT** in accordance with this Decision.

IT IS SO ORDERED.

s/Nora Beth Dorsey
Nora Beth Dorsey
Special Master

APPENDIX G

United States Court of Federal Claims
Office of Special Masters

W.J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.
Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

Case No. 21-1342V

Special Master Nora Beth Dorsey

DECISION

Filed: March 4, 2022

R.J. and A.J., pro se, Staten Island NY,
for Petitioners

Sarah B. Rifkin,
U.S. Department of Justice
Washington, DC, for Respondent

ORDER GRANTING PETITIONERS' MOTION FOR REDACTION[1]

On February 23, 2022, petitioners filed a motion to redact the undersigned's February 16, 2022 Decision denying entitlement and granting respondent's Motion to Dismiss. Petitioner's Motion ("Pet. Mot.") for Redaction, filed Feb. 23, 2022 (ECF No. 31). Petitioners filed a supplemental motion to amend the caption on March 2, 2022. Pet. Mot. for Amendment of the Caption in this Action ("Pet. Mot. for Amendment"), filed Mar. 2, 2022 (ECF No. 33). The respondent did not object to the motion.

For the following reasons, petitioners' motion is **GRANTED**.

I. RELEVANT PROCEDURAL HISTORY

On May 7, 2021, R.J. and A.J. ("petitioners") filed a petition, on behalf of their minor child, W.J.,

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[1] The undersigned intends to post this Order on the United States Court of Federal Claims' website. **This means the Order will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioners have 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, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this unpublished Order contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services).

pursuant to the National Vaccine Injury Compensation Program ("Vaccine Act" or "the Program"), 42 U.S.C. § 300aa-10 et seq. (2012).[2] Petitioners generally allege that their minor child, W.J., suffered from a chronic encephalopathy Table claim and/or a cause-in-fact or significant aggravation of pre-existing cerebral and immunological damage, including immune-related blood disorders, severe eczema, and many other allergies as a result of a measles, mumps, and rubella ("MMR") vaccination administered on February 24, 2005. Petition at 1 (ECF No. 1).

On February 16, 2022, the undersigned issued a decision denying entitlement and granting respondent's motion to dismiss. Decision dated Feb. 16, 2022 (ECF No. 29). That same day, the undersigned issued a scheduling order stating that during the pendency of the case, petitioners' minor child reached the age of majority. Order dated Feb. 16, 2022 (ECF No. 30). The undersigned instructed petitioners' to file a motion to amend the caption to modify the proper party of interest from W.J.'s parents to W.J. Id.

On February 23, petitioners filed a motion to redact petitioners' names in the decision and to keep their son's name as initials. Pet. Mot. for Redaction at 1. Petitioner filed additional documentation showing petitioners remained the legal guardian of their son despite his reaching the age of majority. Id. Petitioners

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[2] The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 to -34 (2012). All citations in this Order to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

then filed a supplemental motion to amend the caption on March 2, 2022, requesting redaction and caption amendment to "keep sensitive medical or other potentially embarrassing information private." Pet. Mot. for Amendment at 1. Petitioners stated, to identify "all [p]etitioners by their initials only, in the caption, is the best way to preserve the balance between both the public's right to access and [W.J.'s] privacy concerns." Id. at 5.

Respondent filed a response on March 4, 2022, outlining the standards for a motion for redaction and "defer[ring] to the sound discretion of the Court to determine what remedy strikes the appropriate balance between the public and private interests in this instance." Respondent's Response to Pet. Mot. for Redaction ("Resp. Response"), filed Mar. 4, 2022 (ECF No. 47).

This matter is now ripe for adjudication.

II. DISCUSSION

A motion for redaction is governed by section 12(d)(4)(B) of the Vaccine Act. See § 12(d)(4)(B). That section provides that information concerning "medical files and similar files" may be redacted if its disclosure "would constitute a clearly unwarranted invasion of privacy." Id. What constitutes a "clearly unwarranted invasion of privacy" requires balancing petitioners' "right of privacy against the public purpose of the Vaccine Act." W.C. v. Sec'y of Health & Hum. Servs., 100 Fed. Cl. 440, 460 (2011), aff'd, 704 F.3d 1352 (Fed. Cir. 2013). While a petitioner has an interest in keeping sensitive medical or other

embarrassing information private, the public has an interest in disclosure, so as to increase public awareness of vaccines and the medical conditions they may or may not cause. Id. at 461. In other words, sensitive information is often the subject of the litigation, and "in cases where sensitive information is the subject of the dispute, that information is routinely disclosed in decisions, to enable the reader to follow and understand the decision maker's rationale." Castagna v. Sec'y of Health & Hum. Servs., No. 99-411V, 2011 WL 4348135, at *13 (Fed. Cl. Spec. Mstr. Aug. 25, 2011).

Although the Vaccine Rules make mandatory the redaction of a minor's name, adult petitioner's names, which are not similarly protected automatically, may also be redacted if the petitioner establishes proper grounds for redaction. See R.V. v. Sec'y of Health & Hum. Servs., No. 08-504V, 2016 WL 3776888, at *2 (Fed. Cl. Spec. Mstr. May 10, 2016) ("[A] petitioner needs to make some showing to justify the relief of redaction; redaction is not available simply at a petitioner's beck and call."). The undersigned will permit redaction in cases, such as this, where a specialized showing is made.

The facts and circumstances of this case warrant redaction of petitioners' names to initials. Petitioners made an adequate showing for redaction. **Accordingly, petitioners' motion for redaction of their names in the decision is GRANTED.**

Thus, the public version of the decision denying entitlement shall be redacted to include only petitioners' initials. Moreover, the undersigned further directs the clerk to amend the case caption to the following:

* *

W.J., by his parents and legal guardians, R.J. and A.J., *

Petitioner, *

v. *

SECRETARY OF HEALTH AND HUMAN SERVICES, *

Respondent. *

* *

Any questions regarding this Order may be directed to my law clerk, Megan Andersen, at (202) 357-6345 or Megan_Andersen@cfc.uscourts.gov.

IT IS SO ORDERED.

s/Nora Beth Dorsey
Nora Beth Dorsey
Special Master