No. 2022-1854

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STEPHANIE DIMASI,

Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

On Appeal from the United States Court of Federal Claims in 1:15-vv-01455-AOB, Judge Armando O. Bonilla.

CORRECTED NONCONFIDENTIAL SUPPLEMENTAL BRIEF FOR RESPONDENT-APPELLEE SECRETARY OF HEALTH AND HUMAN SERVICES

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CONFIDENTIAL MATERIAL OMITTED

The material omitted on page 3 is a quotation from an HHS report incorporating medical history. The materials omitted in the first paragraph of page 4 are quotations from an HHS expert report incorporating medical history. The materials omitted in the second paragraph of page 4 are quotations from an affidavit from pro se petitioner describing her communication about her medical history with former counsel. The materials omitted in the first paragraph on page 5 are quotations from Dr. Leist's expert report incorporating opinions about medical history. The material omitted in the first block redaction in the second paragraph on page 5 is a quotation from an affidavit from pro se petitioner describing her communication with former counsel about her medical history. The remainder of the material omitted in the second paragraph on page 5 are quotations from email correspondence between pro se petitioner and her former counsel about her medical history. The materials omitted

in the first paragraph on page 6 are quotations from email correspondence between pro se petitioner and her former counsel about her medical history. The material omitted in the second paragraph on page 6 is a quotation from Dr. Kinsbourne's supplemental expert report incorporating opinions about medical history. The material omitted on page 7 is a quotation from briefing submitted by petitioner's former counsel as part of the entitlement proceedings, incorporating medical history. The materials omitted on page 22 are quotations from briefing submitted by petitioner's former counsel as part of the entitlement proceedings, incorporating medical history and comparison to another syndrome. The materials omitted in the second paragraph on page 26 are quotations from correspondence between pro se petitioner and her former counsel about her medical history. The material omitted in the last paragraph on page 26 is a quotation from an affidavit from pro se petitioner about her medical history. All such material is under seal and therefore has been redacted unless it has already been quoted or paraphrased in the special master's public decisions.

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TABLE OF AUTHORITIES

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STATEMENT OF RELATED CASES

No appeal of this case has been before this or any other appellate court. To the knowledge of respondent-appellee, there is no same or similar case, filed pursuant to the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. § 300aa-1 to -34, pending before the Supreme Court, this Court, or any other Court of Appeals.

STATEMENT OF JURISDICTION

The Special Master entered a decision denying compensation on November 7, 2019, pursuant to his authority under the Vaccine Act. *See* 42 U.S.C. §§ 300aa-12(a)-(d), 300aa-13. Because no motion for review was filed with the United States Court of Federal Claims, the clerk of the United States Court of Federal Claims entered final judgment on December 11, 2019. *See id.* § 300aa-12(e).

Vaccine Rule 36(a)(2) provides in relevant part that "[i]f after the entry of judgment" a party "seeks relief from a judgment or order pursuant to RCFC 60, the clerk will refer the motion" to the "assigned special master." U.S. Ct. Fed. Claims Vaccine R. 36(a)(2). Petitioner, Stephanie DiMasi, moved to reopen the Special Master's entitlement decision under Rule 60(b) of the Rules of the United States Court of Federal Claims (Rule 60(b)). The Special Master denied Ms. DiMasi's motion on November 10, 2021, Appx178-203, and the United States Court of Federal Claims denied review of that determination on April 4, 2022, as reissued on April 19, 2022, Appx15-20. Ms. DiMasi timely appealed on June 1, 2022, and this Court has jurisdiction under 42 U.S.C. § 300aa-12(f) and 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE SUPPLEMENTAL ISSUES

The government respectfully submits this supplemental brief in response to the Court's order of December 19, 2022. That order asked that court-appointed Amicus and the government file supplemental briefs to address whether Ms. DiMasi's attorney's understanding of the timing of Ms. DiMasi's post-vaccination neuropathy

symptoms and any potentially related decision not to pursue a significant aggravation claim on her behalf provided grounds for relief as a "mistake" under Rule 60(b)(1) and whether further factual proceedings were required before the Special Master could rule on the motion. In addition, the Court asked the parties to address whether the cases allowing reopening based on gross negligence under Rule 60(b)(6) extended to this context.

STATEMENT OF THE CASE

A. Statutory Background

The Vaccine Act created the National Vaccine Injury Compensation Program, through which claimants may petition to receive compensation for vaccine-related injuries. *See* 42 U.S.C. § 300aa-10(a). To be entitled to compensation for such injuries, claimants must demonstrate that they have "sustained, or had significantly aggravated" a vaccine-related "illness, disability, injury, or condition." *Id.* § 300aa-11(c)(1)(C). For claims like the ones at issue here, claimants bear the burden of proving that causation. *Id.* § 300aa-11(c)(1)(C)(ii).

Claims filed under the Vaccine Act are adjudicated in the first instance by the Office of Special Masters. 42 U.S.C. §§ 300aa-12(c)-(d). Upon decision by the Special Master, parties have 30 days to file a motion for review in the United States Court of Federal Claims. *Id.* § 300aa-12(e). If no such motion is filed, the "clerk of the of the United States Court of Federal Claims" is required to "immediately enter judgment in

accordance with the Special Master's decision," at which point no further review is available. *Id.*

Rule of the United States Court of Federal Claims 60(b), which parallels Federal Rule of Civil Procedure 60(b), authorizes reopening of such final decisions on limited grounds.[1] Rule 60(b) provides in relevant part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Rule] 59(b); . . . or (6) any other reason that justifies relief.

B. Factual And Procedural Background

1. Initial Proceedings Before The Special Master

In December 2015, Stephanie DiMasi filed a claim pursuant to the Vaccine Act through counsel, alleging that a seasonal influenza (flu) vaccine she received in December 2012 caused her to suffer acute autonomic and sensory neuropathy (AASN), small fiber neuropathy, and postural orthostatic tachycardia syndrome (POTS). *See* Appx2, Appx179.

The government subsequently issued a report assessing Ms. DiMasi's claim under the Vaccine Act, which identified two primary problems. First, the report explained that "the medical records indicate that petitioner complained of [redacted] description of symptoms

[1] Because Federal Rule of Civil Procedure 60(b) and Rule of the United States Court of Federal Claims 60(b) are materially identical, this brief will use "Rule 60(b)" to refer to both.

description of symptoms more than six months *prior* to her receipt of the flu vaccine." SAppx11-12 (emphasis added). And, second, the report stated that Ms. DiMasi's symptoms occurred too soon after the vaccine: description of symptoms began within minutes of her receipt of the flu vaccine, which is far too soon to support a finding of an immunological response to the vaccine." SAppx12.

After reviewing the government's report, Ms. DiMasi emailed her attorney to say that she was "communications with counsel re medical history communications with counsel re medical history" SAppx140, ¶¶ 6, 8. She "reminded him that neuropathy onset was not immediate," "that the two medical notes indicating this were incorrect," and that "all of [her] other medical records stated the onset correctly." *Id.* ¶ 8. She also emphasized that she "communications with counsel re medical history." *See id.* ¶¶ 8, 9.

Counsel subsequently submitted Dr. Kinsbourne's expert report to the Special Master. That expert report opined that Ms. DiMasi did not have any preexisting conditions that could have been an alternate cause of her post-vaccination neuropathy. SAppx24. The report recounted conflicting medical evidence about the timing of the onset of Ms. DiMasi's post-vaccination neuropathy symptoms before concluding that Ms. DiMasi "had the onset of AASN within a day of an influenza vaccination, a temporal interval that has been shown to be medically reasonable." *See* SAppx18-19, SAppx24.

The government countered with Dr. Leist's expert report, which opined that Ms. DiMasi's neuropathy predated her 2012 flu vaccination. Specifically, Dr. Leist stated that "[redacted]." SAppx35; *see also id.* (noting a history of symptoms "dating back to at least 2008"). The opinion concluded that "[redacted]." *Id.*

In response to the government's expert report, Ms. DiMasi's counsel asked her to "[redacted]." SAppx140, ¶ 9. Ms. DiMasi reiterated that she "[redacted]" immediately after vaccination, and "[redacted]," which she had not had previously. SAppx184. She also explained that [redacted]," *id.*, and she [redacted].

communications ," SAppx185. She unequivocally stated: "communications with counsel re medical history with counsel re medical history communications with counsel re medical history ." *Id.*

Dr. Kinsbourne's supplemental expert report explained that his prior report "outlined a mechanism by which a vaccine injury can become manifest with minimal latency," even assuming that the neuropathy symptoms "began one day after the influenza vaccination." SAppx39. He also emphasized that "opinion based on symptoms opinion based on symptoms " like the ones in Ms. DiMasi's pre-vaccination records, and "there had been no record of Ms. DiMasi experiencing symptoms of neuropathy before the vaccination." *Id.*

The Special Master then issued an order regarding the parties' final briefs. As relevant here, the order instructed the parties to address whether the medical records indicated that Ms. DiMasi had preexisting "POTS, AASN, and/or small fiber neuropathy" that could have been significantly aggravated by her 2012 flu vaccine. SAppx44-46. Consistent with Ms. DiMasi's statements regarding preexisting conditions, the final brief explained: "Petitioner does not allege, Dr. Kinsbourne does not believe and the record does not support that Petitioner experienced any symptoms of neuropathy before the vaccination." SAppx93; *see also* SAppx98-99. The brief then addressed Dr. Leist's statement that Ms. DiMasi had "these injuries since at least 2008," countering that "[n]one of the treating physicians stated that these conditions (small fiber neuropathy or POTS) existed prior to the December 2012 vaccination." SAppx98. Having taken the position that Ms. DiMasi had no relevant

preexisting conditions, the brief explained that "Petitioner does not allege a significant aggravation claim in her Petition." SAppx104. The brief instead pressed a causation-in-fact claim, arguing that Ms. DiMasi "had a rapid onset of AASN, documented to be within four (4) days of vaccination, a temporal interval that has been shown to be medically reasonable, particularly given her medical history [redacted] medical history" SAppx97.

2. Entitlement Determination

In November 2019, the Special Master denied Ms. DiMasi's request for compensation. *See* Appx21, Appx29. The Special Master recognized that "Ms. DiMasi has specifically denied that her conditions pre-dated the influenza vaccination and, relatedly, does not allege a significant aggravation claim." Appx21. The Special Master then determined that Ms. DiMasi failed to demonstrate that her neuropathy conditions were caused solely by the flu vaccine based on the "find[ing] that the evidence supports Ms. DiMasi having symptoms related to her small fiber neuropathy and POTS before the December 4, 2012 influenza vaccination." Appx29.

Ms. DiMasi's counsel informed her that her claim had been denied in a November 11, 2019 email. Appx198. After a phone call that day, a misunderstanding developed about whether counsel was still considering pursuing an appeal. *Id.* Ms. DiMasi sent him an email the following day urging appeal, but she received no response and did not contact her attorney again until December 11, 2019, which was

after the time to appeal had elapsed, making the entitlement decision final. Appx198-199.

3. Motion To Reopen

On September 15, 2020, approximately nine months after the entry of judgment on Ms. DiMasi's entitlement claim, Ms. DiMasi filed a letter moving to reopen her case pro se. *See* Appx31-32. Ms. DiMasi asserted that her former counsel "effectively abandon[ed]" her by failing to argue that she did not have preexisting conditions; by failing to inform her of the possibility of a significant aggravation claim; by requesting a ruling on the record; and by failing to timely file a motion for review of the Special Master's entitlement decision. *See* Appx175. *See generally* Appx172-176. The Special Master denied the motion for reopening after receiving additional evidence, including an affidavit from Ms. DiMasi's former counsel and a rebuttal affidavit from Ms. DiMasi. Appx157-171. After Ms. DiMasi filed a motion for reconsideration, the Special Master vacated the prior order and permitted supplemental briefing. Appx177. The Special Master subsequently issued an order denying relief. Appx178-203.

As relevant here, the Special Master determined that the evidence presented did not overcome the finding in the entitlement decision "that symptoms related to Ms. DiMasi's small fiber neuropathy and POTS began prior to her December 4, 2012 influenza vaccination." Appx194. The Special Master explained that "[t]his finding was based on medical records and the testimony of respondent's expert, Dr. Leist,

who opined that Ms. DiMasi's pre-vaccination history of syncope/near syncope, palpitations, and tachycardia, as well as peripheral neuropathy, were suggestive of pre-vaccination POTS and small fiber neuropathy." *Id.* The Special Master also denied reopening based on Ms. DiMasi's argument that "she was never informed of the option to pursue a significant aggravation claim" because the decision not to pursue that theory of causation "amounts to a tactical decision by which Ms. DiMasi remains bound. Ms. DiMasi as client/principal could dictate the objectives, i.e. to pursue compensation for a vaccine-related injury," and her counsel "ha[d] deliberately chosen not to pursue an avenue for relief based on practical and ethical concerns." Appx196-197.

The Special Master also rejected Ms. DiMasi's argument that reopening was justified because her attorney failed to file a timely appeal, explaining that Ms. DiMasi did not act diligently in ensuring the appeal was filed. Appx197-199.

Ms. DiMasi appealed the Special Master's order, and Judge Bonilla affirmed in April 2022. Appx15-20.

Ms. DiMasi timely appealed the United States Court of Federal Claims' decision. Appx14. After the parties completed briefing, this Court issued an order indicating an intention to appoint Amicus and requesting supplemental briefing.

SUMMARY OF ARGUMENT

Ms. DiMasi brought a claim, through counsel, seeking compensation for injuries she alleges were caused by a flu vaccine she received in December 2012. Ms. DiMasi asserted that the flu vaccine was the cause-in-fact of her AASN, small fiber neuropathy, and POTS. The Special Master rejected that claim based on pre-vaccination medical records that indicated that Ms. DiMasi had symptoms of these disorders prior to December 2012.

After counsel failed to appeal, Ms. DiMasi moved, now pro se, to reopen her case, alleging among other things that her attorney failed to correct the record as to how quickly her acute neuropathy symptoms began after vaccination and that her attorney erred in not presenting a significant aggravation theory of compensation. The Special Master denied that request after receiving additional evidence and supplemental briefing. Ms. DiMasi appealed to the United States Court of Federal Claims and subsequently to this Court.

Following full briefing, this Court requested supplemental briefing on whether Ms. DiMasi's allegations that her attorney erred provide a basis for reopening under Rule 60(b)(1)'s "mistake" provision. Order 9-14. Specifically, the Court asked the parties to brief the extent to which a client is bound by an attorney's errors, including whether *Information Systems & Networks Corp. v. United State*s, 994 F.2d 792 (Fed. Cir. 1993), provides the proper framework for evaluating when a client is bound by an attorney's decisions, whether the Restatements and the American Bar Association's

(ABA) Model Rules of Professional Conduct are instructive, and whether allowing reopening in these circumstances would have an impact on the judicial system. *See* Order 11-14, 11 n.**. The Court also asked whether, in the alternative, "Ms. DiMasi's Rule 60(b) motion, considered under the mistake component of Rule 60(b)(1), can prevail without a finding of attorney failure." Order 12. And the Court instructed the parties to address whether the cases allowing reopening based on gross negligence under Rule 60(b)(6) "extend to the facts of this case." Order 15-16. The Court further inquired whether a hearing was required in this case or whether the "governing legal standards for Rule 60(b) relief nevertheless justify" the decision without the need for further fact-finding procedures. Order 10-11.

In response to the Court's order, the government respectfully submits that the Special Master did not abuse his discretion in denying Ms. DiMasi's request to reopen the final merits judgment in her case. Neither of the two attorney errors alleged justify relief under Rule 60(b)(1). Both the decision to brief the post-vaccination neuropathy symptoms based on medical records (and without additional testimony from Ms. DiMasi) and the decision not to press a significant aggravation theory of causation reflect strategic choices to which Ms. DiMasi is bound. Those actions were not the result of mistake, inadvertence, or excusable neglect within the meaning of Rule 60(b)(1). Nor, under the facts as alleged here, is relief available under the alternate theory of "gross negligence" that might come within the ambit of Rule 60(b)(6); any such relief is limited to cases of attorney abandonment, not arguably ill-advised

tactical decisions. Moreover, applicable equitable factors—which include a client's responsibility for monitoring litigation and retaining new counsel if necessary—provide an independent basis for affirming the Special Master's denial here.

Nor can Ms. DiMasi's motion for reopening be supported by any mistake on the part of the Special Master. The motion does not identify any dispositive judicial "mistake" regarding the onset of her symptoms after her 2012 flu vaccination; rather the Special Master ruled that Ms. DiMasi's preexisting conditions defeated her causation-in-fact claim that a flu vaccine was the sole cause of her medical conditions. Moreover, the motion was not filed within a reasonable time to challenge this determination, and the equitable factors weigh against relief.

For these reasons, no additional fact-finding procedures were necessary. There are no questions of fact to be resolved that bear on the correctness of the Special Master's decision to deny reopening. Amicus' invocation of this Court's decision in *Kirby v. Secretary of Health & Human Services*, 997 F.3d 1378 (Fed. Cir. 2021), similarly fails to persuade. That argument has been waived and, in any event, misses the mark. Any dispute over the import of Ms. DiMasi's post-vaccination medical records is immaterial because the Special Master's causation finding turned instead on the fact that Ms. DiMasi's pre-vaccination records established that she had preexisting conditions.

As a final matter, the government incorporates the arguments raised in its original response brief. Specifically, the government reiterates its arguments that the

Special Master reasonably denied reopening under Rule 60(b)(2) as Ms. DiMasi's evidentiary submissions were not "new" within the meaning of that provision. *See* Gov't Response Br. 12. In any event, this issue is moot in light of the Special Master's thorough examination of that post-judgment material in denying reopening. *See* Gov't Response Br. 12. The government also maintains its argument that the Special Master reasonably denied Rule 60(b)(6) relief based on Ms. DiMasi's contention that her attorney abandoned her or misled her as to the time to appeal the original compensation decision. *See* Gov't Response Br. 20-22. Ms. DiMasi failed to diligently protect her appellate rights as required by this Court's precedents. *See* Gov't Response Br. 21.

ARGUMENT

I. Standard Of Review

In Vaccine Act cases, this Court reviews a decision of the Special Master under the same standard as the United States Court of Federal Claims and determines if the findings of fact and conclusions of law are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Rodriguez v. Secretary of Health & Human Servs.*, 632 F.3d 1381, 1383-84 (Fed. Cir. 2011) (quoting *Avera v. Secretary of Health & Human Servs.*, 515 F.3d 1343, 1347 (Fed. Cir. 2008)); *see also* 42 U.S.C. § 300aa-12(e)(2)(B). A decision to grant or deny relief pursuant to Rule 60(b), however, "should be reviewed on an abuse of discretion basis." *Patton v. Secretary of the Dep't of Health & Human Servs.*, 25

F.3d 1021, 1029 (Fed. Cir. 1994). Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted[,]denial must have been so *unwarranted* as to constitute an abuse of discretion." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

II. The Special Master Did Not Abuse His Discretion In Denying Reopening Based On Alleged Attorney Error

The Court asked the parties to address whether the Special Master should have permitted reopening under Rule 60(b)(1)'s "mistake" provision based on Ms. DiMasi's allegations that: (1) her attorney allowed a factual mistake to persist in the record by failing to argue that her post-vaccination neuropathy symptoms began several days (rather than immediately) after her 2012 flu vaccination and (2) her attorney made a legal mistake in not pressing a significant aggravation claim. *See* Order 9-14. Relatedly, the Court requested briefing on the proper framework for evaluating whether Ms. DiMasi was bound by these attorney errors under agency principles, *see* Order 13-14, and whether the factors identified in *Information Systems & Networks Corp. v. United State*s, 994 F.2d 792, 795 (Fed. Cir. 1993), govern this inquiry, *see* Order 11-13, 11 n.**.

For the reasons described below, the Special Master did not abuse his discretion in denying relief. The attorney's actions in briefing the post-vaccination neuropathy symptoms without additional testimony from Ms. DiMasi and in not pressing the significant aggravation theory of causation were tactical choices to which Ms. DiMasi is bound, rather than the result of mistake, inadvertence, or excusable

neglect within the meaning of Rule 60(b)(1). Nor, under the facts as alleged here, is relief available under an alternate theory of "gross negligence" under Rule 60(b)(6)'s catch-all provision; courts have limited such relief to cases of true attorney abandonment, which did not occur here. *See* Order 15-16. Finally, equitable factors—which can include a client's culpability in not retaining new counsel earlier (rather than the more limited view of culpability discussed in *Information Systems*)—provide an independent basis for affirming the Special Master's denial here.

A. The Type Of Attorney Errors Alleged Here Do Not Provide A Basis for Reopening Under Rule 60(b)(1)

Rule of the United States Court of Federal Claims 60(b) provides in relevant part that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" under certain conditions. Those conditions include the following: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Rule] 59(b); . . . or (6) any other reason that justifies relief." U.S. Ct. Fed. Claims R. 60(b). RCFC 60(b) is identical to Federal Rule of Civil Procedure 60(b), which governs in district courts, and this Court looks to case law interpreting that Rule when interpreting the Claims Court's Rule. *See Information Sys.*, 994 F.2d at 794 & n.3.

In addition to meeting the requirements of the specific provision under which a movant requests relief, a movant under Rule 60(b) must meet relevant time

constraints, including for Rule 60(b)(1) that the motion was filed within a "reasonable time" and in any event "no[t] more than a year after the entry of the judgment." RCFC 60(c)(1). Courts also weigh equitable factors in deciding whether to grant reopening, including whether reopening on the ground raised might lead to a different result, whether reopening would result in any prejudice to the court or the non-moving party, and whether the movant's own conduct contributed to the delay in the issue being presented to the court before or after judgment. *See, e.g.*, *Dobyns v. United States*, 915 F.3d 733, 738 (Fed. Cir. 2019); 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2857 (3d ed.), Westlaw (database updated Apr. 2022) (Wright & Miller).

1. Rule 60(b)(1) Relief Is Not Available Based On An Attorney's Failure To Raise A Particular Legal Theory Or Adduce Evidence In A Particular Way

Courts have discretion under Rule 60(b)(1) to reopen judgments that turned on a "misconception[] or misunderstanding[]" or an "error[] of law or fact" by a court or a party. *See Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022) (quotation marks omitted). While "Rule 60(a) affords relief from minor clerical mistakes or errors arising from simple oversight or omission," Rule 60(b)(1) covers "[e]rrors of a more substantial nature" that go beyond "a mere clerical error or oversight." *Patton*, 25 F.3d at 1029-30. These mistakes may sometimes include errors made by attorneys. For example, the Sixth Circuit has held that it was an abuse of discretion to deny a Rule 60(b)(1) motion where an attorney mistakenly filed a stipulation that the case would

be limited to one issue while simultaneously filing a brief raising additional defenses. *In re Salem Mortg. Co.*, 791 F.2d 456, 459-60 (6th Cir. 1986). The court of appeals observed that reopening was required because there was an "obvious[] contradict[ion]" before the court. *Id.* at 460.

Rule 60(b)(1) does not, however, encompass "deliberate actions" by a party or "their chosen counsel," such as tactical decisions to forgo presenting evidence or legal theories, even if those actions are ill-informed or ill-advised. *See Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir. 2006); *see also U.S. Commodity Futures Trading Comm'n v. Kratville*, 796 F.3d 873, 896 (8th Cir. 2015) ("Rule 60(b)(1) 'does not permit litigants and their counsel to evade the consequences of their legal positions and litigation strategies, even though these might prove unsuccessful, ill-advised, or even flatly erroneous.'") (quoting *McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 593 (6th Cir. 2002)).

In *Latshaw*, for example, the Ninth Circuit upheld the denial of a Rule 60(b)(1) motion where the movant argued that she should be allowed to reopen her acceptance of an offer of judgment because it was based on her attorney's mistaken advice regarding attorneys' fees and mistaken statement that none of her attorneys were willing to represent her. *Latshaw*, 452 F.3d at 1100-02. And in *U.S. Commodity Futures*, the Eighth Circuit upheld the denial of a Rule 60(b)(1) motion where, among other things, the attorney had failed to "reset[]" the client's deposition "so that evidence could be offered" and incorrectly "t[old the client] that taking the Fifth

Amendment would not be a problem in defending against summary judgment when such was clearly wrong." *U.S. Commodity Futures*, 796 F.3d at 895-96; *see also, e.g.*, *McCurry*, 298 F.3d at 593-95 (attorney's tactical or negligent failure to name necessary client as plaintiff under applicable state law); *Robertson v. Granite Sch. Dist.*, 951 F.2d 1260, 1992 WL 2883, at *2 (10th Cir. 1992) (table decision) (attorney's negligent failure to produce an affidavit that could have established pretext in a racial discrimination case to oppose summary judgment). These decisions incorporate the bedrock principle that "clients must be held accountable for the acts and omissions of their attorneys" because to hold otherwise "'would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent.'" *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962)).

Contrary to Amicus's assertions that such denials are only appropriate where the litigant has made "well-informed tactical decisions," Amicus Br. 28, the courts of appeals have upheld denials of motions under Rule 60(b)(1) when litigants have argued that their attorneys made these decisions negligently. *See, e.g.*, *Nansamba v. North Shore Med. Ctr., Inc.*, 727 F.3d 33, 38-40 (1st Cir. 2013) (failing to open email attachment with relevant medical records); *Dao v. IBM Corp.*, 2 F. App'x 99, 100 (2d Cir. 2001) (failing to bring "to the court's attention" the existence of a relevant meeting or potential related "third-party evidence" that client raised with attorney); *Moon v. United States*, 89 F.3d 829, 1996 WL 342005, at *2-3 (4th Cir. 1996) (per

curiam) (table decision) (failing to include opposing affidavits from client rebutting alleged Food Stamp Program violation based on attorney's misunderstanding that the government's exhibits would not be considered affidavits); *Kanida v. Gulf Coast Med. Pers.*, 109 F. App'x 670, 671 (5th Cir. 2004) (per curiam) (misplacing video evidence from client); *Robertson*, 1992 WL 2883, at *2 (failing to submit affidavit that other employees had used racial slurs).

Amicus's argument that the above principles are only relevant when relief is sought under Rule 60(b)(1)'s excusable neglect provision is similarly unpersuasive. *See* Amicus Br. 28. The precedent cited above is not so limited. Courts deny Rule 60(b)(1) requests based on alleged attorney error under various theories: sometimes looking to the requirements specific to the "mistake," "inadvertence," or "excusable neglect" provisions and sometimes looking to the general equitable principles undergirding all Rule 60(b) relief. But regardless of the label, the result is the same. The Ninth Circuit, for example, has expressly held that similar analysis applies to motions arising under the "mistake" provision as the "excusable neglect" provision. *See, e.g.*, *Latshaw*, 452 F.3d at 1100-02. And the Sixth Circuit likewise has cautioned that "'Rule 60 was not intended to relieve counsel of the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise,'" in evaluating a claim of "attorney[] mistake or inadvertence" under Rule 60(b)(1), though ultimately finding that a genuinely inadvertent mistake had occurred in that case. *Salem Mortg. Co.*, 791 F.2d at 459 (quoting *Federal's, Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 583 (6th

Cir. 1977)); *see also, e.g.*, *Robertson*, 1992 WL 2883, at *2; *Moon*, 1996 WL 342005, at *2-3.

Amicus's reading of Rule 60(b) must also be rejected because it would enable a litigant to circumvent the limitation that an attorney's "neglect" be "excusable" by simply claiming that the ground for reopening arises under the "mistake" provision. Although "deliberate actions" by counsel are perhaps "mistakes" in the colloquial sense of ill-advised actions, they are not the kind of inadvertent mistake or misunderstanding that is generally encompassed by Rule 60(b)(1)'s mistake provision. *See Latshaw*, 452 F.3d at 1100-02. Indeed, the Supreme Court has stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect" excusing the failure to timely file but can sometimes be excusable depending on "all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 392-93, 395. It would be odd to simultaneously conclude that *any* "inadvertence, ignorance of the rules, or mistakes construing the rules" could satisfy Rule 60(b)(1) so long as the litigant characterized the reason for reopening as a "mistake" and not "excusable neglect."

And, finally, even assuming attorney tactical decisions could be considered "mistakes" under Rule 60(b)(1), interpreting the "mistake" provision as free from any other restriction (that is, any kind of attorney error could justify relief) would open the door to undoing final judgments anytime a client could point to an attorney action that was, in hindsight, suboptimal. And it would also run contrary to the Supreme

Court's approach to construing the scope of the "mistake" provision by looking to "the words surrounding 'mistake' in Rule 60(b)(1)"—*i.e.*, "inadvertence" and "excusable neglect"—rather than interpreting those provisions as covering entirely distinct concepts. *See Kemp*, 142 S. Ct. at 1863 (explaining that the history of courts granting relief for certain legal errors under the "excusable neglect" and "inadvertence" provisions indicates that Rule 60(b)(1) relief is also available for legal errors under the "mistake" provision).

2. The Attorney's Factual Presentation Of The Onset Of Ms. DiMasi's Post-Vaccination Neuropathy Does Not Provide A Basis For Reopening

In seeking reopening, Ms. DiMasi relies on the fact that her attorney failed to present her testimonial evidence about the timing of her post-vaccination neuropathy symptoms. But the briefing submitted by her attorney was not mistaken about the timing of symptoms, nor the result of excusable neglect; rather, the manner in which the attorney presented evidence reflected his tactical decisions about how best to advocate for relief under the Vaccine Act. *Cf. Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) (holding that "Rule 60(b)(1) is not available to allow a party merely to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument"). Ms. DiMasi's attorney's factual presentation regarding the onset of her neuropathy thus did not provide a basis for reopening, and the Special Master did not abuse his discretion in denying that request.

Contrary to Amicus's arguments that Ms. DiMasi's counsel "allow[ed] a mistake of fact" about the timing of the onset of her neuropathy symptoms after vaccination "into the record essentially uncontested," Amicus Br. 50; *see also* Amicus Br. 47-48, her attorney in fact argued that Ms. DiMasi did not report neuropathy symptoms until several days after the vaccination. In the "Proximate Temporal Relationship Between Vaccination and Onset" section of the final brief, Ms. DiMasi's attorney emphasized that description of symptoms [redacted]" in the medical report from the day after her vaccination and that "[i]t was only on December 8, 2012, four (4) days after the vaccination" that she "description of symptoms [redacted]" SAppx102. He analogized this four-day onset to the established "comparison to another syndrome [redacted]," which is a "comparison to another syndrome [redacted]," as a basis for finding an appropriate temporal relationship between vaccination and onset here. SAppx103; *see also* SAppx97-98. In the final brief filed on her behalf, Ms. DiMasi's attorney thus advocated for the position that her symptoms began several days after the vaccination.

Ms. DiMasi urges that her attorney should have disclaimed entirely the report of her only expert witness, who opined that "a one-day onset of AASN is medically reasonable." *Compare* Appx31, *and* Amicus Br. 47, *with* SAppx102. She also urges that her attorney should have allowed her to testify to explain that the medical records from Dr. Chen and Dr. Fisher (which were included as part of the medical record)

were incorrect. *Compare, e.g.*, Appx32, *with* SAppx85-86, SAppx102. But these are strategic attorney decisions that cannot support reopening under Rule 60(b)(1). *See, e.g.*, *Dao*, 2 F. App'x at 100 (explaining that Rule 60(b)(1) relief is not available based on similar alleged attorney failures). And, contrary to Amicus's contentions, Amicus Br. 52-53, the attorney's treatment in a post-judgment affidavit of Dr. Chen's and Dr. Fisher's notations as part of the medical record cannot alter the fact that the attorney disputed the chronology presented by those notations in the brief to the Special Master. *Compare* Appx154, *with* SAppx102-103.

That one might question the wisdom of such decisions in hindsight does not change the result. Even an attorney who does "a poor job of marshaling the facts . . . does not reflect the malfeasant discharge of responsibility sufficient" to grant reopening. *See Knapp v. Dow Corning Corp.*, 941 F.2d 1336, 1338 (5th Cir. 1991); *cf. Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (explaining that "[t]he adversary process could not function effectively if every tactical decision required client approval" and, therefore, "[p]utting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination[or] to decide not to put certain witnesses on the stand"). Ms. DiMasi's attorney's decisions about how to present the factual record to the Special Master are thus tactical determinations that bound Ms. DiMasi and not the type of conduct for which Rule 60(b)(1) relief is available.

3. The Attorney's Determination Not To Press A Significant Aggravation Theory Of Causation Also Does Not Provide A Basis For Reopening

The Court also asked the parties to address Ms. DiMasi's allegations that her attorney's mistake about the "precise timing of the emergence" of her post-vaccination neuropathy symptoms "infected" her attorney's "choice not to present a significant aggravation claim" and to address whether she is bound by that choice given her allegations that she was not consulted about this decision. *See* Order 3, 11-14.

Ms. DiMasi's attorney determined not to bring a significant aggravation claim and focus only on causation-in-fact. Causation-in-fact and significant aggravation claims operate as alternate theories of causation to demonstrate that a claimant is entitled to compensation under the Vaccine Act for an injury arising from a particular vaccination. The two theories are, however, mutually exclusive because a significant-aggravation theory requires that the claimant have a preexisting condition that was aggravated, while a causation-in-fact theory requires that the claimant have developed a new condition that did not preexist the vaccination date. *See, e.g.*, *Locane v. Secretary of Health & Human Servs.*, 685 F.3d 1375, 1379 (Fed. Cir. 2012); *see also* 42 U.S.C. § 300aa-33(4). The decision to focus on one or the other theory was within the authority of Ms. DiMasi's attorney, consistent with Ms. DiMasi's instructions that she did not have relevant preexisting conditions, and, in any event, the type of strategic decision that does not qualify for relief under Rule 60(b)(1). That decision—which

turned on an understanding of preexisting conditions as described by Ms. DiMasi—was also not motivated by any confusion regarding the timing of post-vaccination symptoms.

a. As an initial matter, Ms. DiMasi's attorney's decision not to pursue a significant aggravation theory of causation was not based on any misunderstanding of fact regarding the timing of post-vaccination symptoms. A significant aggravation claim required preexisting conditions that worsened, regardless of the timing of symptoms after the vaccination. Amicus makes no claim to the contrary.

The attorney's decision was instead grounded in Ms. DiMasi's statements that she did not have any preexisting conditions that related to her post-vaccination illness. Although the Special Master asked the parties to address whether Ms. DiMasi had preexisting "POTS, AASN and/or small fiber neuropathy" that could have been significantly aggravated by her 2012 flu vaccine, *see* SAppx45-46, her attorney could not so argue because Ms. DiMasi had told him that she did not have any preexisting neuropathy or POTS conditions, *see* Appx155, ¶ 22; *see supra* pp. 4-6. The Special Master recognized as much, explaining that "Ms. DiMasi has specifically denied that her conditions pre-dated the influenza vaccination and, relatedly, does not allege a significant aggravation claim." Appx21.

For the reasons explained *supra* pp. 17-19, the decision of an attorney to pursue one legal theory rather than another, especially when that decision is based on the client's statements, cannot provide grounds for reopening under Rule 60(b). That is

because "[w]here counsel makes a deliberate choice to rely on one legal theory, the party cannot thereafter attempt to be relieved of the consequences of that conscious decision should the theory prove to be unsuccessful." *FHC Equities, LLC v. MBL Life Assurance Corp.*, 188 F.3d 678, 687 (6th Cir. 1999) (quotation marks omitted).

Amicus's argument that Ms. DiMasi's attorney was nonetheless "required" to present Ms. DiMasi's "pre-vaccine neurological and cardiac symptoms" from her medical records, *i.e.*, as preexisting conditions, in response to the Special Master's order, *see* Amicus Br. 66, fails to undermine this sensible conclusion. Doing so would have been at odds with Ms. DiMasi's express statements to her attorney that her earlier symptoms were transient and resolved. SAppx140, ¶¶ 8, 9 (stating that she did not have any preexisting "neuropathy" symptoms); SAppx184 (explaining that "[redacted] communications with counsel re medical history [redacted]" were communications with counsel re medical history communications with counsel re medical [redacted]"). In such circumstances, as the Special history
Master recognized, Ms. DiMasi's attorney reasonably concluded that Ms. DiMasi's "mitigation and/or denial of preexisting symptoms negated the ethical and practical possibility of filing a significant aggravation claim." Appx155, ¶ 22.

And Ms. DiMasi still did not abandon her contention that she lacked a preexisting neuropathy condition when she proceeded pro se: in her letter requesting reopening, Ms. DiMasi again emphasized that she did not "description of medical history [redacted] description of medical history [redacted] description of [redacted]." SAppx189, ¶ 19; *see also* SAppx140, SAppx190, ¶ 20; Appx32-35 medical history

(arguing that she should have been informed of the availability of the significant aggravation claim while simultaneously detailing why she believed the court had erred in finding that she had any preexisting "conditions that would predispose [her] to neuropathy" before her flu vaccine). Her initial briefing to this Court likewise emphasizes "[t]he determination made by the court that this was preexisting was false and it was based on one casual mention in 2012 (at an unrelated visit) of the back of [her] knee feeling tingly when [she] sat down and put pressure against it" and that the "palpations" she had in 2008 "did not require any treatment, other than reducing caffeine" and were "not in any way related to, or precursors for postural tachycardia syndrome (POTS), which is caused by damage to autonomic nerves." *See* Informal Opening Br. 11, 14.

b. Amicus' contention that Ms. DiMasi's attorney acted outside the scope of his authority similarly does nothing to cast doubt on the Special Master's decision to deny reopening. *See* Amicus Br. 50-56.

As an initial matter, even assuming arguendo that Rule 60(b)(1) relief were theoretically available on the ground that an attorney's waiver of a causation theory might fall outside the attorney's authority, relief would not be warranted here. Ms. DiMasi's attorney made a reasonable attempt to carry out her objectives, based on her statements, to seek compensation under the Vaccine Act without conceding that she had any preexisting neurological symptoms. He was therefore acting within the scope of his authority. *See* Restatement (Third) of Agency § 2.01 (Am. Law Inst. 2006)

(explaining that an agent has "[i]mplied authority" to "act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent").

In any event, a litigant may not simply assert that any action was taken outside the scope of an attorney's authority and reopen a final judgment. Drawing on the longstanding tradition that the authority to settle a case or claim is generally reserved to the client, courts have only allowed reopening in a narrow set of cases. Specifically, the courts of appeals have held that a client may not be bound by an attorney settling a case or claim (or doing so by stipulated judgment) when the attorney acted outside the scope of their authority. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 27 cmts. a, d (Am. Law Inst. 2000); *see, e.g.*, *Mpala v. Segarra*, 718 F. App'x 84, 85 (2d Cir. 2018); *Associates Disc. Corp. v. Goldman*, 524 F.2d 1051, 1053-54 (3d Cir. 1975); *Bradford Exch. v. Trein's Exch.*, 600 F.2d 99, 102 (7th Cir. 1979); *Sheng v. Starkey Labs., Inc.*, 53 F.3d 192, 194-95 (8th Cir. 1995)*; cf. Cashner*, 98 F.3d at 577-78 (explaining that Rule 60(b)(1) could be used to reopen a "'judgment entered upon an agreement by the attorney . . . on affirmative proof that the attorney had no right to consent to its entry'" but not to reopen a judgment where the party made a mistake as to the scope of a stipulation based on counsel's advice (quoting *Surety Ins. Co. of Cal. v. Williams*, 729 F.2d 581, 582-83 (8th Cir. 1984))).

But there is no similar tradition applicable to decisions about which theories or arguments to raise in briefing. To the contrary, the Third Circuit, for example, has upheld the denial of Rule 60(b) relief where appellants argued that their attorneys failed to "explore the Constitutional issue of the loss of [Appellants'] right to a jury trial." *Doe v. Ritz Carlton Hotel Co.*, 666 F. App'x 180, 185-86, 185 n.3 (3d Cir. 2016) (quotation marks omitted); *see also, e.g.*, *supra* pp. 17-19.

And drawing a line between authority to settle and authority to devise legal strategy accords with the common understanding of an attorney's role in litigation. For example, Comment 2 of the ABA Model Rules of Professional Conduct 1.2 explains that "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rules of Prof'l Conduct 1.2 cmt. 2; *see also* Restatement (Third) of the Law Governing Lawyers, ch. 2, Topic 3 § Scope ("accept[ing]" the "middle view . . . that the client defines the goals of the representation and the lawyer implements them" subject to consultation).

Indeed, even where an attorney may be acting contrary to a client's wishes, the Restatement (Third) of the Law Governing Lawyers has recognized that "[c]lient instructions given to a lawyer do not nullify the lawyer's apparent authority to act for the client in dealings with tribunals and third persons . . . , unless the latter have actual knowledge of the client's instructions" with the result that the client can still be bound in such circumstances. Restatement (Third) of the Law Governing Lawyers § 21 cmt.

d. This Court has emphasized, for example, that a litigant "cannot free itself of the estoppel that its counsel has created with respect to [an opposing party] merely by retaining different counsel, and no rule of agency law with which we are familiar can relieve [the litigant] of the estoppel on the ground that its current counsel acted *ultra vires*." *See Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1059 (Fed. Cir. 1995); *cf. Gonzalez v. United States*, 553 U.S. 242, 248 (2008) ("[D]ecisions by counsel are generally given effect as to what arguments to pursue[.]"), *id.* at 249 (explaining that "choices" about "the objections to make, the witnesses to call, and the arguments to advance . . . can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote").

Amicus's assertion that the authority to settle is "substantially equivalent to" the authority to choose a litigation strategy does not advance the argument. *See* Amicus Br. 62-65 (quoting Restatement (Third) of the Law Governing Lawyers § 22 cmt. e). To the contrary, given the myriad choices about what arguments to press in litigation, judges and litigants rely on the principle that a party is bound by the arguments made (or not made) through counsel. Interpreting Rule 60(b) to allow litigants to undo those choices after judgment would significantly undermine the principles of finality and reliability that undergird our legal system.

Equally unpersuasive is Amicus's contention that breakdowns in communication between an attorney and a client regarding available alternative legal

theories provide grounds for Rule 60(b)(1) relief. *See* Amicus Br. 53-55. For example, the Sixth Circuit has upheld the denial of relief under Rule 60(b)(1) even where the record indicated that the attorney may not have "fully informed" the clients as to "the potential consequences of any strategies they might have employed," concluding that the clients were nonetheless bound by their attorney's decision to name only one of them as a party; this was true whether the decision was "purely strategic" or instead negligent in light of the governing state law in this wrongful death suit. *McCurry*, 298 F.3d at 594. Although such failures to consult with the client as to strategy may fall short of the best practices embodied in the ABA Model Rules of Professional Conduct and the Restatement (Third) of the Law Governing Lawyers, *see* Order 13-14, they do not provide a basis for reopening a judgment.

B. Relief Is Likewise Unavailable Under Rule 60(b)(6)

The Special Master likewise correctly determined that Ms. DiMasi's attorney's actions did not rise to the level of attorney "gross negligence" that courts have determined may justify reopening under Rule 60(b)(6). *Compare* Appx184-185, Appx189-190, *with* Appx172, Appx175.

Recognizing that relief under Rule 60(b)(6) is only available in "exceptional circumstances," courts have generally limited Rule 60(b)(6) relief in this context to situations in which an attorney's negligence rises to the level of actual or constructive abandonment, often in conjunction with counsel's efforts to affirmatively mislead the client to hide that abandonment. For example, the Ninth Circuit has explained that

Rule 60(b)(6) relief from a default judgment was warranted where the attorney "virtually abandoned his client by failing to proceed with his client's defense," including by missing court appearances and neglecting motions, while at the same time "explicitly represent[ing] to [the client] that the case was proceeding properly." *Community Dental Servs. v. Tani*, 282 F.3d 1164, 1170-72 (9th Cir. 2002); *see also, e.g.*, *Maples v. Thomas*, 565 U.S. 266, 271, 288-89 (2012) (habeas case in which attorneys abandoned incarcerated client without notice and failed to withdraw as attorneys of record with the result that he did not receive notice of adverse decision in time to appeal); *United States v. Cirami*, 563 F.2d 26, 34 (2d Cir. 1977) ("constructive disappearance" of defendants' attorney "who was allegedly suffering from a psychological disorder which led him to neglect" defendants' business "while at the same time" providing reassurances to them); *Boughner v. Secretary of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978) (attorney failed to oppose motions for summary judgment in 52 cases "leaving his clients unrepresented"); *Fuller v. Quire*, 916 F.2d 358, 359-61 (6th Cir. 1990) (dismissal for failure to prosecute where movant "displayed reasonable diligence in attempting to discover the status of his case" and the attorney "suggested a settlement was pending" but "then ceased all contact"); *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 122-23 (D.C. Cir. 1977) (dismissal with prejudice for failure to appear where attorney "misled the client by reassuring him that

the litigation was continuing smoothly," even after the attorney knew the litigation "had already been aborted").[2]

Courts have, however, resisted attempts to extend such relief beyond these narrow circumstances. For example, this Court upheld the denial of Rule 60(b)(6) relief on the ground that the "nature of" an attorney's "gross negligence" in failing to do legal research as to the implications of a voluntary dismissal did "not rise to the same level of egregious conduct as an attorney's abandonment or affirmative misleading of his client" so as to come within Rule 60(b)(6). *Mora v. Secretary of Health & Human Servs.*, 673 F. App'x 991, 995-97 (Fed Cir. 2016). And the Ninth Circuit has limited Rule 60(b)(6) relief based on attorney abandonment to the default judgment context while simultaneously disclaiming the availability of Rule 60(b)(1) relief for "innocent, albeit careless or negligent, attorney mistake" and "intentional attorney misconduct" that falls short of abandonment. *See Latshaw*, 452 F.3d at 1101.

The Special Master thus correctly rejected Ms. DiMasi's request for relief under Rule 60(b)(6). Appx184-185, Appx189-190. As was the case with respect to the failure to conduct legal research at issue in *Mora*, Ms. DiMasi's attorney's failure to fully

[2] Not all courts of appeals agree that attorney abandonment claims may provide a basis for reopening under Rule 60(b)(6). Although the Seventh Circuit has declined to recognize an exception under Rule 60(b)(6) for attorney abandonment, *see, e.g.*, *United States v. 7108 W. Grand Ave.*, 15 F.3d 632, 634 (7th Cir. 1994), the court has explained that "[a]bandoned clients who take reasonable steps to protect themselves can expect to have judgments reopened under Rule 60(b)(1)" because attorney abandonment severs the agency relationship, *Moje v. Federal Hockey League, LLC*, 792 F.3d 756, 759 (7th Cir. 2015).

discuss her options and the attorney's decision to forgo the significant aggravation theory do not suffice to bring Ms. DiMasi's request for reopening within Rule 60(b)(6)'s ambit. Such allegations do not satisfy Rule 60(b)(6)'s "extraordinary circumstances" requirement as applied to attorney abandonment claims.[3]

Amicus erroneously contends that Rule 60(b)(6) relief is also available because Ms. DiMasi's attorney's actions were outside of the scope of his authority. *See* Amicus Br. 59-69. For the reasons explained *supra* pp. 27-31, relief on this theory is not available under Rule 60(b)(1). It is also not available under Rule 60(b)(6), and the cases on which Amicus relies do not hold otherwise. *See id.* at 60 (first citing *Thomas v. Colorado Tr. Deed Funds, Inc.*, 366 F.2d 136, 138-40 (10th Cir. 1966) (allowing reopening for one client without identifying the specific Rule 60(b) provision when that client did not authorize the attorney to settle a case or stipulate to final disposition of the case based thereon); then citing *Bradford Exch.*, 600 F.2d at 102 (allowing reopening under Rule 60(b)(1) where attorney was not authorized to enter a settlement agreement imposing "onerous and costly" obligations on the client); and then citing *Amin v. Merit Sys. Prot. Bd.*, 951 F.2d 1247, 1254 (Fed. Cir. 1991) (upholding the Merit

[3] The government agrees that a litigant need only demonstrate "extraordinary circumstances" when seeking relief pursuant to Rule 60(b)(6). *See* Order 14. The Special Master's references to extraordinary circumstances were properly confined to the sections of the opinion referencing Ms. DiMasi's constructive abandonment claims under Rule 60(b)(6), *see* Appx184-185, Appx189-190.

Systems Protections Board's denial of an administrative petition for review to set aside a settlement agreement without reference to Rule 60(b)).[4]

C. The Equitable Factors Support Denial, And The Special Master Therefore Cannot Be Said To Have Abused His Discretion

Courts may grant Rule 60 motions on "just terms," and all Rule 60 motions are subject to general equitable factors that balance "justice" with a "scrupulous regard for the aims of finality," Wright & Miller § 2857, and the Special Master's decision denying reopening should be upheld on consideration of these factors. As elaborated below, the equitable factors courts consider overlap with, but are not entirely limited to, the factors identified in *Information Systems*. *See* Order 11-12, 11 n.**.

1. First, in weighing the interest in finality, courts assess prejudice to both the court and opposing party. Specifically, courts consider whether a "do-over[]" from a reopening will prejudice the court by "divert[ing]" resources to previously-final cases or undermine the "orderliness and predictability in the judicial process," even absent prejudice to the opposing party. *Talasila, Inc. v. United States*, 524 F. App'x 671, 673

[4] The Sixth and Ninth Circuits have held that Rule 60(b)(6) relief is available to reopen judgments based on settlements that were beyond government attorneys' authority to resolve. *See Washington v. Penwell*, 700 F.2d 570, 573-74 (9th Cir. 1983); *United States v. 32.40 Acres of Land, More or Less, Situated in Leelanau Cty.*, 614 F.2d 108, 113 (6th Cir. 1980). But *Washington* and *32.40 Acres of Land* involved the distinct question of the extent to which attorneys may bind state or federal governments, as the Sixth Circuit seems to have implicitly acknowledged in a later case. *Compare Washington*, 700 F.2d at 573-74, *and 32.40 Acres of Land*, 614 F.2d at 113, *with United States v. 1914 Auten Drive*, 81 F.3d 162, 1996 WL 132213, at *2 (6th Cir 1996) (table decision). And, as explained *supra*, this case involves no similar attorney action.

(Fed. Cir. 2013) (first and second quotation); *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977) (third quotation). The potential prejudice to the non-movant if the case is reopened, such as the hardship caused by reopening discovery, is an additional factor weighing against Rule 60(b) relief. *See, e.g.*, *U.S. Commodity Futures*, 796 F.3d at 896 (discussing "significant delay" to non-movant in retaking a deposition and conducting "additional discovery"); Wright & Miller § 2857 (explaining that courts have denied relief where a "party would be unable to obtain witnesses for a new action" or "when many actions have been taken on the strength of the judgment").

Second, in determining whether a case should be reopened, courts consider how responsible the movant is for the litigation conduct that forms the basis of the claim for reopening. Although "willfully declin[ing] to follow a court's rules and procedures," *Information Sys.*, 994 F.2d at 796, is certainly culpable conduct, conduct need not rise to that level, or be of that type, to be taken into consideration in weighing the equities. The discussion of culpability in *Information Systems* makes sense because in that case there had been no decision on the merits, and the question was whether missing deadlines was willful behavior sufficient to merit a default judgment. *Cf. id.* at 795; Wright & Miller § 2857 ("The cases calling for great liberality in granting Rule 60(b) motions, for the most part, have involved default judgments."). Where a merits judgment has been entered, the types of culpable conduct that counsel against reopening are necessarily broader, as a variety of litigation conduct may have led to the circumstances purportedly requiring reopening.

Courts may thus consider factors that fall short of willful misconduct in ignoring court orders to determine whether the movant's conduct defeats a claim for reopening. And, as Amicus acknowledges, courts considering Rule 60(b) motions may draw from general equitable principles of waiver and estoppel, which prevent litigants from changing their views on appeal by pressing arguments they have not previously raised or disclaiming errors that they have invited. *See* Amicus Br. 32 (first citing *Atlantic Brewing Co. v. William J. Brennan Grocery Co.*, 79 F.2d 45, 47 (8th Cir. 1935); then citing *Johnson v. United States*, 318 U.S. 189, 201 (1943); and then citing *Key Pharm. v. Hercon Labs. Corp.*, 161 F.3d 709, 715 (Fed. Cir. 1998)); *see also, e.g.*, *In re Braen*, 900 F.2d 621, 628-29, 629 n.7 (3d Cir. 1990) (analogizing estoppel principles to Rule 60(b) denials of reopening based on attorney failures).

Courts may, for example, consider whether a party or attorney did not act diligently to uncover a purported mistake or attorney failure. *See, e.g.*, Wright & Miller § 2858; *Choice Hotels Int'l, Inc. v. Grover*, 792 F.3d 753, 756 (7th Cir. 2015). As the Seventh Circuit has explained, "[c]ivil litigants can hire replacement counsel freely" and can "monitor how their lawyers are performing (or not performing)." *Choice Hotels*, 792 F.3d at 756. "Litigants who know or strongly suspect that their lawyers are asleep on the job must act to protect their own interests by hiring someone else." *Id.*; *see also Brooks v. Yates*, 818 F.3d 532, 535 (9th Cir. 2016) (per curiam) ("Even where a petitioner is abandoned by counsel, the petitioner must also show that he diligently pursued his rights before relief can be granted under Rule 60(b)(6)."); *cf. Sneed v.*

McDonald, 819 F.3d 1347, 1354 (Fed. Cir. 2016) (concluding that equitable tolling of an appellate deadline is not reasonable unless the client exercised "reasonable diligence" by "check[ing] with the attorney before the statutory filing time is about to run out to confirm that the attorney will undertake the representation" if they wish to later argue attorney abandonment on this issue). That is especially true in Vaccine Act cases where attorneys' fees are available even for unsuccessful (but reasonable) claims. *See* 42 U.S.C. § 300aa-15(e)(1).

2. Applying these principles, the Special Master did not err in denying reopening under Rule 60(b). Although the government did not develop an argument that it would be prejudiced by reopening in this case, a per se rule favoring reopening based on the kind of post-judgment assertions advanced here could require the reallocation of significant government resources. Records in Vaccine Act cases can include thousands of pages of dense medical records, medical literature, and expert reports, which may need to be reassessed or supplemented in light of new legal theories and new testimonial evidence. And delay also threatens to render medical evidence stale.

Ms. DiMasi's actions similarly underscore that the Special Master did not abuse his discretion in denying reopening on this ground. *See* Appx189 (explaining that "Ms. DiMasi, like all petitioners, is responsible for supervising her attorney"). Ms. DiMasi did not act diligently in supervising her attorney to prevent the mistakes she attests occurred, and she did not seek new counsel based on her ongoing dissatisfaction with

the representation. The affidavits and email correspondence Ms. DiMasi submitted as part of her motion to reopen demonstrate that she was aware that she was not receiving drafts or final versions of court filings. SAppx140-141, ¶¶ 7, 9, SAppx188, ¶ 3, SAppx189, ¶ 14. Those materials also document her concerns about her counsel's lack of responsiveness and communication about her medical records years before judgment was entered. *See* SAppx140-141, ¶¶ 7-9, SAppx193, SAppx197-200, SAppx202. Despite her concerns about her counsel, Ms. DiMasi made no effort to retain new counsel, even after her attorney asked on March 10, 2017—before submission of the first expert report on her behalf and years before final briefing —if she wanted different counsel. *See* SAppx199-200.

III. There Is Also No Basis For Reopening Under Rule 60(b)(1) Based On A Purported Judicial Mistake

The Special Master likewise did not abuse his discretion in ruling that relief under Rule 60(b)(1)'s "mistake" provision was not available based on a judicial mistake. *See* Order 12. Ms. DiMasi's motion to reopen does not identify any dispositive judicial error, the motion was untimely with respect to any challenge to the Special Master's causation-in-fact ruling, and the equitable factors weigh against relief.

A. The Motion Does Not Identify A Potentially Dispositive Judicial Mistake

Under Rule 60(b)(1), relief may be granted from "judicial error" when "inadvertence is shown." *Patton*, 25 F.3d at 1030 (quotation marks omitted); *Kemp*, 142 S. Ct. at 1862. Provided that the general Rule 60(b) requirements are satisfied, courts

may grant such relief where the basis for a central factual mistake is evident in the record at the time of the judgment. In *Patton*, for example, this Court explained that relief might be available under Rule 60(b)(1)'s mistake provision where the Special Master had indicated an intention to grant a Vaccine Act petitioner damages for pain and suffering but had inadvertently failed to include such damages as part of the judgment. *See Patton*, 25 F.3d at 1029; *see also Cappillino v. Hyde Park Cent. Sch. Dist.*, 135 F.3d 264, 266 (2d Cir. 1998) (holding that it was an abuse of discretion not to correct an obvious factual mistake in not treating the plaintiff's pro se letter as a rejection of the settlement within the time period to reopen the case for failure to settle).

Ms. DiMasi has identified no analogous error here. The Special Master did not err in stating that "Ms. DiMasi has specifically denied that her conditions pre-dated the influenza vaccination and, relatedly, does not allege a significant aggravation claim." *See* Appx21, Appx29. That accurate description of waiver does not display any misunderstanding of the relevant record before the Special Master. *Cf. Lebahn v. Owens*, 813 F.3d 1300, 1307 (10th Cir. 2016) (affirming the district court's denial of a Rule 60(b)(1) motion based on a mistake of law on the ground that the district court "had applied the law to the facts and issues as pleaded by [the] plaintiff and briefed by the parties" at the time of the judgment and therefore had not made a cognizable mistake (quotation marks omitted)); *Fuller*, 916 F.2d at 360 (explaining that Rule 60(b)(1) relief is not available where "no mistake was made" because the "district court did exactly what it thought right when it dismissed the action"). The Special

Master's determination that the brief filed on behalf of Ms. DiMasi did not raise a significant aggravation theory of causation and therefore waived that issue did not turn on any assumption that Ms. DiMasi's post-vaccination neuropathy symptoms occurred too quickly after vaccination, as Amicus mistakenly insists. *See* Amicus Br. 56.

Nor was there any error in the Special Master not *sua sponte* considering a significant aggravation claim. As the Tenth Circuit has explained in upholding denial of Rule 60(b)(1) relief, the "court had no obligation to sua sponte construct an argument for [the litigant] that he failed to raise on his own behalf." *Lebahn*, 813 F.3d at 1308. That is particularly true here, where the Special Master went beyond what was required by requesting briefing on the potential significant aggravation claim before ruling on the subsequent briefs.

Any mistake as to whether Ms. DiMasi's acute neuropathy symptoms began within one or four days of vaccination was also immaterial to the Special Master's finding that she had not shown causation-in-fact. That is because the Special Master's holding on this score was based on his conclusion that Ms. DiMasi already had preexisting neuropathy conditions evidenced in her pre-vaccination medical records. It was not based, as Amicus urges, on an assumption that "the onset of symptoms occurred far too quickly to be an immunological response." Amicus Br. 56.

To prove causation-in-fact in an off-table claim like the one here, a petitioner must be able to demonstrate, among other things, "a logical sequence of cause and

effect showing that the vaccination was *the* reason for the injury." *See Locane*, 685 F.3d at 1379 (emphasis added) (quotation marks omitted). And even then, that showing can be rebutted if the government "can show by a preponderance of the evidence that the injury is due to factors unrelated to the vaccine." *Id.* (quotation marks omitted). Here, although Ms. DiMasi's attorney argued that she did not have any preexisting conditions, the Special Master denied her causation-in-fact claim based on a contrary finding "that the evidence supports Ms. DiMasi having symptoms related to her small fiber neuropathy and POTS before the December 4, 2012 influenza vaccination." Appx29. Because that finding turned on Ms. DiMasi's medical records *before* her vaccination—rather than anything about the timing of the acute neuropathy symptoms *after* her vaccination—any factual mistake as to those later medical records was irrelevant to the outcome. *See* Appx194 (denying reopening on this ground and explaining that the "finding was based on medical records and the testimony of respondent's expert, Dr. Leist, who opined that Ms. DiMasi's *pre-vaccination* history of syncope/near syncope, palpitations, and tachycardia, as well as peripheral neuropathy, were suggestive of pre-vaccination POTS and small fiber neuropathy") (emphasis added).

B. The Motion Was Not Raised Within A Reasonable Time, And The Equitable Factors Support Denial

Any request for Rule 60(b) relief based on a purported judicial mistake fails for two additional reasons.

First, movants must demonstrate that a motion under Rule 60(b)(1) was filed within a "reasonable time." RCFC 60(c)(1); *see, e.g.*, Wright & Miller § 2857 (explaining that courts "have held that the motion must be made within a 'reasonable time,' even though the stated time limit has not expired"). With respect to what constitutes a "reasonable" time, this Court has cautioned that, if such requests "involve consideration of the merits of the case" brought under the Vaccine Act, they must be brought within "the 30-day time limit of section 300aa-12(e)(1)" to prevent Rule 60(b) from "be[ing] used as a substitute for an appeal." *See Patton*, 25 F.3d at 1028-29 (citing *Ackermann v. United States*, 340 U.S. 193, 198-99 (1950)); *see also, e.g., Lebahn*, 813 F.3d at 1305 (holding that a "Rule 60(b)(1) motion asserting mistake of law is untimely—and therefore gives the *district court* no authority to grant relief—unless brought within the time to appeal"); Wright & Miller § 2857.

Ms. DiMasi's motion is untimely with respect to any argument that the Special Master erred in finding that she could not prove causation-in-fact because her neuropathy conditions pre-dated her December 2012 flu vaccination. Whether the Special Master correctly determined that Ms. DiMasi had preexisting neuropathy conditions was squarely presented at the time of the original decision and therefore may only be reviewed through a timely appeal.

Second, as described *supra* pp. 35-39, the Special Master's denial of Ms. DiMasi's motion may also be affirmed based on consideration of the equities. In particular, Ms. DiMasi has not demonstrated that she fulfilled her responsibility to

monitor her case and retain new counsel if needed. The materials she submitted to the Special Master reveal that she long harbored concerns about her attorney's treatment of her medical records and lack of communication—which predated her first expert report and final briefing in this case.

And more generally, a per se rule favoring reopening based on post-judgment assertions that a Special Master incorrectly assessed the evidence as presented at the time of the entitlement determination or was required to address waived arguments *sua sponte* would have detrimental practical effects. It would undermine the important principle that final judgments are final and could result in the reallocation of significant government and judicial resources to evaluate new legal theories long after discovery has closed and years after the vaccination at issue.

C. No Additional Factfinding Procedures Are Necessary

In light of the foregoing analysis, the Special Master was not required to conduct any additional factfinding before denying the motion to reopen. As this Court noted, it is often, but not always, necessary for a court to hold a hearing to resolve a material dispute between a movant and the movant's former attorney to determine whether the attorney acted beyond the scope of authority to resolve a case by settlement or stipulation. *See* Order 5-6 (first citing *Sheng v. Starkey Labs., Inc.*, 53 F.3d 192 (8th Cir. 1995); then citing *Michaud v. Michaud*, 932 F.2d 77 (1st Cir. 1991); then citing *Garabedian v. Allstates Eng'g Co.*, 811 F.2d 802 (3d Cir. 1987) (per curiam); then citing *Montes v. Janitorial Partners, Inc.*, 859 F.3d 1079, 1084-85 (D.C. Cir. 2017);

then citing *Durukan Am., LLC v. Rain Trading, Inc.*, 787 F.3d 1161, 1164 (7th Cir. 2015); and then citing *Bouret-Echevarría v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 46-49 (1st Cir. 2015)). *But see Virtual Fonlink, Inc. v. Bailey*, 164 F. App'x 606, 607-08 (9th Cir. 2006) (holding that the district court did not abuse its discretion in declining to allow for oral testimony in making a credibility determination); *Jian Wang v. IBM*, 634 F. App'x 326, 327 (2d Cir. 2016) (same). No such hearing is required here, however, because the decision of whether to reopen the judgment does not turn on resolving a credibility dispute.

Amicus's arguments to the contrary miss the mark. First, no hearing was required to resolve the question of the conflicting medical records as to the onset of Ms. DiMasi's acute neuropathy symptoms after her 2012 flu vaccine because that factual dispute was irrelevant to the Special Master's entitlement decision denying compensation based on the presence of *preexisting* conditions. *Compare* Amicus Br. 69-70, *with supra* pp. 41-42. Second, there is no need to resolve any credibility dispute between Ms. DiMasi and her former attorney because the outcome would not change under either version of events. Even assuming as true Ms. DiMasi's assertions that her attorney did not inform her of the option of raising a significant aggravation theory, her own post-judgment filings confirm that her attorney correctly determined that it would have been impossible to do so while at the same time following her instructions to argue that she had no relevant preexisting conditions. *Compare* Amicus Br. 70, *with supra* pp. 26-27. And, moreover, as explained *supra* pp. 27-35, allegations

that an attorney failed to raise an alternate theory of causation are not the kind of Rule 60(b)(1) "mistake, inadvertence, or neglect" or Rule 60(b)(6) attorney abandonment claims on which relief can be based.

Amicus's new argument that additional factfinding was required under *Kirby v. Secretary of Health & Human Services*, 997 F.3d 1378 (Fed. Cir. 2021), is equally unavailing. *See* Amicus Br. 71-73. As an initial matter, that argument has been waived because Ms. DiMasi did not raise it and amicus cannot generally interject new grounds for appeal. *See, e.g.*, *Christian v. United States*, 337 F.3d 1338, 1345 (Fed. Cir. 2003). In any event, Amicus's *Kirby* argument is predicated on a fundamental misunderstanding of the basis of the Special Master's original determination. Amicus contends that the Special Master erred by presuming that Dr. Chen's and Dr. Fisher's *post-vaccination* medical records established that Ms. DiMasi's acute neuropathy symptoms occurred within a day of vaccination instead of four days later. *See* Amicus Br. 72-73. But, as discussed *supra* pp. 41-42, any dispute over the meaning of those records was immaterial because the Special Master's causation finding turned instead on the fact that Ms. DiMasi's *pre-vaccination* records established that she had preexisting neuropathy conditions, which foreclosed an argument that she could have first developed small fiber neuropathy and POTS solely in reaction to the vaccine as would

be required to establish causation-in-fact. *See* Appx29, Appx194.[5] Amicus's new argument therefore provides no basis for remand on this record.

CONCLUSION

For the foregoing reasons, the judgment of the Special Master should be affirmed.

Respectfully submitted,

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[5] More generally, the government notes that the *Kirby* decision confirms that "oral testimony in conflict with contemporaneous documentary evidence deserves little weight" and that medical records are generally "trustworthy" because they "contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions," where "accuracy has an extra premium." *Kirby*, 997 F.3d at 1382 (quoting *Cucuras v. Secretary of the Dep't of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993)). While *Kirby* explained that contemporaneous medical records are not necessarily presumed to be "accurate and complete as to all the patient's physical conditions," *id.* at 1383, *Kirby* thus also affirmed *Cucuras*'s holding that "it was not erroneous to give greater weight to contemporaneous medical records than to later, contradictory testimony," *id.* at 1382.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,045 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Caroline D. Lopez
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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system except that service will be accomplished by mail as follows:

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