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ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
07/21/2017
Clerk of the Court
BY: ANNA TORRES
Deputy Clerk

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF SAN FRANCISCO**

14 DEWAYNE JOHNSON,

15 Plaintiff,

16 v.

17 MONSANTO COMPANY, STEVEN D.
18 GOULD, WILBUR-ELLIS COMPANY
19 LLC, and WILBUR-ELLIS FEED, LLC,

20 Defendants.

Case No. CGC-16-550128

**NOTICE OF MOTION AND MOTION BY
PLAINTIFF DEWAYNE JOHNSON FOR
TRIAL PREFERENCE**

Hon. Judge Curtis E.A. Karnow

Hearing Date: August 29, 2017

Time: 9:00 a.m.

Department: 304

**[Filed Concurrently with Declaration of
Timothy Litzenburg; Declaration of Chadi
Nabhan, MD; Declaration of Thach-Giao
Truong, MD and [Proposed] Order]**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD;

2 PLEASE TAKE NOTICE that, on August 29, 2017 at 9:00 a.m., or as soon thereafter as the matter
3 may be heard before the Honorable Curtis E.A. Karnow, Superior Court Judge, in Department 304 of the
4 above entitled court located at 400 McAllister St. San Francisco, CA 94102-4515, Plaintiff Dewayne
5 Johnson will and hereby does respectfully ask this Court for an order granting a trial preference pursuant
6 to Cal.R.Ct. 3.1335 and Code Civ. Proc. §§ 36(d) and (e). Good cause exists to grant this motion because
7 Plaintiff has terminal epidermotropic T-cell lymphoma (a non-Hodgkin lymphoma) and his medical
8 condition is such that there is substantial medical doubt that he will live more than six months and granting
9 a trial preference is in the interests of justice under the circumstances. Because of his terminal cancer and
10 grave condition, if this motion is not granted, he will be deprived of justice because he is unlikely to
11 survive long enough to see the day that his case goes to trial. This motion is based on this notice of motion,
12 the accompanying memorandum of points and authorities, the Declaration of Timothy Litzenburg
13 (“Litzenburg Decl.”) and exhibits appended thereto, the Declaration of Chadi Nabhan, MD (“Nabhan
14 Decl.”) and the Declaration of Thach-Giao Truong, MD (“Truong Decl.”), and such further evidence and
15 argument as the Court may consider at the time of the hearing of this motion.

16
17
18 Dated: July 21, 2017

Respectfully Submitted,

The Miller Firm, LLC

19
20 By: /s/ Timothy Litzenburg
Timothy Litzenburg (Admitted *Pro Hac Vice*)

21 *Attorney for Plaintiff*
22 *Dewayne Johnson*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 **I. INTRODUCTION**

4 This is not a motion that Plaintiff or his counsel would have ever wanted to file. But, it is a motion
5 that must be brought and should be granted for several reason.

6 *First*, California law gives this Court the discretion and power to set an earlier trial where a party
7 suffers from an illness or condition “raising substantial medical doubt of survival of that party beyond six
8 months.” Code Civ. Proc. § 36(d). This motion has been filed because Mr. Johnson has terminal T-cell
9 lymphoma. In their declarations, both Thach-Giao Truong, MD, Mr. Johnson’s treating oncologist and
10 Chadi Nabhan, MD, an expert in non Hodgkin lymphoma, have stated that he is not likely to survive
11 beyond six months. Unless this motion is granted, he will not likely live to see the day that his case goes
12 to trial – let alone survive long enough to be present, participate, and testify at the trial of his case.

13 *Second*, the interests of justice strongly support granting this motion. California law recognizes
14 that a party has the right to be present and participate in the trial of his case. If this motion is not granted,
15 that right will be denied. Mr. Johnson will not live to see the day that his case is decided at trial. As the
16 plaintiff with the burden of proof, his case will be significantly compromised if he is unable to be present
17 in court and testify live at trial. This is particularly true where evidence about the level of exposure to
18 Defendants’ product will primarily be through Plaintiff’s testimony. In addition, the damages available
19 to his family in a wrongful death case after he dies are substantially limited in comparison to those that
20 may be recoverable, should he prevail at trial, in a personal injury case.

21 *Third* and finally, while Plaintiff will clearly suffer extreme and irreparable harm and prejudice if
22 this motion is denied (and he dies before his case proceeds to trial), Defendants will not suffer undue
23 prejudice if this motion is granted. Preference motions are routinely granted in mass tort cases in
24 California. They have been granted and preference cases have been tried in the *Vioxx*, *Toyota*, *DePuy*,
25 *Actos* and numerous other mass torts to ensure that terminally ill and elderly plaintiffs have the opportunity
26 to have their cases tried while the are still alive. This has been accomplished (and can easily be done in
27 this case) by cooperatively working together to complete necessary discovery on an expedited basis. Thus
28 while there are numerous reasons to grant this motion, there are no legitimate reasons to deny it. It is

1 unfortunate that this motion has been brought, but it should be granted. Therefore, the presence of an
2 MDL in federal court should not hinder any preference trial in California.

3 **II. BACKGROUND**

4 Medical History and Prognosis:

5 In 2014, Dewayne “Lee” Johnson was working as a groundskeeper for the Benicia Unified School
6 District; for several years, his job had included mixing and spraying hundreds of gallons of Monsanto
7 glyphosate-containing products to school properties. He experienced a severe skin rash that summer, and
8 reported to his health care providers in contemporaneous notes that the condition seemed to worsen with
9 exposure to RangerPro (a Monsanto product). His healthcare providers documented reviewing the
10 Material Safety Data Sheet for the product online; it contained no reference to a cancer risk.

11 In August 2014, Mr. Johnson was diagnosed with epidermotropic T-cell lymphoma. His job
12 continued to require application of glyphosate products; medical records note extensive dermal exposure
13 in January 2015. Mr. Johnson underwent chemotherapy throughout much of 2015, however, his disease
14 continued to progress. In September 2015, a biopsy confirmed mycosis fungoides (a non-Hodgkin
15 lymphoma) *with large cell transformation* (see Declaration of Timothy Litzenburg, Exhibit 1). That
16 finding represented a significant advancement of the disease. Indeed, the median survival time for this
17 disease, following large cell transformation, is approximately 18 months. Mr. Johnson has outlived that
18 period by four months so far.

19 Mr. Johnson’s cancer has spread throughout his skin and lymph nodes in the past two years, and
20 has proven resistant to a number of different chemotherapies, as well as radiation therapy. Mr. Johnson
21 was put on a clinical trial, through Stanford, of an experimental chemotherapy agent. While it appeared
22 to slow the advance of his disease temporarily, the disease has recently continued to progress, and Mr.
23 Johnson has suffered from treatment-related side effects such as neuropathy.

24 In April 2017, Mr. Johnson saw his medical oncologist Dr. Truong, who noted that his previously-
25 improving skin lesions were now “more inflamed,” and ordered a repeat PET scan. Scan performed April
26 18, 2017 confirmed “a significant interval increase in the number size and intensity [of] skin lesions
27 suggesting interval progression of disease.” (Declaration of Timothy Litzenburg, Exhibit 2; this note also
28 contains a good overview summary of his disease timeline). Mr. Johnson had another office visit with

1 Dr. Truong on June 22, 2017. Dr. Truong has confirmed unfortunately, that Mr. Johnson’s prognosis is
2 not good. Specifically, Dr. Truong states that Mr. Johnson:

3
4 was confirmed pathologically to have large cell transformation on September 17, 2015. Median
5 survival after this transformation, for the subtype of lymphoma Mr. Johnson suffers from, is 1.5
6 years. At this time, Mr. Johnson has lived beyond that median survival. However, his disease
7 continues to progress. He is undergoing active chemotherapy, but realistically, there is very little
8 chance of cure. **Mr. Johnson’s current condition raises medical doubt of survival beyond six
9 months.** Furthermore, given his condition and prognosis, it is not clear whether Mr. Johnson would
10 be able to meaningfully attend or participate in any trial beginning later than January 2018.

11 *See, Truong Decl.*

12 Plaintiff has also identified non-Hodgkin lymphoma expert and medical oncologist Chadi Nabhan,
13 M.D., whose signed report was served on Monsanto on or about May 1, 2017. Dr. Nabhan has reviewed
14 voluminous medical records of Mr. Johnson’s, with an eye toward his prognosis, and has provided the
15 attached declaration (Exhibit 4, Declaration of Chadi Nabhan, M.D.). After that review, it is Dr. Nabhan’s
16 conclusion that Mr. Johnson’s life expectancy is short and his “current condition raises substantial medical
17 doubt of survival beyond six months.”

18 **III. AN EARLY TRIAL DATE IS NECESSARY BECAUSE PLAINTIFF HAS TERMINAL
19 CANCER AND IS UNLIKELY TO SURVIVE BEYOND SIX MONTHS**

20 A motion pursuant to Code of Civil Procedure section 36 for a trial “preference can be claimed by
21 *ex parte* or noticed motion ‘at any time’ during the pendency of the action.” Weil & Brown, Cal. Prac.
22 Guide: Civ. Proc. Before Trial (The Rutter Group 2016), at ¶¶ 12:271, 12:246.4 (quoting Code Civ. Proc.
23 § 36(c)(2)). In setting a case for trial, it is necessary to take into account a party’s right to a preference.
24 Cal. R. Cr. 3.729(2).

25 **A. The Court has Discretion to Grant a Trial Preference Where a Party Is Unlikely To
26 Survive Beyond Six Months Because Of An Illness Or Condition**

27 In enacting section 36, the intent of the Legislature recognized that it was imperative to safeguard
28 litigants “against the acknowledged risk that death or incapacity might deprive them of the opportunity
to have their case effectively tried and to obtain the appropriate recover.” *Swaithes v. Superior Court*
(1989) 212 Cal.App.3d 1082, 1085. Against the backdrop of this important aim, California courts have
consistently respected the rights of “ailing or elderly litigants” to have their cases specially set for trial to

1 ensure that they are afforded their day in court. *See, e.g., Warren v. Schecter* (1997) 57 Cal.App.4th 1189,
2 1197.

3 Under California Law, where, as here, a party suffers from an illness or condition “raising
4 substantial medical doubt of survival of that party beyond six months,” courts have the discretionary
5 power to set an earlier trial date. Code Civ. Proc. § 36(d). *See also* Haning, Flahavan, Cheng & Wright
6 (The Rutter Group 2016), at ¶ 8:28. A motion for a trial preference based on a party’s terminal illness
7 may be granted where, as is shown here, there is “clear and convincing medical documentation” that the
8 party has an illness and is unlikely to survive beyond six months. *Id. See also* Weil & Brown, at ¶¶
9 12:247.5, 12:251. Section 36(d) provides:

10
11 In its discretion, the court may also grant a motion for preference that is accompanied by clear and
12 convincing medical documentation that concludes that one of the parties suffers from an illness or
13 condition raising substantial medical doubt of survival of that that party beyond six months, and
14 that satisfies the court that the interests of justice will be served by granting the preference.

Code Civ. Proc. § 36(d).

15 **B. Setting This Case For An Earlier Trial Is In The Interests Of Justice**

16 In addition to Code Civ. Proc. § 36(d), the Court also has the discretionary power to grant
17 a trial priority where, as here, there is good cause to do so and where "the interests of justice will be
18 served by granting this preference." Code Civ. Proc. § 36(e). "The decision to grant or deny a
19 preferential trial setting under [Code Civ. Proc.] § 36(e) 'rests at all times in the sound discretion of the
20 trial court in light of the totality of the circumstances.'" Weil & Brown, at ¶ 12:256.2 (quoting *Salas v.*
21 *Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 344). As part of this analysis, it is appropriate to recognize
22 that Plaintiff's terminal cancer makes "it increasingly difficult [for her] to participate in the litigation and
23 thus amount[s] to cause for trial preference." *Haning, et al.*, at ¶ 8:36. The interests of justice strongly
24 support granting this motion. Plaintiff should be able to have his case set for trial and proceed to trial
25 while he is still alive. Waiting to set this case for trial sometime after Ms. Johnson is dead is not in the
26 interests of justice. In our system of justice, he has the right to be present and participate in the trial of his
27 case and see his case be decided at trial. California courts have long recognized that "justice delayed is
28 justice denied." *Laborers' Int'l Union Etc. v. El Dorado Landscape Co.* (1989) 208 Cal.App.3d 993.

1 1006. Delaying the trial of this case beyond six months will result in justice being denied to Mr. Johnson.
2 In *Looney v. Superior Court* (1993) 16 Cal.App.4th 521, the court explained:

3
4 [T]here can be little argument that section 36 was enacted for the purpose of assuring that an aged
5 or terminally ill plaintiff would be able to participate in the trial of his or her case and be able to
6 realize redress upon the claim asserted. Such a preference is not only necessary to assure a
7 party's peace of mind that she or she will live to see a particular dispute brought to resolution but
8 it can also have substantive consequences. The party's presence and ability to testify in person
9 and/or assist counsel may be critical to success. In addition the nature of the ultimate recovery can
10 be adversely affected by a plaintiff's death prior to judgment.

11 *Id.* at 532.

12 The reasons for granting a trial preference articulated in *Looney* apply here. If this motion is not
13 granted, Mr. Johnson will not be able to participate in the trial of his case. He will not live to see the day
14 that his case is decided at trial. Equally important, as the plaintiff with the burden of proof, his case will
15 be significantly compromised if he is unable to be present in court and testify live at trial. Likewise, the
16 damages available to his family in a wrongful death case after he dies are substantially limited in
17 comparison to those that may be recoverable, should he prevail at trial, in a personal injury case. This
18 motion has been brought purely because it is necessary in light of Mr. Johnson's medical condition.
19 The fact that there are many cases against Monsanto in federal court involving many other people who
20 have NHL because of Defendants' glyphosate-based products and conduct is not a reason to deny this
21 motion.

22 Mr. Johnson's right to have his case tried while he is alive should not be denied because
23 Defendants' products and conduct also harmed many other people like him. That Defendants' products
24 and conduct were a substantial factor in harming many others should not be used as a shield or justification
25 to delay the trial of a dying man who deserves his day in court while he is alive and able to testify. Mr.
26 Johnson's interest in this action will be irreparably harmed and prejudicially impaired if he is not granted
27 a trial preference.

28 **C. While Plaintiff Would Suffer Undeniable Prejudice If This Motion Is Denied,**
There Will Be No Undue Prejudice To Defendants If This Motion Is Granted.

If this motion is denied, the prejudicial impact to Mr. Johnson will be severe and undeniable: he
will not live to see the day that his case goes to trial; he will not be able to be present or testify in the trial

1 of his case; he will not to get justice during his lifetime for the harm that he has suffered. In short, it
2 cannot credibly be claimed that Plaintiff would not suffer extreme prejudice if this motion is denied.
3 There are clearly strong and compelling reasons to grant this motion and to ensure that Mr. Johnson's case
4 is set for trial before he dies. By contrast, there will be no prejudice to Defendants if this motion is granted.
5 It is anticipated that Defendants will argue that the Court should not grant this motion because they have
6 not had the opportunity to conduct all necessary discovery. That argument, in addition to
7 applying equally to Plaintiff, who has the burden of proof at trial, does not justify denial of this motion.

8 In ruling on a motion for a trial preference, "[t]he court cannot balance conflicting interests of
9 opposing litigants." Weil & Brown, at ¶ 12:248. "Thus, trial must be set within 120 days even if opposing
10 parties have not completed discovery or pretrial preparations." Id. (citing *Swaithes v. Superior Court*
11 (1989) 212 Cal.App.3d 1082, 1086. Furthermore, as has been effectively done in other cases and
12 JCCPs where courts have granted preference motions to allow the trials of terminally ill plaintiffs to
13 proceed while they are still alive, to ameliorate any potential concerns, Plaintiff's counsel will work
14 cooperatively with Defendants' counsel to ensure that all parties have a fair and reasonable opportunity to
15 conduct all essential discovery before trial if this motion is granted. All parties, particularly Plaintiff who
16 has the burden of proof at trial, have an interest in ensuring that all necessary discovery is completed
17 before trial.

18 Even if Defendants' interest in completing protracted discovery was a basis to delay the trial of
19 Mr. Johnson's case (which it is not under California law), it is not a legitimate one here. Extensive
20 discovery has already been conducted to date. Defendants believe very strongly that the evidence shows
21 that their products are not dangerous or defective. The only discovery that they might want or need in
22 order to be ready for trial within the next 120 days is discovery specific to Mr. Johnson. If this
23 motion is granted, Plaintiff's counsel will immediately provide expedited discovery to Defendants,
24 including written discovery and depositions. In short, the parties easily can - and should - work together
25 cooperatively to have this case ready for trial within an expedited calendar.

1 **IV. CONCLUSION**

2 Based on the foregoing, Plaintiff Dewayne Johnson respectfully asks the Court to exercise its
3 discretion and set his case for trial in the near future so that he can be present, participate and testify in
4 his case at trial.

5
6 DATED: July 21, 2017

By: /s/ Timothy Litzenburg

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