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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF SAN FRANCISCO**

15 DEWAYNE JOHNSON,
16
17 Plaintiff,

18 vs.

19 MONSANTO COMPANY,
20
21 Defendant.

Case No.: CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
CONTINUANCE OF TRIAL DATE**

Hon. Judge Curtis E.A. Karnow

Hearing Date: April 3, 2018
Time: 9:00 a.m.
Department: 304

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
03/20/2018
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

1 **PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR CONTINUANCE OF**
2 **TRIAL DATE**

3 **“CONTINUANCES OF TRIALS ARE DISFAVORED”- RULE 3.1332(C)**

4 **COMES NOW PLAINTIFF**, DEWAYNE JOHNSON, by his attorneys, and opposes this Motion
5 for Continuance. The parties on August 21, 2017 agreed to a stipulated trial date of this matter,
6 and Plaintiff agreed to withdraw his Motion for Preference as part of that stipulation. Now after
7 discovery is completed, seven months later, Defendant attempts to withdraw from its agreement.
8 The Motion for Continuance should be denied.
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10 Plaintiff continues to suffer from non-Hodgkin lymphoma, with large cell transformation,
11 the same diagnosis as he had when his treating/managing oncologist signed a declaration that there
12 was “medical doubt of survival beyond six months,” as did a leading non-Hodgkin lymphoma
13 expert who reviewed the records and literature. Attached to the Declaration of Timothy Litzenburg
14 as **Exhibit A** is an updated declaration by Dr. Nabhan, who has examined the patient in person
15 since his last declaration. He states again that Mr. Johnson’s condition today “CONTINUES TO
16 raise substantial medical doubt of survival beyond six months.” (Declaration of Timothy
17 Litzenburg, **Exhibit A** at 2:24-25). However, this is irrelevant to the issue presently before the
18 Court; this is not a preference Motion. That Motion was withdrawn by agreement with Monsanto
19 fixing a trial date in June 2018. *It is unfortunate, to say the least, that we must ask the Court to*
20 *enforce this unambiguous written agreement/stipulation.*
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23 **PROCEDURAL BACKGROUND**

24 This case has been pending for more than two years; it was filed in January 2016. The case
25 proceeded in routine fashion until Plaintiff’s counsel learned of Mr. Johnson’s terminal condition
26 in June 2017. At that time, Plaintiff requested an expedited trial informally, at a Case Management
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1 Conference. The Court requested a Motion and briefs, and a hearing was set for August 29, 2017.

2 The Motion was supported by a declaration of Dr. Truong, Mr. Johnson's oncologist, and
3 Dr. Nabhan, the retained expert oncologist who will testify at trial on causation. Both agreed that
4 the median survival for a mycoses fungoides patient with large cell transformation was short. Dr.
5 Truong, in fact, acknowledged that Mr. Johnson had already surpassed that median survival.
6
7 (Declaration of Timothy Litzenburg, **Exhibit B**; p.2:8-10).

8 Defendant contacted Plaintiff in July 2017 and began to negotiate a trial date. After
9 numerous emails and telephone calls, the parties agreed to a compromise trial date of June 2018.
10 There is no doubt that Monsanto preferred a later trial date, just as Plaintiff preferred a trial date
11 within 120 days per C.C.P. § 36. Mr. Johnson withdrew his Motion following a signed stipulation
12 of the parties, and the Court entered an Order August 29, 2017 setting trial for June 18, 2018 and
13 setting forth other scheduling matters.
14

15 Importantly, the issue of the trial judge was discussed at length in Court on that date. This
16 Court indicated that it was unavailable for a June trial. The parties were previously advised by the
17 Court that if it did not have room in its own schedule, the case could be sent to the Presiding Judge
18 for assignment to a trial judge (see CMO 5). And, the parties discussed this throughout their
19 negotiations.
20

21 The stipulation, *signed and filed by Monsanto* on August 21, 2017 reads, in
22 pertinent part:

23 **PLAINTIFF AND MONSANTO AGREE AND REQUEST THAT, IF A**
24 **TRIAL DATE IN JUNE 2018 IS NOT FEASIBLE FOR DEPARTMENT 304,**
25 **THE COURT REFER THIS LAWSUIT TO THE PRESIDING JUDGE FOR**
26 **ASSIGNMENT TO ANOTHER JUDGE FOR TRIAL IN JUNE 2018**

27 (Declaration of Timothy Litzenburg, **Exhibit C** at 1:25-27). As part of this agreement, Monsanto

1 requested and Plaintiff agreed to dismiss three Defendants in this case- Wilbur Ellis Company
2 LLC, Wilbur Ellis Feed, LLC and Steven Gould, a Monsanto sales executive for California.
3 (Declaration of Timothy Litzenburg, **Exhibit C** at 1:13-18). Lastly, the parties agreed and put in
4 the stipulation that:
5

6 **A TRIAL DATE BE SET IN THIS CASE FOR JUNE 2018 AND THAT THE**
7 **TRIAL DATE REMAIN EVEN IN THE EVENT THAT PLAINTIFF**
8 **PASSES AWAY PRIOR TO THAT DATE**

9 The Court's August 29, 2017 Order set a trial date of June 18, 2018, and sets forth in
10 pertinent part:

11 **June 18, 2018-- Dept. 206 (master calendar): Trial: 9:30 a.m. (estimate: 4 weeks,**
12 **jury)**

13
14 The Order also dictates much of the pre-trial scheduling; it was later amended by another CMO
15 clarifying some of the pretrial deadlines. Most of those dates have now passed and been complied
16 with. All fact discovery is complete, all expert discovery is complete, and motions *in limine*,
17 *Sargon/Cooper* motions and dispositive motions have all been filed. Generally, all that remains is
18 the discussion of deposition designations, and possible submission to the Court of disputes thereon.
19

20 **MEDICAL AND FACTUAL STATUS**

21 The parties, their experts, and all treating physicians agree that Mr. Johnson continues to
22 suffer from non-Hodgkin lymphoma with large cell transformation. Nobody has suggested that
23 his disease is in remission. On October 30, 2017, Dr. Nabhan met with Mr. Johnson in person and
24 discussed his health and treatment and examined him. His expert report states, in pertinent part:
25

26 It is my impression that Mr. Johnson has CTCL with LCT and that the extent of his
27 disease is substantial putting him in a poor prognosis category with limited life span.
28 Allogenic BMT [bone marrow transplant] might something [sic] to consider if he

1 has a match and his disease responds to treatment which is unlikely, but is
2 something that he discussed with some of his physicians in the Bay area. After
3 meeting Mr. Johnson today, I affirm my opinion that he has a poor prognosis and
4 that his life expectancy is limited.

5 Mr. Johnson's discovery deposition was scheduled for December 6, 2017, with a trial
6 deposition to take place the following day. On December 6, however, Plaintiff could not leave his
7 bed, or even answer the phone, because he was so ill from chemotherapy the day before. His
8 deposition was taken the next day and Plaintiff arranged a date the following month to allow
9 continuation of the deposition as well as a trial deposition.

10 Mr. Johnson appeared in slightly better health at that January deposition, as he was not
11 receiving chemotherapy during that week (though he did begin another course in January 2018).
12 On January 18, 2018, the parties took the deposition of Dr. Truong, and Monsanto's present
13 Motion appears to be based solely on the following exchange:
14

15 20 Q How much body surface is involved with Mr.
16 21 Johnson today with respect to the distribution of his
17 22 lesions?

18 23 A Today?

19 24 Q Yes.

20 25 A From my recent visit with him, I would say it

21 1 would be more than 80 percent but improving.

22 2 Q It's improving?

23 3 A Yes.

24 4 Q Do you have an assessment as to why it's

25 5 improving?

26 6 A He's responding to treatment.

27 (Declaration of Timothy Litzenburg, **Exhibit D**, Truong deposition at pp. 55-56). Defense
28 counsel asked Dr. Truong pointedly whether the prognosis contained in her Declaration had
changed, and she did not indicate any change, saying only "So the prognosis for someone with

1 mycosis fungoides is based on what other people have experienced. Each person’s survival
2 depends on how they do.” (Id. at 72:17-20).

3 Mr. Johnson has since suspended chemotherapy, not because he is in remission or cured,
4 but because the side effects were so severe. The treatment caused sores in his mouth which left
5 him unable to eat or talk at times.
6

7 Dr. Nabhan has reviewed the transcript of Dr. Truong’s deposition and submits an
8 updated declaration, (Declaration of Timothy Litzenburg, **Exhibit A**), in which he states that
9 there continues to be substantial medical doubt of Mr. Johnson’s survival beyond six months. At
10 deposition, Dr. Nabhan explained the simple logic behind saying he expected Mr. Johnson to die
11 in 2019, rather than six months after his July declaration: “You already survived the 24 months I
12 have projected, so you probably are on the higher end of things, and that obviously persuaded me
13 that he will probably live longer than I originally predicted.” (Declaration of Timothy
14 Litzenburg, **Exhibit E**; Nabhan dep. 1/30/18 at 57:12-16). And, his Declaration signed just
15 yesterday states that there remains, at this time, substantial doubt of survival beyond six months.
16
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18 Simply put, everyone involved is happy that Mr. Johnson has shown some response to
19 treatment. However, at some point he will stop responding, and he will die, most likely in 2018
20 or 2019.
21

22 ARGUMENT

23 Plaintiff is chagrined that he must ask the Court to step in and enforce an unambiguous
24 written and signed agreement between the parties. However, Defendants are attempting to
25 repudiate that agreement. The Court has, in essence, already enforced this agreement by entering
26 an Order reflective of it.
27

1 This is *not* a CCP § 36 trial setting. The Plaintiff withdrew that Motion upon signing the
2 stipulation. Defendant appears to suggest that it should be treated as a preference setting, however.

3 If indeed it was such a setting, the following applies for continuance motions:
4

5 There shall be no continuance beyond 120 days from the granting of the motion for
6 preference except for physical disability of a party or a party's attorney, or upon a
7 showing of good cause stated in the record. Any continuance shall be for no more
8 than 15 days and no more than one continuance for physical disability may be
9 granted to any party.

10 Certainly, there is nothing to support the continuance of a preferential setting. However,
11 again, this is a stipulated trial date; an actual §36 trial would have occurred in December 2017.
12 Mr. Johnson gave up his right to a preference trial, as well as his causes of action against three
13 viable Defendants, in exchange for this stipulated date and to avoid uncertainty. If the Court had
14 granted an Order on a contested Motion, Monsanto would likely have asked for a reconsideration,
15 a continuance, or other relief from the Order. One benefit of the negotiated and stipulated trial
16 date was that the parties understood it would not be subject to efforts by either side to contest it.

17 Indeed, consider if Plaintiff had violated the stipulation by filing another Motion for
18 Preference in late 2017; though he appeared to be on death's door in December, such an action
19 would have been bad faith in light of the agreement and stipulation. The stipulation even provides
20 that "the trial date remain even in the event that Plaintiff passes away prior to that date."

21 To suggest that Mr. Johnson must be in hospice care or the like to retain his
22 agreed/stipulated/ordered trial date is without any basis in the case law, rules, or statutes.
23 Presumably, if there were any such support Monsanto would have cited it.

24 Instead, Defendants cite to Standards of Judicial Administration stating that "complex
25 litigation should be assigned to one judge for all purposes." However, Defendants omit the second
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1 part of that subsection, “If such an assignment is not possible, a single judge should be assigned to
2 hear law and motion matters and discovery matters.” Standard 3.10(b). This of course is the case
3 here. This Court is unavailable to sit for the trial of this matter on the date agreed to by the parties.
4 That is reflected in the Order, and it has been repeatedly discussed with and among the parties
5 dating back to as July 2017 (CMO 5 states in pertinent part: “I have informed counsel that I am
6 not likely to be available to try this case in the Fall/Winter 2017, and if a preference is granted, I
7 may request the Presiding Judge to send the case to a judge of this Court out of her trial assignment
8 Department.”). In fact, at the August 29, 2017 case management conference, the parties discussed
9 the Court’s availability at length. Despite the stipulation, counsel for Defendant argued essentially
10 the same thing they are arguing now; that Monsanto would prefer this Department hear the trial of
11 this matter. Lead trial counsel for Plaintiff stated that, among other things, he had family
12 obligations in July 2018. The Court stated that “family comes first” and signed the Order setting
13 the trial date and sending the case to the Presiding Judge for assignment.
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17 Monsanto should not be permitted to unilaterally vitiate the agreement and stipulation. It
18 is tantamount to appealing a settlement; the parties agreed among themselves, and each
19 compromised its position. It is unsurprising that a corporate Defendant would try to delay or avoid
20 trial; what is somewhat unbelievable is that one would ask the Court to set aside the agreement,
21 without justification. Neither the stipulation nor the Order predicated the trial setting on Mr.
22 Johnson being near death come June. Even if this was a contested preference setting, there is no
23 provision for cancelling or moving the trial based on the ups and downs of the parties’ health.
24 Indeed, § 36 has a heightened standard for continuances. Again, this is inapplicable to this Motion,
25 but illustrative of California’s attitude toward litigants with short life expectancies.
26
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1 Monsanto has presented the Court with a logic pretzel; the trial should be delayed slightly,
2 they argue, because Mr. Johnson has “responded” to recent chemotherapy. This argument runs
3 counter to the public policy behind timely trial settings for litigants with short life expectancies;
4 Monsanto is arguing that, because Mr. Johnson is well enough to attend trial now, it should be
5 delayed to a time when it is less likely that he will be alive or in attendance. Defendant is also
6 attempting to break an agreement and stipulation negotiated with the undersigned counsel. There
7 is no policy support or authority to move a trial date based on Mr. Johnson’s “responsiveness” to
8 a certain chemotherapy agent. Lest there be any ambiguity as to the intent or agreement of the
9 parties, just prior to signing the stipulation, on August 21, 2017 Plaintiff’s counsel emailed Defense
10 counsel “I want to make a few things clear. We have discussed our mutual preference for Judge
11 Karnow who has presided over the case to date, to try the case. I am not making any offers to
12 continue or delay trial at this time- our stip/order is clear for a June trial date.” Defendant replied
13 “Understood.” No “good cause” exists here; Rule 3.1332 sets forth seven examples of good cause;
14 Defendant does not claim this case meets any of those exceptions.
15
16
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18 CONCLUSION

19 The Court should deny Monsanto’s request to discard the agreement, stipulation and Order
20 regarding the trial date of this case. Plaintiff asks the Court to enforce a stipulation. Mr. Johnson
21 relinquished his right to trial within 120 days, as well as his claims against several other parties, in
22 exchange for this date certain. Indeed, “all parties and their counsel must regard the date set for
23 trial as certain.” Rule 3.1332. This certainty, and the prospect of adjudication by jury, is at the
24 heart of our judicial system’s ability to resolve cases.
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Respectfully submitted,

DATED: March 20 2018

/s/ Timothy Litzenburg
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