

1 Karen Barth Menzies (CA SBN 180234)
2 GIBBS LAW GROUP LLP
3 505 14th Street, Suite 1110
4 Oakland, CA 94612
5 Tel: (510) 350-9700
6 Fax: (510) 350-9701
7 kbm@classlawgroup.com

8 Fletcher V. Trammell, Esq.
9 Melissa Binstock Ephron, Esq.
10 TRAMMELL, PC
11 3262 Westheimer Rd., Ste. 423
12 Houston, TX 77098
13 Tel: (800) 405-1740
14 Fax: (800) 532-0992
15 fletch@trammellpc.com
16 melissa@trammellpc.com

17 Alexander G. Dwyer
18 Andrew F. Kirkendall
19 Erin M. Wood
20 KIRKENDALL DWYER LLP
21 4343 Sigma Rd, Suite 200
22 Dallas, TX 75244
23 Tel: 214-271-4027
24 Fax: 214-253-0629
25 ad@kirkendalldwyer.com
26 ak@kirkendalldwyer.com
27 ewood@kirkendalldwyer.com
28 *Attorneys for Plaintiff*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

JCCP NO. 4953

COORDINATION PROCEEDING SPECIAL
TITLE (Rule 3.550)

ASSIGNED FOR ALL PURPOSES TO
HONORABLE WINIFRED SMITH
DEPARTMENT 21

ROUNDUP PRODUCTS CASES

**NOTICE OF MOTION AND
PLAINTIFF'S MOTION FOR TRIAL
PREFERENCE**

THIS DOCUMENT RELATES TO:

Donnetta Stephens v. Monsanto Company, et al.,
(San Francisco County Superior Court, Case No.
CGC-20-585764)

*[Filed concurrently with the Declaration of
Fletcher V. Trammel; Declaration of
Donnetta Stephens; Exhibits; and Proposed
Order]*

Reservation ID: R-2213248
Date: November 13, 2020
Time: 10:00 a.m.
Place: Department 21

1 **ALL PARTIES AND THEIR COUNSELS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 13, 2020 at 10:00 a.m., or soon thereafter as
3
4 the matter can be heard in Department 21 of this Court, The Honorable Winifred Smith presiding,
5 located at 1221 Oak Street, third floor, Oakland, California, 94612, Plaintiff will move and hereby
6 does respectfully move this Court for an Order granting a trial preference pursuant to Cal. Code.
7 Civ. Proc. § 36(a) and Cal. R. Ct. 3.1335.
8

9 Plaintiff's Motion for Trial Preference is based on Cal. Code. Civ. Proc. § 36(a) and Cal.
10 R. Ct. 3.1335 and Plaintiff respectfully requests that this Honorable Court grant Plaintiff's
11 preference trial because: 1) Plaintiff was diagnosed with the blood cancer Non-Hodgkin's
12 Lymphoma, specifically High Grade B-Cell Lymphoma, as a direct result of exposure to
13 Monsanto's Roundup herbicide; 2) Plaintiff is over the age of 70; and 3) Plaintiff's health is such
14 that a preferential trial setting is necessary to prevent prejudicing her interest in this litigation.
15 Because of Plaintiff's cancer, her serious medical conditions, and the risk she faces with the novel
16 coronavirus, if this Motion is not granted, Plaintiff will be deprived of justice, because she is
17 unlikely to survive long enough to see the day that her case goes to trial.
18
19

20 This Motion is based on this Notice of Motion, the accompanying Memorandum of Points
21 and Authorities, the Declaration of Fletcher V. Trammell, the Declaration of Donnetta Stephens,
22 and exhibits appended thereto, and such further evidence and argument as the Court may consider
23 at the time of hearing of this Motion.
24

25 Dated: October 14, 2020
26
27
28

Respectfully submitted,

GIBBS LAW GROUP LLP

By: 

Karen Barth Menzies
GIBBS LAW GROUP LLP
505 14th Street, Suite 1110
Oakland, CA 94612
Tel: (510) 350-9700
Fax: (510) 350-9701
kbm@classlawgroup.com

Fletcher V. Trammell
Melissa Binstock Ephron
TRAMMELL, PC
3262 Westheimer Rd., Ste. 423
Houston, TX 77098
Tel: (800) 405-1740
Fax: (800) 532-0992
fletch@trammellpc.com
melissa@trammellpc.com

Alexander G. Dwyer
Andrew F. Kirkendall
Erin M. Wood
KIRKENDALL DWYER LLP
4343 Sigma Rd, Suite 200
Dallas, TX 75244
Tel: 214-271-4027
Fax: 214-253-0629
ad@kirkendalldwyer.com
ak@kirkendalldwyer.com
ewood@kirkendalldwyer.com

Attorneys for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Plaintiff Donnetta Stephens (hereinafter “Plaintiff” or “Ms. Stephens”) commenced this action
4 against Defendants on August 4, 2020. As shown below, Ms. Stephens is over the age of 70 and
5 has been diagnosed with High Grade B-Cell Lymphoma. Plaintiff is elderly and very ill, and her
6 right to a jury trial will be prejudiced if she is not granted a preferential trial setting within the next
7 120 days. *See* Trammell Decl. ¶ 5. Therefore, Plaintiff respectfully requests a preferential trial
8 setting within the next 120 days pursuant to Cal. R. Ct. 3.1335 and Cal. Code. Civ. Proc. § 36(a)
9 and (e).

10 On October 9, 2020, Plaintiff served a completed Plaintiff Fact Sheet and medical records
11 authorizations on Defendants. *See* Trammell Decl. ¶ 4.

12 **ARGUMENT**

13 **I. Applicable Law, Interpretation, and Purpose of Section 36(a)**

14 California Code of Civil Procedure Section 36 states in pertinent part:
15

16 (a) A party to a civil action who is over 70 years of age may petition the court for a
17 preference, which the court shall grant if the court makes both of the following findings:

18 (1) The party has a substantial interest in the action as a whole;

19 (2) The health of the party is such that a preference is necessary to prevent
20 prejudicing the party’s interest in the litigation.

21 [. . .]

22 (c) Unless the court otherwise orders:

23 (1) A party may file and serve a motion for preference supported by a declaration of
24 the moving party that all essential parties have been served with process or have
25 appeared;

26 (2) At any time during the pendency of the action, a party who reaches 70 years of
27 age may file and serve a motion for preference.

28 [. . .]

1 (e) Notwithstanding any other provision of law, the court may in its discretion grant a
2 motion for preference that is supported by a showing that satisfies the court that the interest
of justice will be served by granting this preference.

3 (f) Upon the granting of such a motion for preference, the court shall set the matter for trial
4 no more than 120 days from that date and there shall be no continuance beyond 120 days
5 from the granting of the motion for preference except for physical disability of a party or a
6 party's attorney, or upon a showing of good cause stated in the record. Any continuance
shall be for no more than 15 days and no more than one continuance for physical disability
may be granted to any party.

7 Cal. Civ. Proc. Code § 36(a), (c), (e), and (f).

8
9 Other grounds for preference stated in § 36 of the Code of Civil Procedure are discretionary
10 (see § 36, subds. (d), (e)). However, § 36(a) is "**mandatory.**" *Ellis v. Superior Court for City &*
11 *Cty. of San Francisco*, No. A155248, 2019 WL 365768, at *3 (Cal. Ct. App. Jan. 30, 2019). Thus,
12 if the court finds (1) the party has a substantial interest in the action and (2) his or her health is
13 such that a preference is necessary to avoid prejudicing that interest, "the court *shall* grant [the
14 preference]." (§ 36(a), italics added.). *Fox v. Superior Court*, 21 Cal. App. 5th 529, 533 (2018).

15 When the movant is over 70 years of age, the two aforementioned findings constitute the *only*
16 relevant considerations for the court to assess; the court is not permitted to assess other factors
17 such as, among other things, the interest of the other parties, whether the streamlined timeline is an
18 inconvenience to the court or the other parties, or what amount of discovery has been completed.
19 *Ellis*, No. A155248, 2019 WL 365768, at *3. *See e.g., Swaithes v. Superior Court*, 212 Cal.App.3d
20 1082, 1085 (1989) ("Mere inconvenience to the court or to other litigants is irrelevant."); *Miller v.*
21 *Superior Court*, 221 Cal.App.3d 1200,1204–1206 (1990) ("Failure to complete discovery or other
22 pretrial matters does not affect the absolute substantive right to trial preference for those litigants
23 who qualify for preference under subsection (a) of section 36. The trial court has no power to
24 balance the differing interests of opposing litigants in applying the provision."). Further, a short
25 life expectancy is *not* a relevant metric in considering a motion for preference brought pursuant to
26 CCP § 36(a). *Fox*, 21 Cal. App. 5th at 535.

27 By way of evidentiary proof, the movant need not muster all his evidence in order to prevail
28 on his motion. Rather, only a minimal amount of evidentiary support is required. *Ellis*, No.

1 A155248, 2019 WL 365768, at *3; *Looney v. Superior Court*, 16 Cal. App. 4th 521, 532 (1993).
2 As such, § 36.5 states that the “medical diagnosis and prognosis” of the movant seeking a
3 preference under § 36(a) may be established through an affidavit “signed by the attorney for the
4 party seeking preference based upon information and belief as to the medical diagnosis and
5 prognosis of any party.” *Fox*, 21 Cal.App.5th at 524 (citing Weil & Brown, *Cal. Practice Guide:
6 Civil Procedure Before Trial* (The Rutter Group 2017) ¶ 12:247.1, p. 12(I)–44 (attorney
7 declaration under section 36.5 “can consist entirely of hearsay and conclusions”)).

8 The case law elucidated above reflects the very narrow purview allowable in the court’s
9 assessment of whether a case qualifies for preference under § 36(a). The public policy
10 undergirding this statutory section is deeply rooted in the pivotal concern of ensuring a party can
11 participate and assist effectively at trial. *Koch-Ash v. Superior Court*, 180 Cal. App. 3d 689, 694
12 (Ct. App. 1986); *Looney*, 16 Cal. App. 4th at 532. Without the enforcement of this section, a
13 qualifying plaintiff’s substantive right to trial during his lifetime would otherwise be irrevocably
14 lost.

15 **II. Plaintiff Meets the Requirements of Section 36(a)**

16 **A. Plaintiff is 70 Years Old.**

17 Ms. Stephens is a 70-year-old individual who was diagnosed with High Grade B-Cell
18 Lymphoma. *See* Trammell Declaration ¶ 5; Stephens Declaration ¶ 3.

19 **B. Plaintiff Has a Substantial Interest In This Case Because Plaintiff Has Been**
20 **Diagnosed With Non-Hodgkin’s Lymphoma.**

21
22 Ms. Stephens has a substantial interest in this case, because her lawsuit against Defendants
23 alleges that her Non-Hodgkin’s Lymphoma was caused by Defendants’ Roundup product,
24 resulting in personal injury and damages.

25 **C. Plaintiff’s Health Is Such That Preference Is Necessary To Prevent Prejudicing**
26 **Her Interest In This Litigation.**
27
28

1 Ms. Stephens is 70 years old, and her health is such that preference is necessary to prevent
2 prejudicing her interests in this litigation. *See* Trammell Decl. ¶ 5; Stephens Decl. ¶ 9. Ms.
3 Stephens suffers from numerous health complications and has had a difficult battle with NHL
4 since being diagnosed in 2017. *See* Exh. 1 (Surgical Pathology Report). Indeed, Ms. Stephens
5 suffered a relapse in the summer of 2019 and had to undergo additional rounds of chemotherapy at
6 that time. *See* Stephens Dec. ¶ 4. Ms. Stephens suffers from a myriad of NHL comorbidities and
7 independent conditions that have devastated her health and have rendered her extremely weak,
8 fatigued, and in a perpetual state of pain. These conditions include but are not limited to heart
9 failure, kidney failure, chronic airway obstruction, drug-induced peripheral neuropathy,
10 antineoplastic chemotherapy induced pancytopenia, arthritis, vertigo, blood clots and artery
11 blockages, hardening of the aorta, lymphadenopathy, a seizure disorder, severe uncontrolled high
12 blood pressure, and malnutrition. *See* Exh. 2 (MyChart Record); *See also* Stephens Dec. ¶ 5.

13 Ms. Stephen’s peripheral neuropathy has left her with chronic pain in her feet, legs, and arms.
14 *See* Trammell Decl. ¶ 5; *See also* Stephens Dec. ¶ 6. She also suffers from severe weakness,
15 describing her legs as feeling like “rubber” or “doll’s legs.” Stephens Dec. ¶ 6. The pain and
16 weakness Ms. Stephens experiences in her feet and legs cause her to stumble and fall frequently,
17 and she relies on her husband to walk behind her in case she should fall. *Id.* Because of this pain
18 and weakness, Ms. Stephens is no longer able to drive a car. *Id.* Ms. Stephens also suffers from
19 severe vertigo and very regularly passes out due to the intense dizziness she experiences. *Id.*
20 Formerly, Ms. Stephens was an active individual who loved to tend to her neighbors’ gardens.
21 Now, she can barely walk and must use a cane or walker to support herself. *Id.* at 5. Her physician
22 has informed her that she will need a wheelchair in the near future. *Id.* Using her own word, Ms.
23 Stephens describes the pain she experiences as though she is getting shot through with electricity.
24 *See* Stephens Dec. ¶ 6. As this description reflects, the pain Ms. Stephens experiences is relentless,
25 unabated, and all-consuming, causing this once former active individual to live her life in a
26 perpetual state of fear of undertaking the simple task of movement.

27 If her physical debility was not enough, Ms. Stephens also suffers from what is colloquially
28 known as “chemo brain.” *See* Stephens Dec. ¶ 7. Ms. Stephens reports that her cognitive processing

1 and memory are greatly hampered, and she very frequently must ask her husband for assistance with
2 recalling information. *Id.* She describes herself as “using incoherent speech” and as having thoughts
3 that are “fuzzy” and “blurry.” *Id.* She states, “I feel like my mind does not work; I cannot remember
4 what I did yesterday.” *Id.* Ms. Stephens reports that she has a difficult time recalling words and will,
5 instead, describe the word she is trying to use. *Id.* Her husband often tells her to “stop talking and
6 start over,” because Ms. Stephens’ speech is frequently incoherent. *Id.* Ms. Stephens notes that she
7 will be in the middle of a task but will forget what she is doing mid-task, and she has started using
8 a pen and notepad to remind herself where she is going and what she is doing. *Id.*

9 Finally, the current COVID-19 pandemic has also put Ms. Stephens’ precarious health at even
10 greater risk. After undergoing six rounds of chemotherapy, Ms. Stephens has been left
11 immunocompromised and cannot leave her house without great risk to his already fragile health.
12 *See* Trammell Decl. ¶ 5; *See also* Stephens Dec. ¶ 8.

13 As elucidated above, Ms. Stephens quality of life has been severely affected by a litany of
14 medical conditions, including NHL. In addition to her delicate health, the hostile environment
15 created by the novel coronavirus has placed Ms. Stephens in an extremely perilous state. She fears
16 that, if a preferential trial setting is not granted, her interests in this litigation will be prejudiced,
17 rendering her unable to meaningfully participate at trial. Stephens Dec. ¶ 5. Therefore, Plaintiff
18 respectfully requests that this Court grant her request for a preferential trial setting.

19 **III. The First District Court of Appeal’s Decision In *Fox v. Superior Court* Is**
20 **Controlling And Instructive.**

21
22 *Fox v. Superior Court*, 21 Cal.App.5th 529 (2018) (“*Fox*”) mentioned above is a First District
23 Court of Appeal’s decision that is both controlling and instructive here. In *Fox*, a plaintiff in an
24 underlying asbestos case brought a motion for trial preference pursuant to CCP § 36(a) where her
25 counsel presented a declaration showing that she suffered from lung cancer and coronary artery
26 disease, among other ailments. *Id.* at 535.

27 Ms. Fox was in partial remission and was responding to chemotherapy but was suffering from
28 side effects, including “chemo brain” *Id.* at 532 as well as “whole body aches and pain, severe

1 abdominal and bowel complications, nausea and vomiting, dehydration, drowsiness, extreme
2 weakness and fatigue.” *Id.* at 535. The trial court denied Ms. Fox’s preference motion. However,
3 the First District Court of Appeals found that the trial court abused its discretion and issued a
4 peremptory writ of mandate directing the superior court to vacate its order and to grant a new
5 order setting trial within 120 days. *Id.* at 536–37.

6 Specifically, the court held that Section 36(a) does not require a party’s imminent death or
7 incapacity. *Id.* Rather, the court must consider factors such as a person’s state of physical
8 discomfort, the ability to perform basic life functions, and the ability to recall facts and dedicate
9 time and attention to the litigation. *Id.* Simply put, the question the court must ask is, *is this person*
10 *“very sick?”* *Id.* (emphasis and question mark added).

11 Ms. Fox and Ms. Stephens’ medical conditions are strikingly similar, further demonstrating
12 that Ms. Stephens is indeed “very sick” and should be entitled to a preferential trial setting.

13 Specifically:

- 14 1. Ms. Fox was over 70 years of age; Ms. Stephens is currently 70 years old.
- 15 2. Ms. Fox was diagnosed with cancer and was in partial remission; Ms. Stephens was
16 diagnosed with cancer, underwent surgery to remove her tumor, suffered a relapse in 2019,
17 underwent six rounds of chemo, and is being closely followed by her doctors.
- 18 3. Ms. Fox had significant health complications, including asbestos-related pleural disease,
19 coronary artery disease, and anemia; Ms. Stephens also suffers from significant health
20 complications, including but not limited to heart failure, kidney failure, chronic airway
21 obstruction, drug-induced peripheral neuropathy, antineoplastic chemotherapy induced
22 pancytopenia, arthritis, vertigo, blood clots and artery blockages, hardening of the aorta,
23 lymphadenopathy, a seizure disorder, severe uncontrolled high blood pressure, and
24 malnutrition.
- 25 4. Both Ms. Fox and Ms. Stephens suffered or are suffering from significant side effects of
26 their cancer treatment such as body aches and pains, extreme weakness and fatigue, and
27 “chemo brain.”
28

1 Furthermore, unlike Ms. Fox, Ms. Stephens also must contend with the perpetual threat of
2 contracting and succumbing to COVID-19, making her current life circumstance almost untenable.

3 The mirroring of symptoms, alone, should entitle Ms. Stephens to a preferential trial setting in
4 order to prevent prejudicing her rights in this litigation. Therefore, Plaintiff respectfully requests
5 that this Court grant her request for a preferential trial setting.

6 **IV. This Court Previously Granted A Preferential Trial Setting Pursuant To Section**
7 **36(a) For Plaintiffs in Similar Circumstances as Ms. Stephens.**

8
9 Previously, this Court granted the preference motions of two plaintiffs in this coordinated
10 proceeding who are similarly situated to Ms. Stephens for purposes of CCP Section 36(a). *See*
11 *Pilliod et al. v. Monsanto*, JCCP No. 4953, Case No. RG 1786270. In this case, this Court, using
12 *Fox* as a guide, held that the Pilliods’ poor health mandated a trial preference. *See* Orders Granting
13 Plaintiffs’ Motion for Preference, JCCP No. 4953 (Filed Nov. 15, 2018) at 7 (“Order”). This Court
14 further held that the standard under Section 36(a) and the *Fox* case is “not whether the moving
15 party is getting worse.” *Id.* at 6. Rather, the test is “whether the moving party’s current health is
16 ‘such that a preference is necessary to prevent prejudicing the party’s interest in the litigation.’”
17 *Id.* This court specifically considered symptomology impacting each plaintiff’s physical and
18 neurological capacities. *Id.* at 5–8.

19 In applying this test, the Court took note of Mrs. Pilliod’s symptoms of dizziness, irregular
20 gait, double vision, and brain fog. *Id.* at 5. The Court noted how these symptoms impaired Mrs.
21 Pilliod’s life by requiring her to drive her car with one eye shut and requiring her to keep her
22 hands on the walls to walk around her home. *Id.* The Court also noted Mr. Pilliod’s impaired
23 ability to concentrate and communicate. *Id.* After assessing the conglomeration of symptoms, the
24 Court noted that the Pilliods had “significant cognitive or functional impairments that greatly
25 impact their ability to carry on the functions of everyday living” and that both “have significant
26 and reasonably founded fears that their health will decline.” *Id.* at 7. As such, this court found the
27 Pilliods were indeed entitled to a preferential trial setting. *Id.*
28

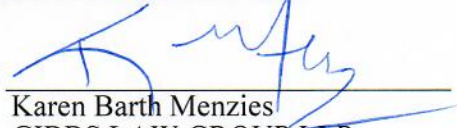
1 As discussed above, Ms. Stephens suffers from a litany of symptoms that impact her physical
2 body as well as her cognitive capacities. Specifically, Ms. Stephens suffers from extreme body
3 weakness, dizziness, and fatigue and lives in a state of perpetual pain, something even beyond
4 what the Pilliods suffered with. Like Mrs. Pilliods, Ms. Stephens must utilize a cane, walker, and
5 her husband's support around her home for fear of falling. She is also unable to drive as a result of
6 her extreme weakness. Ms. Stephens is unable to process and recall information as well and
7 frequently forgets what she is doing mid-task. This constellation of symptoms, in addition to the
8 litany of health conditions Ms. Stephens suffers from, in addition to the real risks surrounding
9 COVID-19, are surely and certainly enough to cause Ms. Stephens to have significant and
10 reasonably founded fears that her health will decline. As such, Plaintiff respectfully requests that
11 this Court grant his request for a preferential trial setting.

12
13 **CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests for the Court to grant Plaintiff's
15 Motion for a preferential trial setting and requests for a trial date to be set within the next 120
16 days.

17
18 Respectfully submitted,

19
20 **GIBBS LAW GROUP LLP**

21 By: 
22 Karen Barth Menzies
23 GIBBS LAW GROUP LLP
24 505 14th Street, Suite 1110
25 Oakland, CA 94612
26 Tel: (510) 350-9700
27 Fax: (510) 350-9701
28 kbm@classlawgroup.com

Fletcher V. Trammell
Melissa Binstock Ephron
TRAMMELL, PC
3262 Westheimer Rd., Ste. 423
Houston, TX 77098

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Tel: (800) 405-1740
Fax: (800) 532-0992
fletch@trammellpc.com
melissa@trammellpc.com

Alexander G. Dwyer
Andrew F. Kirkendall
Erin M. Wood
KIRKENDALL DWYER LLP
4343 Sigma Rd, Suite 200
Dallas, TX 75244
Tel: 214-271-4027
Fax: 214-253-0629
ad@kirkendalldwyer.com
ak@kirkendalldwyer.com
ewood@kirkendalldwyer.com
Attorneys for Plaintiff