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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

COORDINATION PROCEEDING SPECIAL TITLE (RULE 3.550) PARAQUAT CASES This document relates to: All Coordinated Actions	Case No. JCCP: 5031 CIVMS 5031 Assigned for All Purposes to: Hon. Edward G. Weil, Dept. 39 **THE ISAAK PLAINTIFFS' OPPOSITION TO THE WALKUP FIRM'S PROPOSED CMO NO. 2 RE: PREFERENCE PROTOCOL**

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MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW plaintiffs George and Carol Isaak, Kevin Harker, and Steven De La Vega (hereinafter, the "Isaak Plaintiffs"), respectfully and jointly oppose the Walkup Firm[1]'s Proposed Case Management Order No. 2 Re: Preference Protocol.

I. THE ISAAK PLAINTIFFS OPPOSE THE WALKUP FIRM'S PROPOSED CASE MANAGEMENT ORDER NO 2.

The Walkup Firm's request for a "preference committee" is unconstitutional on its face and should be denied. The Court determines if a plaintiff is entitled to statutory preference. Whether "the plaintiff meets the criteria for probable Parkinson's disease and genuine paraquat exposure" are matters reserved for the jury– not a conflicted (and settled) "preference committee." The Court should deny the Walkup Firm's attempt to circumvent California's constitution and the judicial system which allows Plaintiffs the right to a jury of their peers to decide whether they had the requisite exposure and injury.

A. "Preference Committees" are Improper.

In 1979, the California legislature passed Code of Civil Procedure 36 "The preference statute" to allow certain Plaintiffs their day in court. There is no provision in the statute for a "preference committee" of arbitrary lawyers to opine as to whether a plaintiff may exercise their statutory and constitutional rights. Indeed, such a provision would undermine the very purpose and function of the preference statue: to provide qualifying plaintiffs a trial within 120 days. Worse yet, the Walkup Firm requests this Court to legislate against a problem that does not exist. Indeed, this JCCP has been in existence for nearly 2.5 years and only one preference motion has been filed. There is no tsunami of preference filings as the Walkup

1 The unconstitutional "Preference Committee" was requested by the law firms of Walkup, Melodia, Kelly & Schoenberger; Fears Nachawati, PLLC; and Schneider Wallace Cottrell Konecky, LLP (collectively. "Walkup Firm").

Firm suggest. Even so, to the extent any of the Walkup Firm's concerns are valid, the proper remedy is for the Walkup attorneys to petition to amend Rule 36 in Sacramento – not in this courtroom.

In stark contrast, the Isaak Plaintiffs have respectfully requested that this Court enter an alternative Proposed Order on Motions for Trial Preference (Exhibit B to the Isaak Plaintiffs' Motion to Enter CMO 1), which simply establishes a set of deadlines for discovery and motions of any preference trial that may be granted in this JCCP. Importantly, the Isaak Plaintiffs' Proposed Order does not attempt to abrogate any potential preference plaintiffs' rights under CCP § 36 or the California constitution.

B. The specific "Preference Committee" Proposed By The Walkup Firm Is Not Only Unconstitutional On Its Face, But Also Patently Improper In Make-Up And Scope.

1. The Proposed "Preference Committee" is Conflicted.

The loudest voice of the proposed preference committee is the Walkup Firm itself, a law firm who has been involved in this JCCP since its inception and who is in the middle of a large, lucrative, settlement with the defendants involving its Paraquat cases. Upon best information, the Walkup settlement program offers Defendants "walk away" rights that can still be exercised and (as stated in previous filings), the Issak plaintiffs believe the Walkup Firm is a conflicted law firm until that settlement program is completed.

An example of the conflict is highlighted in the Paraquat MDL, where the Walkup Firm is co-lead counsel. Despite being in litigation for over two years, the Walkup Firm cannot or will not provide the discovery and litigation documents to the MDL Plaintiffs (even though they are co-lead counsel) because of provisions in its settlement with defendants. Indeed, Hoke Declaration **Exhibit 9** is a letter from the Tillery Firm that defendants filed in the MDL highlighting the conflict. Noticeably absent from Walkup's proposed CMO 1 is a request that Defendants produce all discovery (both fact and expert) in the JCCP.

Further, and specific to the Issak Plaintiffs, Mr. Baghdadi (the MDL Co-lead and member of the Walkup Firm) appeared at a non-substantive *ex parte* hearing set merely to advance Mr. Issak's preference

hearing; and without standing to even appear at the hearing – opposed Mr. Issak's constitutional rights to a preference trial. Mr. Baghdadi was successful in delaying the hearing. Any preference committee should not have conflicted members.

2. The Scope Of The Proposed "Preference Committee" Usurps The Judge And Jury And Denies Plaintiffs Basic Statutory And Constitutional Rights.

The Walkup firm requests that a "preference committee" be formed to opine on:

1. Whether the plaintiff seeking preference demonstrates a substantial interest in the action as a whole;
2. Whether the plaintiff meets "the criteria" for probable Parkinson's disease and genuine paraquat exposure;
3. Whether the plaintiff's case is procedurally ready to make and support a motion for preference; and
4. Whether the plaintiff's case (*i.e.* plaintiff's lawyers) is capable of trial readiness.

These are not questions for an arbitrary group of lawyers. Taken in turn: (1) this is a question for the court, not some conglomeration of (some recently settled) lawyers; (2) these are fundamental questions for the jury and subject to expert testimony. It is highly improper for this group of proposed lawyers to be providing opinions about whether JCCP plaintiffs have "genuine paraquat exposure" and/or "probable Parkinson's disease"; (3) putting aside that a preference committee is unconstitutional on its face, this is the only question that resembles any color of reasonableness. Even so, this question is best left for the lawyers hired by the preference plaintiff to ensure they follow California Code of Civil Procedure Section 36 and does not warrant the creation of an unconstitutional committee; and (4) not only is this extremely subjective opinion improper for the "preference committee" to provide, but it is impossible for the proposed committee members to know unless they are actually on the trial team.

Last, if created, the proposed committee will certainly deny and/or delay the Rule 36 constitutional rights of JCCP clients for an unclear end-result. The proposed process creates unfair bias toward any preference plaintiff that does not receive the "stamp of approval" from the preference committee. This would abrogate CCP Section 36 and this Court's authority. For example, if the committee "approves" the preference request, it appears the committee members will confer with defense counsel. While, on the other hand, if the committee does not approve the preference request, the requesting counsel is left to confer with defense counsel (page 4, para 8). It will not be difficult for defense counsel to know the committee's position, and thus be biased towards the merits of the case. While there is nothing in the Proposed CMO 2 that specifically allows the committee to provide its recommendations directly to the Court – it appears such a recommendation to the Court is inherent in the setup of the Committee – why else would the Committee be reviewing the medical records, declarations and conferring with defense counsel. Additionally, if the committee is not going to share its opinion/approval with the Court, then the committee serves no real purpose other than to delay and deny constitutional rights.

C. Rule 36(a) Rights are Absolute and not affected by a Coordinated Proceeding.

California Code of Civil Procedure Section 36(a) "grants a mandatory and absolute right to trial preference over all other civil matters lacking such a preference; the trial court 'shall' grant the preference and has no discretion to avoid the command of section 36(a) in the interest of efficient management of the court's docket as a whole." *Miller v. Superior Court* (1990) 221 Cal. App. 3d 1200, 1204. *See, also, Rice v. Superior Court* (1982) 136 Cal. App. 3d 81, 84-87 (finding that the language of Section 36, subdivision (a) of the Code of Civil Procedure was intended by the Legislature to be mandatory); *Sprowl v. Superior Court* (1990) 219 Cal. App. 3d 777, 781 ("section 36 is mandatory, leaving no room for such courtesy and no discretion to the court.").

"The application of section 36, subdivision (a), does not violate the power of trial courts to regulate the order of their business. Mere inconvenience to the court or to other litigants is irrelevant. Failure to complete discovery or other pre-trial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations." *Swaithes v. Superior Court* (1989) 212 Cal. App. 3d 1082, 1085–86, modified (Aug. 17, 1989), modified (Aug. 23, 1989) (internal citations omitted). "Accordingly, subdivision (a) of section 36 is **mandatory and absolute** in its application in civil cases whenever the litigants are 70 years old." *Id*. (emphasis added) [citing *Koch-Ash v. Superior Court* (1986) 180 Cal. App. 3d 689]. Indeed, "section 36 manifested the legislative determination that the specified age of 70 conclusively demonstrates the need for a preferential trial date to avoid an irrevocable loss of a qualifying plaintiff's substantive right to trial during his or her lifetime and to potential recovery of damages that would not survive plaintiff's pretrial death." *Koch-Ash v. Superior Court* (1986) 180 Cal. App. 3d 689, 694.

Indeed, Section 36 was specifically enacted for the purpose of ensuring that an aged plaintiff will be able to meaningfully participate in trial and be able to realize redress upon the claims asserted:

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

Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 532 (emphasis added). The same applies here.

The presence of a JCCP cannot factor into the Court's consideration of an individual plaintiff's preference motion. Individual plaintiffs "must be afforded trial setting preference" if they satisfy Section

36(a)'s requirements regardless of any competing case management statutes. *Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2020)* ¶¶ 8:25, 8:27.5 pp. 8-14, 8-16; *Vinokur v. Superior Court* (1988) 198 Cal.App.3d 500. In *Vinokur*, the Court considered whether the Judicial Arbitration Act (§ 1141.10, *et seq.*) could in any way supersede or affect the mandatory nature of Section 36(a). *Id.* The Court deemed it necessary to compare the purposes of the two statutes which "presents a conflict between a statute enacted in order to ensure that senior litigants do not lose the right to have their cases litigated because of delays in setting trial dates" and "another statute intended principally as a device for easing a growing burden on our courts and to be encouraged or required 'whenever possible.'" *Id.* at 503. The Court had little difficulty finding that "[u]nder these circumstances **section 36, which is 'mandatory and absolute in its application,' is unquestionably the controlling authority**, **and the competing interest of the arbitration statute must yield in order to ensure older litigants have their day in court**." *Id.* The California Court of Appeal recently held that when two statutory policies collide (here, the coordinated proceeding and the preference statute) that Section 36(a) wins and preference must be granted. *Fox v. Superior Court* (2017) 21 Cal. App. 5th 529, 535 ("where a party meets the requisite standard for calendar preference under subdivision (a), preference must be granted. No weighing of the interests is involved.").

Here, *Vinokur* is controlling and precludes consideration of the presence of JCCP in determining a right to a preference trial.[2] Like the Arbitration Act, the legislature granted the judiciary discretionary power to create JCCPs where coordination would promote:

> the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; **the efficient utilization of judicial facilities and manpower; the calendar of the courts;** the disadvantages of duplicative and inconsistent rulings, orders, or

2 If anything, the presence of this JCCP exists supports a preference motion. The parties' Case Management Statement ("CMS") dated March 5, 2021 states that "discovery is substantially complete in the Illinois proceedings" and that that discovery was incorporated into the JCCP, pp. 2-3. A case was ready for trial in Illinois over four months ago and only "relatively modest" discovery remains to be conducted in the JCCP. *Id.*

> judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

Code Civ. Proc., § 404.1. Thus, as in *Vinokur*, the mandate of Section 36 was enacted to protect the substantive rights of a party is "unquestionably the controlling authority" over the discretionary statute CCP § 404, *et seq.*, which was established merely for the convenience of parties and to ease the burden of the courts. Thus this JCCP must likewise "yield in order" to provide medically stricken plaintiffs day in court under CCP Section 36.

While some Plaintiffs may wish to negotiate a trial preference protocol with defendants that deviates from Section 36, the desires of those Plaintiffs' have no relevance to other plaintiffs' substantive right to have a preference trial within 120 days of a court order granting the trial preference. Indeed, Section 36(f) provides "[u]pon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record." Section 36(f) was implemented "to prevent attempted delays by parties *opposing* the motion" for preference and court congestion is not "good cause" for continuance. *Haning et al.*, ¶¶ 8:27, 8:27.1, p 8-16 (emphasis added); *Sprowl v. Sup. Ct.* (1990) 219 Cal.App.3d 777, 780-781. Mr. Isaak chooses not to sacrifice his substantive right to a day in court by waiting for such a protocol. That decision is his alone and cannot be stripped from him through the agreements of other parties.

Finally, important damage claims may not survive a Plaintiffs' death (e.g. pain and suffering). Therefore, not only is a proposed preference committee unconstitutional, but it could strip Plaintiffs of damage claims.

D. Historically, JCCP Proceedings Have Not Seen A Flood of Preference Cases Before Settlement.

Here, the Walkup Firm argues that "The majority of the plaintiffs, including both filed and unfiled cases known to plaintiffs' counsel, are over the age of 65." *See*, Walkup Memorandum at 3. However, the threshold for preference motions under Section 36(a) is 70 years old, not 65. *See*, CCP Section 36(a). Moreover, the Walkup Firm is not the arbiter of Plaintiffs' constitutional right to a jury.

Historically, JCCP proceedings such as the *In re Actos Product Liability Cases* (JCCP 4969) and the *Roundup Products Cases* (JCCP 4953) have shown that – even JCCP proceedings involving large populations of elderly plaintiffs – often avoid a flood of preference motions. For instance, the Actos JCCP involved a large number of elderly plaintiffs who alleged that their bladder cancer was due to their ingestion of Actos, an antidiabetic drug. Yet, only a single preference motion was filed in that JCCP and those Actos cases settled after that single preference trial. *See, e.g.*, *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555. Currently, a vast majority of the Roundup cases have been resolved and JCCP 4953 is currently in the process of terminating after one preference verdict in San Francisco (*see, e.g.*, *Johnson v. Monsanto Company* (2020) 52 Cal.App.5th 434, as modified on denial of reh'g (Aug. 18, 2020), review denied (Oct. 21, 2020)) and a second preference verdict in Alameda County (*see, e.g.*, *Pilliod v. Monsanto Company* (2021) 67 Cal.App.5th 591). *See*, also, Decl. of Curtis. G. Hoke, **Exhibit 1** (Judge Smith's Order terminating JCCP and remanding cases). Clearly, the trial of preference cases expedites global resolution, not hinders them.

Of note, Leslie LaMacchia of Pulaski Kherkher PLLC filed a Joinder in support of CMO 1 and 2, noting that she is "currently reviewing another twenty (20) potential California case which may qualify for preference" and that her firm "currently has seven (7) cases filed in the MDL and is reviewing approximately 2000 more files related to Parkinson's disease and Paraquat exposure." *See*, Pulaski Joinder

in Support of Proposed CMO 1 and 2 at p. 2. This joinder was filed by the Walkup Firm and is merely a strategic filing to create the impression that a flood of preference motions may be filed in the future. Despite its review, Pulaski Kherkher PLLC has yet to file a preference motion and, problematically, Ms. LaMacchia's joinder is intentionally vague. Indeed, it does not specify how many cases will actually qualify for preference, nor does it state how many of Ms. LaMacchia's "approximately 2000 more files" are even from California. Even so, if Ms. LaMacchia has somehow been retained by an inordinate number of California preference 36(a) plaintiffs, and she believes it is her clients' best interest to file for preference trials, then undersigned counsel supports their constitutional right to do so. As a member of the proposed "preference committee" (Alicia O'Neill is a Watts Guerra lawyer), it is not surprising that Watts Guerra LLC filed a nearly identically-worded Joinder (again, through the Walkup Firm) on September 8, 202. The Watts Joinder suffers from the same problems.

E. This JCCP Is Not An "Action" – It Is A Coordinated Proceeding Comprised Of Numerous Included Coordinated Actions; But Should This Court Decide That The JCCP Is Actually An "Action," The Paraquat JCCP Is Factually Inapposite To The California Fire Cases.

As a threshold matter CCP Section 36(a) requires that a Court decide whether "The party has a substantial interest in the action as a whole." *See,* Code Civ. Proc. § 36(a)(1). Notably, Judge Karnow's December 31, 2018 ruling in the *California Northbay Fire Cases* (JCCP 4955) wrestled with the "substantial interest in the action as a whole" language of CCP Section 36(a). Although Judge Karnow noted that "there are no known cases interpreting this phrase" he ultimately concluded that "I understand the phrase to permit me to determine if the moving party has a substantial interest in the context of all cases included in a JCCP coordination action." *See,* Kelly Decl., Exhibit 1 at pp. 8-10.

The Isaak Plaintiffs respectfully disagree with Judge Karnow's ruling and rulings adopting a similar conclusion. Simply stated, a Judicial Council Coordinated Proceeding is not an "action"; rather, it is a

coordinated proceeding composed of numerous coordinated actions. By way of example, Mr. and Mrs. Isaak have filed an individual action in San Francisco (*Isaak v. Syngenta AG, et al.*, San Francisco Sup. Ct. Case No.: CGC-21-591254); their action was subsequently *coordinated* into this JCCP. In short, the Isaak's "action as a whole" simply refers to their individual action (comprised of two married plaintiffs) against Syngenta AG, *et al*. By way of further example, perhaps if Mr. and Mrs. Isaak permissibly joined dozens of additional plaintiffs in a multi-plaintiff action pursuant to CCP Section 378, one might reasonably argue that they have less of an interest in their action as a whole. Not so here.

To be sure, if the JCCP were considered an "action," innumerable numbers of plaintiffs would be permitted to permissibly join this JCCP under CCP Section 378. Of course, California Rule of Court 3.521 specifically accounts for this: "A request submitted to the Chair of the Judicial Council for the assignment of a judge to determine whether the coordination of certain **actions** is appropriate, or a request that a coordination trial judge make such a determination concerning an add-on case, must be designated a "Petition for Coordination" and may be made at any time after filing of the complaint." *See* Cal. Rule of Court, Rule 3.521 (emphasis added).

Indeed, the California Code of Civil Procedure is clear: "An action **is an ordinary proceeding in a court of justice by which one party prosecutes another** for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." *See*, Code Civ. Proc. § 22 (emphasis added). Additionally, CCP Section 404.1 clearly states:

> Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing **all of the actions** for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

See, Code Civ. Proc. § 404.1 (emphasis added). In order words, the California Code of Civil Procedure is clear: a coordinated proceeding is simply composed of coordinated actions. CCP Section 379 permits multiple plaintiffs to join an action if they wish, but the Isaak Plaintiffs have elected not to do so here; and CCP 3.521 permits coordination of those actions. The JCCP itself is simply not an "action" but a coordination of actions.

Unsurprisingly, the same clarity between an "action" and a coordinated *proceeding* can be found in the California Rules of Court as well. For instance, California Rule of Court 3.501 includes a series of definitions which clearly differentiate between an action and a proceeding:

> Rule 3.501(1): "Action" means any civil action or proceeding that is subject to coordination or that affects an action subject to coordination.
>
> Rule 3.501(5): "Coordinated action" means any action that has been ordered coordinated with one or more other actions under chapter 3 (commencing with section 404) of title 4 of part 2 of the Code of Civil Procedure and the rules in this chapter.
>
> Rule 3.501(8): "Coordination proceeding" means any procedure authorized by chapter 3 (commencing with section 404) of title 4 of part 2 of the Code of Civil Procedure and by the rules in this chapter.
>
> Rule 3.501(9): "Coordination trial judge" means an assigned judge designated under Code of Civil Procedure section 404.3 to hear and determine coordinated actions.

See, Cal. R. Ct. 3.501 (1), (5), (8), (9). Simply put, the California Code of Civil Procedure and Rules of Court went to great lengths to clarify the difference between an "action" and a coordinated proceeding. Based on the language of the California Code of Civil Procedure and the California Rules of Court, it is clear that Mr. and Mrs. Isaak's action is comprised solely of their claims against Syngenta AG, et al., not those of other plaintiffs who have been coordinated into this proceeding.

Even if this Court were to determine that this coordinated proceeding is actually an "action," which it is not, the posture of this JCCP is factually inapposite to the California fire cases. Tellingly, the Walkup

Firm's briefing is completely devoid of any serious discussion of Judge Smith's numerous rulings **granting** trial preference motions for ailing plaintiffs pursuant to CCP Section 36(a) brought in the Roundup JCCP. Indeed, the Honorable Judge Winifred Smith, presiding over the *Roundup Products* JCCP 4953, has routinely granted preference motions brought pursuant to Section 36(a), noting as follows:

> Much of the coordinated work has been completed in this coordinated proceeding [...] This JCCP is in a very different place than appears to have been the situation in *Southern California Fire Cases* [...] In those cases, it appears that common discovery was not complete, these had been no bellwether trials to set out templates for further trials, and that presence trials might upset the management of the common issues of the JCCP [...] Considering all of the above, the court gives very little weight to existence of the JCCP when considering the motions for trial preference under CCP 36.

See, Kelly Exhibit 5 at p. 6-7.

Notably, the Walkup Firm and Defendants have already admitted, in a Joint Case Management Statement dated March 5, 2021, that discovery in this JCCP "is underway and is relatively modest in scope given the extent to which the parties benefit from discovery already produced in Illinois." *See*, Decl. of Curtis G. Hoke, **Exhibit 2** at p. 6. Further, as the Walkup Firm readily admits, "On March 19, 2021, this Court entered a stipulated protective order, under which all depositions in *Hoffman* would be deemed taken in this JCCP." *See*, The Walkup Firm's Memorandum at p. 4. Just as in the Roundup JCCP, much of the coordinated work has already been completed since the inception of this JCCP over two years ago.

To be sure, this JCCP is nothing like the California wildfire cases and is strikingly similar to the Roundup JCCP. First, there is no bellwether process to "disrupt" here since – unlike the *Southern California Fire Cases* (JCCP 4965) – a bellwether process has not been established in over two years. Second, to the best of Plaintiffs' counsel's knowledge, Mr. Isaak is currently the *only* plaintiff who has ever moved for trial preference in this JCCP in the over two years since its inception. Mr. Isaak represents one

case out of only eight non-settled cases that had been coordinated with this JCCP as of the date of Mr. Isaak's preference motion filed August 2, 2021 (three of which are co-opponents here).[3]

In other words, at the time Mr. Isaak moved for trial preference, his case represented 1/8th – or 12.5% of the non-settled cases in this JCCP. In contrast, the *Woolsey Fire* (JCCP 5000) preference motions were brought by "only one of the Engstrom firm's 568 individual plaintiffs (and only one of 265 households) and as to the Singleton firm only five of that firm's 135 plaintiffs (and only 42 households)." *See*, Kelly Exhibit 2 at p. 2. In even starker contrast, in the *Southern California Fire Cases* (JCCP 4965), moving plaintiffs each "constitute[ed] roughly 0.02% of the plaintiffs in the action." *See*, Kelly Exhibit 3 at p. 7. Further, in an Order dated May 7, 2019, Judge Buckley noted that moving plaintiffs comprised only "less than half a percent" of the plaintiffs in JCCP 4965. *See*, Kelly Exhibit 4 at p. 7.

The same does not hold true here, as Mr. Isaak's action represented 1/8th or 12.5% of the non-settled actions coordinated in this JCCP at the time he filed his Motion for Trial Preference on August 2, 2021. Moreover, undersigned counsel represent JCCP Plaintiffs George Isaak, Carol Isaak, Kevin Harker, Stephen De La Vega, and David Aguilar (a total of 5 plaintiffs), who account for approximately 45% of the 11 non-settled plaintiffs with actions coordinated with this JCCP as of August 2, 2021; Mr. and Mrs. Isaak and

[3] Plaintiffs' counsel are aware of the following non-settled actions coordinated with this JCCP as of August 2, 2021:
1.*Harker v. Syngenta, et al.* Case No. CGC-21-589755 (San Francisco Superior Court) (coordinated June 11, 2021) – The Miller Firm (1 Plaintiff)
2.*De La Vega v. Syngenta, et al.* Case No. C21-01057. (Contra Costa Superior Court) (coordinated July 19, 2021) – The Wagstaff Law Firm (1 plaintiff)
3.*Louis Lombardo v. Syngenta et al.*, Alameda County Superior Court; Case No. RG21100757, filed on May 26, 2021 (coordinated July 19, 2021) – Fears Nachwati (1 plaintiff)
4.*Lonnie Owens et al. v. Syngenta et al.*, Contra Costa Superior Court; Case No. C21-01187, filed on June 4, 2021 (coordinated July 19, 2021) – Fears Nachwati (2 plaintiffs)
5.*Borrelli v. Syngenta AG, et al.* (Case No. MSC21-01217), filed June 24, 2021 in Contra Costa County Superior Court (coordinated July 23, 2021) – Walkup Melodia (1 plaintiff)
6.*Isaak v. Syngenta AG, et al.*, San Francisco Superior Court; Case No. CGC-21591254 (coordinated August 2, 2021) – The Miller Firm (2 plaintiffs)
7.*Rubino v. Syngenta, et al.*, Contra Costa County Superior Court Case No. C2101422 (coordinated August 2, 2021) – Heygood Orr Pearson (2 plaintiffs)
8.*Aguiar v. Syngenta, et al.* Case No. C21-01373. (Contra Costa Superior Court) (coordinated August 2, 2021) – The Wagstaff Law Firm (1 plaintiff)

plaintiff Kevin Harker (27%) each agree that Mr. Isaak has a substantial interest in the JCCP as a whole. *See,* Hoke Decl. at ¶ 11.

F. The Preference Committee In The Talcum Powder JCCP Has Already Thwarted One Motion For Trial Preference; The Walkup Firm's Proposed CMO 2 Is Designed To Do The Same.

Experience dictates that past forays into JCCP "Preference Committees" have done little more than *prejudice* prospective plaintiffs from getting their day in court. There should be little doubt that the same will likely happen here if settlement plaintiffs, working closely with defendants prevail in establishing a preference committee, irreparably prejudicing the claims of countless plaintiffs. Indeed, Judge Nelson, overseeing the *Johnson & Johnson Talcum Powder Cases* (JCCP 4872) issued Case Management Order No. 7: Plaintiffs' Trial Preference Committee and Trial Preference Evaluation Protocol, which is remarkably similar to the preference protocol proposed in the Walkup Firm's Proposed CMO 2. *Compare* Proposed CMO 2 with Hoke Decl., **Exhibit 3** (Talc JCCP CMO 7).

Indeed, on May 10, 2021, upon recently learning that plaintiff Debra Blair, who was terminally ill with metastatic ovarian cancer, had less than six months to live, Plaintiffs' counsel promptly wrote an e-mail to the Plaintiffs' Preference Trial Recommendation Committee, urgently asking the Preference Committee to make its written recommendation to the Court, pursuant to CMO 7, that trial preference should be granted. *See,* Hoke Decl., **Exhibit 4** (email dated May 10, 2021). To this day, the Preference Committee has failed to file *any* written report to the Court. Insidiously, J&J argued that, because the Preference Committee had not filed a written report to the Court, Plaintiff could not even have a hearing on her motion for trial preference. *See*, Hoke Decl., **Exhibit 5** (Case Anywhere Message Board Posting). This resulted in significant delays in setting Ms. Blair's motion for trial preference. Tragically, Ms. Blair died on June 6, 2021, and her Motion for Trial Preference, finally set for August 5, 2021, had to be withdrawn. *See*,

Decl. of Curtis G. Hoke, **Exhibit 6** (Notice of Withdrawal of Plaintiff Debra Blair's First Amended Motion for Trial Preference). This is an inherent problem with any "preference committee," and it further underscores why the Isaak Plaintiffs have specifically objected to any such a committee in favor of a more streamlined set of deadlines which have been used successfully in preference cases in this Court and in the Alameda Superior Court. *See*, e.g., Hoke **Exhibit 7** (*Pilliod* preference trial schedule) and Hoke **Exhibit 8** (*Caballero* preference trial schedule).

II. CONCLUSION

For the foregoing reasons, the Isaak Plaintiffs respectfully request that this Court DENY the Walkup Firm's Proposed Case Management Order No. 2 and, instead, enter the Isaak Plaintiffs' [Proposed] Order on Motions for Trial Preference.

Dated: September 17, 2021

Respectfully submitted,

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