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18
19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
20 **COUNTY OF CONTRA COSTA**

21
22 **COORDINATION PROCEEDING**
23 **SPECIAL TITLE (RULE 3.550)**

Case No. JCCP 5031
CIVMS 5031

24 **PARAQUAT CASES**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ENTRY OF PROPOSED AMENDED
CASE MANAGEMENT ORDER NO.
1 RE: ORGANIZATION OF
PLAINTIFFS'
COUNSEL/PLAINTIFFS'
LEADERSHIP AND [PROPOSED]
CASE MANAGEMENT ORDER NO. 2
RE: PREFERENCE PROTOCOL**

25 This document relates to:
26 All Coordinated Actions
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1 **I. INTRODUCTION**

2 The undersigned counsel and their clients, whose cases are presently
3 coordinated in this Judicial Council Coordination Proceeding (“JCCP”) by and
4 through their counsel of record¹ propose that is Court adopt an inclusive and
5 collaborative leadership team (Proposed Amended Case Management Order (“CMO”)
6 No. 1) along with an orderly process for vetting cases for preferential trial setting
7 ([Proposed] CMO No. 2) under California Code of Civil Procedure §36.

8 The proposed Plaintiffs’ leadership group (“Proposed Leadership”) would
9 consist of Amy Eskin, Esq. of Schneider Wallace as Liaison, along with Michael
10 Kelly, Esq. of Walkup, Melodia and Majed Nachawati, Esq. of Fears Nachawati as co-
11 lead counsel. These attorneys have cases pending in the JCCP, have engaged in
12 regular and frequent contact with all constituent firms with cases across the country,
13 have substantial experience in leadership of state and federal coordinated
14 proceeding, and can provide this Court with a collaborative and efficient means of
15 “expedit[ing] the just determination of the coordinated actions without delay.”
16 California Rule of Court 3.541(b). The specific duties and logistics attendant to such
17 appointments are outlined in Proposed Amended CMO 1 re Leadership, which is filed
18 concurrently herewith.²

19 As for CMO 2, this leadership team proposes a Preference Protocol governing
20 the selection of cases for preferential trial setting (See Code Civ. Proc. §36 *et seq.*). All
21 plaintiffs in this JCCP allege they suffer from paraquat-induced Parkinson’s disease.
22 Because Parkinson’s disease is a progressive condition that arises late in life, the
23 overwhelming majority of plaintiffs in this litigation is made up of seniors whose
24 health is in decline, and whose ability to reason, testify, and maintain their safety is

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26 _____
27 ¹ Counsel of record for Plaintiffs include the firms of: Fears Nachawati, Walkup
28 Melodia Kelly & Schoenberger, (“Walkup Melodia”), and Schneider Wallace Cottrell
Konecky LLP.

² Proposed Amended CMO 1 was initially submitted to the Court on August 17, 2021.

1 deteriorating, and will likely worsen during the course of this litigation, prejudicing
2 their interest in this litigation. The standards which entitle one plaintiff to
3 preferential trial setting under Code of Civil Procedure Section 36 apply to multiple
4 (and possibly even the majority of) plaintiffs in this JCCP.

5 The proposed preference protocol will assist the court and leadership in
6 effectively managing this litigation and establish an efficient, orderly process of
7 setting cases for trial. Adopting such a process is consistent with the powers of the
8 coordination judge and the goals of a JCCP to “expedite the just determination of the
9 coordinated actions without delay.” California Rule of Court 3.541.

10 **II. PROCEDURAL BACKGROUND**

11 **A. Nature and Scope of the Paraquat Cases**

12 Plaintiffs are individuals who have been diagnosed with Parkinson’s disease in
13 the years (or in some cases decades) following exposure to an herbicide called
14 paraquat. In the United States, paraquat has been used since 1964 and is used on
15 more than 100 different types of crops across millions of farms. Given its dangers,
16 paraquat is banned in Switzerland, China, Thailand, Norway, Sweden, Denmark,
17 Austria, Finland, Slovenia, and Hungary.

18 The number of cases in this litigation can be expected to grow quickly.
19 Although Parkinson’s disease used to be a rare disorder, epidemiologists now warn of
20 an impending Parkinson’s disease “pandemic.” Between 1990 and 2015, the number
21 of people living with Parkinson’s more than doubled from 2.6 to 6.3 million, according
22 to a 2015 study in *The Lancet Neurology*.³ By 2040, the number is expected to double
23 again, to at least 12.9 million, according to the authors of “The Current and Projected
24 Economic Burden of Parkinson’s Disease in the United States.” The United States
25 alone accounts for more than 10% of the world’s Parkinson’s burden, with an
26

27 ³ GBD 2015 Neurological Disorders Collaborator Group, *Global, Regional, and*
28 *National Burden of Neurological Disorders During 1990-2015: A Systemic Analysis*
for the Global Burden of Disease Study 2015; Vol. 16, *Lancet Neurol.*, Nov. 2017.

1 estimated 930,000 cases of Parkinson’s as of 2020. Plaintiffs in this JCCP are among
2 those Americans who suffer from Parkinson’s disease following their paraquat
3 exposure.

4 Many of the plaintiffs in this coordinated proceeding likely qualify for trial
5 preference. (Declaration of Michael A. Kelly ¶2.) The majority of the plaintiffs,
6 including both filed and unfiled cases known to plaintiffs’ counsel, are over the age of
7 65. (Id.) Parkinson’s is a relentless disease that strips away the dignity and
8 communication abilities of its victims. The characteristic symptoms of Parkinson’s
9 disease are resting tremor, rigidity, and impaired balance. However, the disease also
10 frequently causes depression and other mental disturbance. Patients lose their
11 ability to control their hands (to write or type), their tongues and lips (to speak), and
12 their hands (to make gestures and signs). It eventually traps people in their own
13 bodies. Even for those plaintiffs who are not in immediate danger of dying, they are
14 in danger of losing their ability to meaningfully testify (including regarding their own
15 exposure).

16 The progression of Parkinson’s disease is neither linear nor predictable.
17 Plaintiffs are at risk for substantial disease progression at any time. There is no cure
18 for Parkinson’s disease, and no treatment will slow, stop, or reverse its progression.
19 Treatments commonly employed to improve sufferers’ motor symptoms tend to
20 become progressively less effective over time and cause unwelcome side effects the
21 longer they are used. In short, the reality of these cases is that there are many
22 plaintiffs, as well as many potential plaintiffs, whose disease progression is unstable
23 and who have a real and substantial danger of losing their ability to testify if their
24 trials are not prioritized. (Kelly Decl. at ¶2).

25 **B. Procedural Posture of Paraquat Litigation**

26 **1. Procedural Posture of this JCCP**

27 This JCCP was established on July 25, 2019. From that date until June 11,
28 2021, all plaintiffs in this coordinated proceeding were represented by the lawyers of

1 Walkup, Melodia, Kelly & Schoenberger (“Walkup Melodia”) along with their co-
2 counsel, the lawyers of Korein Tillery. The parties advised the Court that a similar
3 action was proceeding in St. Clair County, Illinois under the Honorable Kevin
4 Hoerner (*Hoffmann v. Syngenta et al.*), in which Korein Tillery (with Walkup
5 Melodia as co-counsel) represented the plaintiffs.

6 On March 19, 2021, this Court entered a stipulated protective order, under
7 which all depositions and discovery taken in *Hoffmann* would be deemed taken in
8 this JCCP. The trial in *Hoffmann* was set to commence on March 22, 2021 and was
9 thereafter continued to May 10, 2021, which date was subsequently vacated by Judge
10 Hoerner until further notice.

11 In the Joint Case Management statement filed on May 19, 2021, Plaintiffs’
12 counsel advised this Court that they were advocating for a trial date in October of
13 2021, and that they might require Court intervention regarding differences that had
14 arisen between Plaintiffs’ and Defendants’ counsel regarding the provisions of a
15 preference protocol. Then as now, the negotiation of a preference protocol and trial
16 date was intended to balance the expedient trial settings given the age and health of
17 the plaintiff population, serve the JCCP Plaintiffs’ best interests by resolving their
18 cases efficiently and justly, and give due consideration to trial readiness, experts’
19 availability, the relative timing of trials (*e.g.*, *Hoffmann*).

20 On June 29, 2021, Walkup Melodia filed a Notice of Partial Settlement for
21 sixteen cases in this JCCP. That settlement is pending. Within the past two months
22 approximately twenty-five additional cases with various additional law firms have
23 been filed and have been added or are pending coordination. Several more are
24 anticipated. (Kelly Decl. at ¶3.) Given the material change in the nature of this
25 litigation, an orderly process that respects the sanctity of Rule 36 and serves the best
26 interests of the Plaintiffs is reasonable and if granted, will provide clarity to all
27 interested parties.

28 Plaintiffs’ counsel have engaged in protracted discussions with the goal of

1 finding common ground with all Plaintiffs’ counsel. More specifically, between June
2 29, 2021 and August 2, 2021, Proposed Leadership had extensive discussions with all
3 counsel with pending cases in this JCCP regarding establishing a preference protocol
4 and leadership structure. These discussions specifically addressed Proposed CMO
5 No. 1, which was attached to Joint Petitioners’ Petition for Appointment of Interim
6 Leadership Structure filed August 2, 2021.

7 On August 2, 2021, a motion for preference was filed in *Isaak v. Syngenta et*
8 *al.*, CGC-21-591254. After the *Isaak* filing, Proposed Leadership had additional
9 discussions with *Isaak’s* counsel and at all times assured fellow plaintiffs’ counsel in
10 this JCCP that Proposed CMO 1 was in no way intended to infringe upon their
11 statutory rights to file preference petitions pursuant to Rule 36 of the California
12 Code of Civil Procedure nor to conduct discovery if the motion were granted. On
13 August 17, 2021, Proposed Leadership filed Amended Proposed CMO 1 which is
14 identical to Proposed CMO 1 except for section I.D., entitled “Stay of Individual
15 Cases.” This section now contains explicit language stating that preference motions
16 under Rule 36 of the California Code of Civil Procedure and any attendant discovery
17 would be exempt from the general stay contemplated in section I.D. and would be
18 governed by an individualized scheduling order entered specifically in any case in
19 which a preference motion has been granted.

20 An ex parte application was heard on August 11, which advanced the hearing
21 date on that motion to September 30, 2021.

22 On August 23, the Court held a case management conference. At that time,
23 counsel for *Isaak* claimed the Walkup firm had a conflict of interest which prevented
24 their service in leadership. The Court inquired regarding the basis for such a claim
25 and no evidence was presented to support the claim. Indeed, none exists. (Kelly Decl.
26 at ¶4.)

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1 **III. LEGAL DISCUSSION**

2 **A. The Leadership Team Proposed Herein Is Inclusive,**
3 **Experienced and Collaborative, with a Proven Track Record of**
4 **Effective Leadership**

5 California Rule of Court 3.501(12) empowers this Court to select attorneys to
6 act as leaders in guiding this litigation toward just and efficient resolution. The
7 leadership proposed herein is uniquely well suited to undertake that responsibility
8 and honor.

9 This proposed leadership team possesses a wealth of experience in leading
10 coordinated proceedings and litigating products liability cases. Michael Kelly served
11 as Co-Lead Counsel in JCCP 4955, (North Bay Fire cases). He is a member of the
12 Plaintiffs' Executive Committee in the Southern California Edison JCCP 5000. Mr.
13 Kelly also was appointed Lead/Liaison Counsel for plaintiffs in the DePuy/ASR
14 artificial hip litigation JCCP. In addition, he brings forty years of products liability
15 experience to this leadership position.

16 Amy Eskin has more than 30 years of products liability experience and
17 extensive leadership experience. Many federal and state courts have appointed her as
18 lead counsel, co-lead counsel, liaison counsel, or a member of the Plaintiffs'
19 leadership in a wide variety of complex cases. She acted as Co-Lead Counsel in MDL
20 2325 (In Re American Medical Systems, Inc.) and was one of only eight attorneys
21 appointed to serve on the Transvaginal Mesh Executive Committee. Ms. Eskin is
22 currently Co-Lead in JCCP 5043, the Gilead Tenofovir cases pending before the
23 Honorable Andrew Y.S. Cheng, in the San Francisco Superior Court and is the
24 director of the mass tort department at her law firm.

25 Finally, Majed Nachawati has broad experience litigating products defect
26 cases across the country. Mr. Nachawati is a co-founder of one of the nation's largest
27 mass tort firms. He currently serves on leadership in the Opioid litigation pending
28 before the Honorable Robert Shaffer and members of his firm currently hold
29 leadership in the AFF litigation, the Paraguard litigation, the Texas Freeze

1 litigation, as well as the Bard and Cook IVC Filter Litigation. Together, this team
2 brings unparalleled experience and will ensure that all plaintiffs in this case are
3 heard, and that litigation proceeds efficiently in the interests of justice.

4 In addition to this team’s leadership experience, its members are experienced
5 in litigating Paraquat cases, understanding of the technical science associated with
6 these cases, and will put this specialized knowledge to use on behalf of all plaintiffs
7 in the action.⁴ Ms. Eskin was recently appointed as a member of the Plaintiffs’
8 Executive Committee and the California State Court Liaison in the Paraquat MDL
9 proceeding in the Southern District of Illinois. Mr. Kelly has been litigating cases
10 regarding paraquat exposures since 2017. He also extensively litigated paraquat
11 cases in this JCCP and, along with his partner Khaldoun Baghdadi, worked
12 cooperatively with defense counsel – negotiating streamlined processes for adoption
13 of discovery from the MDL, and for production of standardized plaintiff fact sheets.

14 Importantly, this team represents a diverse cross-section of the community
15 and the legal profession. This leadership team will bring their distinct backgrounds
16 and unique experiences to effectively guide this litigation and its litigants and their
17 counsel.

18 More importantly, this team is committed to collaboration and cooperation
19 that will serve the interests of all plaintiffs and will assist the Court in the orderly
20 and efficient litigation of this case. It is the best suited to act in that capacity and
21 guide this litigation to its resolution, be it through trial, settlement or both. (See
22 Code Civ. Proc. §404.1)

23 The Court and parties will be best served by a plaintiffs’ team that is
24 coordinated and aligned. Based on their experience, Plaintiffs’ Proposed Leadership
25 understands the importance of working collaboratively among themselves and with
26

27 ⁴ During the case management conference on August 23, 2021, concern about a
28 possible conflict of interest was raised with regards to this proposed team. No
statutory or legal basis was put forth in support of that concern, because none exists.

1 individual Plaintiffs’ counsel and know how to do so effectively. Its members have a
2 demonstrated ability to work collectively, effectively, and efficiently on behalf of the
3 individuals they represent.

4 **B. The Statutory Framework Empowers this Court to Adopt**
5 **Orderly Proceedings for Preference Motions that Take into**
6 **Account the Interests of All Plaintiffs**

7 This coordination proceeding is designed to promote “the ends of justice” and
8 “the convenience of parties” among other things. (Code of Civil Proc. §404.1.) The
9 Court has “inherent equity, supervisory, and administrative powers as well as
10 inherent power to control litigation before [it].” (*Cottle v. Superior Court* (1992) 3
11 Cal.App.4th 1367, 1377 (internal citations omitted).) Under Code of Civil Procedure
12 §404.7, the California Legislature gave the Judicial Council the statutory authority
13 to make rules for the practice and procedure for coordination of civil actions...”
14 “[n]otwithstanding any other provision of law.” (*Indus. Indent. Co. v. Super. Ct.*
15 (1989) 214 Cal.App.3d 259, 263; see also *Abelson v. Nat’l Union Fire Ins. Co.* (1994)
16 28 Cal.App.4th 776, 786 (reasoning that the California legislature has granted the
17 coordination court broad discretion “with flexible procedures and ‘whatever great
18 breadth of discretion may be necessary and appropriate to ease the transition
19 through the judicial system of the logjam of cases which gives rise to coordination.’”)).

20 In that context, this Court is faced with the question of how to control this
21 litigation in a manner that protects the rights of individual plaintiffs, many of whom
22 are elderly and facing serious health concerns, while also advancing the “action as a
23 whole,” which is of heightened importance when many preference-entitled plaintiffs’
24 rights will rise or fall with the management of this action as a whole.

25 This Court retains the authority, when confronted with plaintiffs deserving of
26 preference, to establish a preference protocol that balances the interests of all
27 plaintiffs in the JCCP with the interests of those plaintiffs who request preferential
28 trial setting.

1 **C. Plaintiffs’ Proposed Preference Protocol**

2 These firms also respectfully submit Proposed CMO 2 to manage preference
3 cases, a protocol that fits squarely within the inherent power and discretion of this
4 Court as coordination judge to manage this JCCP efficiently. (See e.g. *In re Toyota*
5 *Motor Cases*, JCCP 4621, 2012 WL 965830 (Super. Ct. L.A. County Mar. 5, 2012) at 7
6 (wherein Los Angeles County Superior Court JCCP Judge held that “coordination
7 power trumps the otherwise mandatory application of Cal. Civ. Proc. Section 36”).).

8 As set forth more fully in Section III.C below, preference in a coordinated
9 proceeding is not automatic; The Honorable Curtis A. Karnow (San Francisco) and
10 The Honorable Daniel Buckley (Los Angeles) refused to address preference motions
11 until a protocol was established to vet potential preference plaintiffs. Further, the
12 law does not mandate preference based on case-specific criteria alone. Instead, the
13 law requires that a plaintiff seeking preference demonstrate “a substantial interest
14 in the action as a whole.” (Code Civ. Proc. §36(a)).

15 In a JCCP, that translates into a substantial interest in the coordinated
16 proceeding.⁵ This criteria is more clearly met when a preference case or group of
17 preference cases is approved by a group of plaintiffs’ firms (who collectively have a
18 substantial interest in the proceeding). On the other hand, the “substantial interest”
19 criterion is clearly lacking in a case that lacks material commonality with the other
20 coordinated cases. Preference trials of non-representative cases, where for example a
21 plaintiff has a variant of Parkinson’s disease and is therefore not representative, may
22 compromise the rights of all remaining plaintiffs’ interests in just and speedy
23 resolution.

24
25 _____
26 ⁵ See *Woolsey Fire Cases*, JCCP No. 5000, Order on Several Motions for Trial
27 Preference (Super. Ct. L.A. County Feb. 2, 2021); *Southern California Fire Cases*,
28 JCCP No. 4965, Ruling on Submitted Matter re Motion for Trial Preference (Super.
Ct. L.A. County July 27, 2020); *California North Bay Fire Cases*, JCCP No. 4955,
Order Denying Without Prejudice Pamela Fowler's Motion for Trial Preference
(Super. Ct. S.F. County Dec. 31, 2018).

1 The key features of the Proposed Preference Committee are:

- 2 1. A membership that includes a broad cross section of attorneys with
3 cases in the JCCP;
- 4 2. An expeditious process for submitting potentially preference-eligible
5 cases to that committee;
- 6 3. A committee that will ensure that all plaintiffs who may qualify for
7 preference have the benefit of the conclusions of an objective group of
8 counsel by collectively and transparently determining if:
 - 9 a. the plaintiff seeking preference can demonstrate “a substantial
10 interest in the action as a whole” per Code of Civil Procedure
11 §36(a);
 - 12 b. the plaintiff meets the criteria for probable Parkinson’s disease
13 and genuine paraquat exposure;
 - 14 c. the plaintiff’s case is procedurally ready to make and support a
15 motion for preference and;
 - 16 d. the plaintiff’s case is capable of trial readiness on the shortened
17 time afforded to a preference case. (See Code Civ. Proc. §36(f).)

18 These features reflect leadership’s belief that, consistent with the rulings of
19 other JCCP courts, there should be a system in place to assist a preference plaintiff
20 to meet the burden of establishing the elements of a preferential trial setting in a
21 JCCP proceeding. Moreover, a Preference Committee working with the counsel
22 proffering the potential preference case will help ensure that the interests of an
23 individual plaintiff are not elevated above and to the detriment of all plaintiffs in the
24 JCCP. This balanced analysis will advance the objectives of the JCCP.⁶

25 This committee’s analysis is especially crucial in a coordinated proceeding with
26 difficult scientific criteria and particularized diagnoses where a large portion of the

27
28 ⁶ Of note, Proposed Leadership has suggested that one of *Isaak’s* counsel, Steve
Brady, serve on the Preference Committee. (See declaration of Michael A. Kelly ¶5.)

1 plaintiff population theoretically meets the preference criteria.

2 Many of the plaintiffs in this coordinated proceeding likely qualify for trial
3 preference. As set forth above, application of the preference statute in a coordinated
4 proceeding does not mandate preference based on case-specific criteria alone. (See fn.
5 5 *supra*) Instead, the law requires that a plaintiff seeking preference demonstrate “a
6 substantial interest in the action as a whole.” (Code Civ. Proc. §36(a).) In this
7 particular litigation, preference cases will essentially function as bellwether cases
8 and that is why a careful, thoughtful selection process is necessary. There must be
9 intentionality in selection, including a thorough review to ensure the cases meet
10 diagnostic and scientific exposure criteria.

11 An uncontrolled race to file competing preference motions risks sending a
12 plaintiff to trial who does not represent the plaintiff population. And should the
13 initial trials be ultimately unsuccessful, it jeopardizes the rights of all remaining
14 plaintiffs in the proceeding. Thus, this leadership team respectfully submits that a
15 preference protocol be established which provides for thoughtful selection of those
16 cases.

17 **D. In a JCCP a Preference Protocol Is An Effective Means of**
18 **Establishing A Substantial Interest in the Action As A Whole**

19 Unlike the other subsections of section 36, preference under subsection (a) is
20 mandatory. California Code of Civil Procedure §36(a) provides:

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

23 **(1) The party has a substantial interest in the action as a whole.**

24 **(2) The health of the party is such that a preference is necessary to
prevent prejudicing the party's interest in the litigation.**

25 (Emphasis supplied.) This section requires a showing that the party seeking
26 preference has a substantial interest in the litigation as a whole.

27 As other JCCP courts have ruled, one individual plaintiff who brings a motion
28 for trial preference in a JCCP does not automatically demonstrate a “substantial

1 interest in the action as a whole,” because most courts interpreting the statute found
2 that “action as a whole” refers to the coordinated proceeding at large. (Kelly Decl. ¶6,
3 Ex. 1 (*California North Bay Fire Cases*, JCCP No. 4955, Order Denying Without
4 Prejudice Pamela Fowler's Motion for Trial Preference (Super. Ct. S.F. County Dec.
5 31, 2018)) at 8-9; see also Kelly Decl. ¶7, Ex. 2 (*Woolsey Fire Cases*, JCCP No. 5000,
6 Order on Several Motions for Trial Preference (Super. Ct. L.A. County Feb. 2, 2021));
7 Kelly Decl. ¶8, Ex. 3 (*Southern California Fire Cases*, JCCP No. 4965, Ruling on
8 Submitted Matter re Motion for Trial Preference (Super. Ct. L.A. County July 27,
9 2020)).)

10 In Los Angeles County, on February 2, 2021, the Honorable William
11 Highberger denied a motion for trial preference under Sections 36(a) and 36(e) in the
12 Woolsey Fire Cases JCCP 5000. In doing so, he determined that the phrase “action as
13 a whole” in the context of a coordinated proceeding requires the party seeking
14 preference to show a substantial interest in the *entire coordinated proceeding*.
15 (emphasis added). Because moving parties were just six of the 6,591 individual
16 plaintiffs in the coordinated proceeding thus far, they “obviously have no interest in
17 the claims of other, unrelated parties for damages...” (Kelly Decl. ¶7, Ex. 2, at 6.).

18 Using similar reasoning, the Honorable Daniel Buckley denied plaintiffs’
19 preference motion in JCCP 4965 for the Southern California Fire Cases on July 27,
20 2020 because they did not have a substantial interest in the action as a whole as
21 required by Section 36(a)(1). In denying the motion, Judge Buckley interpreted
22 “action as a whole” to mean the entire coordinated proceeding and so reasoned that
23 because the three plaintiffs seeking preference were “a scintilla, in the grand scheme
24 of the coordinated proceeding”, they could not be characterized as having a
25 substantial interest in the action. (Kelly Decl. ¶8, Ex. 3, at 3; see also Kelly Decl. ¶9,
26 Ex. 4 (*Southern California Fire Cases*, JCCP No. 4965, Ruling on Motion for Trial
27 Preference (Super. Ct. L.A. County May 7, 2019)) at 7 (wherein Judge Buckley on
28 May 7, 2019 ruled denied nine preference motions for lack of a substantial interest in

1 the litigation as a whole.)

2 In the California North Bay Fire Cases, the Honorable Curtis Karnow denied a
3 plaintiff's motion for preference under Section 36(a) because the plaintiff failed to
4 follow Judge Karnow's preference protocol. Judge Karnow reasoned that preference
5 motions do not further the goal of complex litigation, which is to resolve litigation
6 collaboratively, cooperatively, and with a comprehensive plan, as section 36 instead
7 "presumes cases resolve by trial." (In JCCP No. 4955 (*California North Bay Fire*
8 *Cases*) Order, Kelly Decl. ¶6, Ex. 1, at 7.) He noted that granting the singular
9 preference motion would likely be at the expense of the thousands of plaintiffs not
10 involved in that motion, and if more plaintiffs opted for preference trials,
11 "coordinating these cases would be impossible." (Id. at 3.)⁷

12 The foregoing rulings make manifest that there is nothing absolute,
13 mandatory, or otherwise algorithmic in how a Coordination Judge manages a
14 coordinated proceeding including how cases are set for trial. The statutory power and
15 inherent authority to manage this docket require a nuanced and deliberate balance of
16 the interests of all plaintiffs in the JCCP with the interests of those plaintiffs who
17 request preferential trial setting. A protocol or procedure to enable those plaintiffs
18 with cases that qualify to come forward, collaborate and work collectively can help
19 obtain that balance.

20 Rather than deny preference to those plaintiffs who merit it, the Court should
21 adopt a protocol that enables all parties with qualifying cases to come forward in a
22 defined manner and on a specified timetable.

23 _____
24 ⁷ On the other hand, The Honorable Winifred Smith, presiding over the *In re*
25 *Roundup Products Cases* JCCP 4935, granted three preference motions and denied
26 one in Alameda County in December 2020. In granting the motions, Judge Smith
27 interpreted the phrase "substantial interest in the action as a whole" not as referring
28 to the JCCP in its entirety. Rather, she defined the plaintiff's action as by his
individual complaint. (Kelly Decl. ¶10, Ex. 5, *In re Roundup Cases*, JCCP No. 4953,
Order on C.C.P. 36, Preference Motions on Dublino, Stephens, Witcher, and
Shamirzadi (Super. Ct. Alameda County Dec. 15, 2020).).

1 **IV. CONCLUSION**

2 Based on the foregoing and in the interest of all Plaintiffs in this JCCP, the
3 undersigned respectfully request that the leadership team proposed be appointed per
4 CMO No. 1, and that this Court establish a protocol for the selection of cases for
5 preferential trial setting and pretrial management per CMO No. 2.

6 Dated: September 3, 2021

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10 **OF PROPOSED AMENDED CASE MANAGEMENT ORDER NO. 1 RE:**
11 **ORGANIZATION OF PLAINTIFFS' COUNSEL/PLAINTIFFS' LEADERSHIP**
12 **AND [PROPOSED] CASE MANAGEMENT ORDER NO. 2 RE: PREFERENCE**
13 **PROTOCOL**

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1 I declare under penalty of perjury under the laws of the State of California
2 that the foregoing is true and correct.

3 Executed on September 3, 2021, at San Francisco, California.

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7 Lily Connors

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