

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 277092 NAME: K. Lee Marshall FIRM NAME: Bryan Cave Leighton Paisner LLP STREET ADDRESS: Three Embarcadero Center, 7th Floor CITY: San Francisco STATE: CA ZIP CODE: 94111-4070 TELEPHONE NO.: (415) 675-3400 FAX NO.: (415) 675-3434 E-MAIL ADDRESS: klmarshall@bclplaw.com ATTORNEY FOR (name): Monsanto Company APPELLANT: Monsanto Company RESPONDENT: Dewayne Johnson <p style="text-align: center;">APPLICATION FOR EXTENSION OF TIME TO FILE BRIEF (CIVIL CASE)</p>	A155940 & A156706 SUPERIOR COURT CASE NUMBER: CGC16550128
Notice: Please read Judicial Council form APP-001 before completing this form.	

1. I (name): K. Lee Marshall request that the time to file (check one):
 - appellant's opening brief (AOB)
 - respondent's brief (RB)
 - combined respondent's brief (RB) and appellant's opening brief (AOB) (see rule 8.216)
 - combined appellant's reply brief (ARB) and respondent's brief (RB) (see rule 8.216)
 - appellant's reply brief (ARB)
 now due on (date): June 24, 2019 be extended to (date): July 12, 2019 (18-day extension)

2. I have have not received a rule 8.220 notice.

3. I have received:
 - no previous extensions to file this brief.
 - the following previous extensions
 (number of extensions): extensions by stipulation totaling (total number of days):
 (number of extensions): extensions from the court totaling (total number of days):
 Did the court mark any previous extension "no further?" Yes No

4. I am unable to file a stipulation to an extension because
 - the other party is unwilling to stipulate to an extension.
 - other reason (please specify): Court's order granting calendar preference.

5. The last brief filed by any party was AOB RB RB and AOB ARB and RB
 filed on (date): May 24, 2019

6. The record in this case is:

	<u>Volumes (#)</u>	<u>Pages (#)</u>	<u>Date filed</u>
Appellant's Appendix:	8	8,103	4/24/2019
Reporter's Transcript:	55	5,611	2/19/2019
Respondent's Appendix:	1	355	5/24/2019

7. The trial court has ordered the proceedings in this case stayed until the appeal is decided.

APPELLANT: Monsanto Company RESPONDENT: Dewayne Johnson	COURT OF APPEAL CASE NUMBER: A155940 & A156706
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8. The reasons that I need an extension to file this brief are stated
 below
 on a separate declaration. You may use *Attached Declaration (Court of Appeal)* (form APP-031) for this purpose.

(Please specify; see Cal. Rules of Court, rule 8.63, for factors used in determining whether to grant extensions):

See attached declaration of K. Lee Marshall.

9. For attorneys filing application on behalf of client, I certify that I have delivered a copy of this application to my client (Cal. Rules of Court, rule 8.60).
10. A proof of service of this application on all other parties is attached (see Cal. Rules of Court, rule 8.50). You may use *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) for this purpose.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: June 3, 2019

K. Lee Marshall
 (TYPE OR PRINT NAME)



K. Lee Marshall

(SIGNATURE OF PARTY OR ATTORNEY)

Order on Application is below on a separate document

ORDER

EXTENSION OF TIME IS:

Granted to (date): 07/12/2019

Denied

Date: 06/04/2019



Humes, P. J.

(SIGNATURE OF PRESIDING JUSTICE)

 PRESIDING JUSTICE

DECLARATION OF K. LEE MARSHALL

I, K. Lee Marshall, declare as follows:

1. I am an attorney licensed to practice law in the State of California, and a partner at the law firm of Bryan Cave Leighton Paisner LLP. I am co-counsel of record for Monsanto Company in these consolidated appeals. I was responsible for preparing significant portions of Monsanto's opening brief, and I have responsibility for preparing significant portions of Monsanto's reply brief and cross-respondent's brief in these appeals. I have personal knowledge of the facts set forth herein, and if called upon to testify as a witness thereto, I could and would do so competently.

2. On December 27, 2018, this court granted plaintiff's motion for a calendar preference, ordering that (1) Monsanto file its opening brief (AOB) within 60 days after the reporter's transcript is filed, (2) plaintiff file its combined respondent's brief and cross-appellant's opening brief (RB/X-AOB) within 30 days after the AOB is filed, (3) Monsanto file its combined reply brief and cross-respondent's brief (ARB/X-RB) within 30 days after the RB/X-AOB is filed, and (4) plaintiff file its cross-appellant's reply brief within 20 days after ARB/X-RB is filed. The court also ordered that (1) any notice under rule 8.220(a) specify that the court may impose sanctions if the brief is not filed within five days after the notice is sent, and (2) any extension of time shall be granted only "upon a showing of exceptional good cause."

3. Plaintiff filed his RB/X-AOB on Friday, May 24, 2019. Accordingly, under the court's preference order, Monsanto's ARB/X-RB is currently due on June 24, 2019. Monsanto hereby requests a modest 18-day extension of time to file its ARB/X-RB, so that the brief will be due on July

12, 2019. Monsanto has not filed a prior application for extension of time to file any brief in this case.

4. Since the court set the condensed briefing schedule in this appeal last year, Monsanto has had to defend itself in two lengthy trials involving similar claims that exposure to Monsanto's herbicides caused cancer. On March 27, 2019, a federal jury returned a verdict against Monsanto, awarding the plaintiff more than \$80 million in compensatory and punitive damages. (*Hardeman v. Monsanto Company*, United States District Court for the Northern District of California Case No. 3:16-cv-005252-VC.) The district court entered judgment in *Hardeman* on May 3, 2019. Ten days later, on May 13, 2019, an Alameda County jury returned a verdict against Monsanto, awarding the plaintiffs more than \$2 billion in compensatory and punitive damages. (*Pilliod v. Monsanto Company*, Alameda County Superior Court Case No. RG17862702.) The superior court entered judgment in *Pilliod* on May 22, 2019.

5. I am primarily responsible for drafting the post-trial motion papers in the *Pilliod* case. I am also consulting on the post-trial motions in the *Hardeman* case. Monsanto's post-trial motions in the *Hardeman* case are due on May 31, 2019, and its reply briefs in support of those motions are due on June 21, 2019. Monsanto's post-trial motions in the *Pilliod* case are due on June 17, 2019, and its reply briefs in support of those motions are due on July 2, 2019. As noted, Monsanto's deadline to file its ARB/X-RB in the instant consolidated appeals is June 24, 2019, which falls during the same time frame as the post-trial motion deadlines in *Hardeman* and *Pilliod*. Of course, the verdicts and post-trial motion deadlines in *Hardeman* and *Pilliod* were unknown to Monsanto and this court at the time the court issued its briefing order in this appeal.

Declaration

6. In light of the imminent post-trial motion briefing deadlines in *Hardeman* and *Pilliod*, I am, and will be, devoting a significant amount of time over the next several weeks to the post-trial motions that challenge the enormous verdicts in those cases. These time-sensitive commitments will substantially impair my ability to devote time to prepare the ARB/X-RB in this appeal. (See Cal. Rules of Court, rule 8.63(b)(9).) Given my knowledge of the appellate record and my work preparing several arguments in Monsanto’s opening brief in this appeal, it is not feasible to have other attorneys step in at this point to draft the corresponding arguments in the reply brief. I am the only attorney involved in the *Johnson* appeal who was present for significant portions of the *Johnson* trial. I also had primary responsibility for drafting the post-trial motions in *Johnson*. My co-counsel at Horvitz & Levy LLP were retained after the post-trial motions in *Johnson* were decided.

7. Other factors also weigh strongly in favor of the modest 18-day extension Monsanto requests herein. The appellate record in these consolidated appeals is enormous, consisting of 55 volumes of reporter’s transcript (totaling 5,611 pages), 8 volumes of appellant’s appendix (totaling 8,103 pages), and 1 volume of respondent’s appendix (totaling 355 pages). This record is significantly larger than the average-length record in a civil case. (See Cal. Rules of Court, rule 8.63(b)(3) [“In a civil case, a record containing one volume of clerk’s transcript or appendix and two volumes of reporter’s transcript is considered an average-length record”]; *ibid.* [“The length of the record” is a relevant factor in ruling on an extension request].)

8. The case is unusually complex and presents numerous complicated issues. (See Cal. Rules of Court, rule 8.63(b)(4) [the “complexity of the issues raised” is a relevant factor].) Monsanto has asserted at least

seven issues, including several substantial evidence issues, each relating to an independent claim of error. Those issues include: (a) whether there was substantial evidence to support the jury's finding of a failure to warn under a strict liability or negligence theory; (b) whether there was substantial evidence to support the jury's finding of a design defect under a consumer expectations theory; (c) whether there was substantial evidence that plaintiff's exposure to glyphosate or glyphosate-based herbicides caused his injury; (d) whether plaintiff's design defect and warning claims are preempted by federal law; (e) whether the trial court abused its discretion by excluding EPA and foreign regulatory documents from evidence; (f) whether there was clear and convincing evidence that Monsanto acted with malice or oppression in the conduct that gave rise to liability in this case; and (g) whether the award of \$33 million in future noneconomic damages is excessive as a matter of law. Plaintiff asserts an additional issue in his cross-appeal—namely, whether the trial court erred by reducing the jury's \$250 million verdict for punitive damages to roughly \$39 million under the federal due process clause.

9. The complexity of the issues is underscored by the fact that plaintiff's RB/X-AOB covers 116 pages and contains 27,992 words, just eight words shy of the word limit imposed by rule 8.204(c)(4) of the California Rules of Court. The vast majority of these pages is devoted to the respondent's brief. Monsanto needs sufficient time to adequately address plaintiff's arguments, particularly given the enormous potential exposure Monsanto faces in this litigation.

10. In-house counsel at Bayer, which acquired Monsanto, will need to review, comment on, and edit the ARB/X-RB before it is filed. (See Cal. Rules of Court, rule 8.63(b)(8).) The 30-day period provided under the court's

Declaration

preference order does not allow counsel sufficient time to brief these issues (particularly in light of the significant amount of work that needs to be done on the post-trial motions in *Hardeman* and *Pilliod* in May and June) and allow the client sufficient time to review, comment on, and edit the brief.

11. Monsanto consents to this extension request. (See Cal. Rules of Court, rule 8.63(b)(2).) We presume that plaintiff's counsel opposes this request given the position they asserted in their motion for calendar preference, even though plaintiff will not suffer any prejudice from the modest 18-day extension requested herein. (See Cal. Rules of Court, rule 8.63(b)(1).) By contrast, Monsanto is likely to suffer substantial prejudice if the request is denied. A denial of the requested 18-day extension will impair Monsanto's ability to mount an effective challenge to a judgment exceeding \$78 million, particularly given the concurrent briefing deadlines with which Monsanto must comply in the *Hardeman* and *Pilliod* cases.

12. Monsanto's counsel has been diligent in prosecuting this appeal and there is no basis to conclude that this request is made in order to delay the appellate process. Monsanto filed the AOB without seeking an extension of the filing deadline, and before the court issued a notice under rule 8.220 of the California Rules of Court. Monsanto also sought leave to file an oversized opening brief more than two weeks before it filed the opening brief (rather than at the same time it filed that brief) in order to avoid delaying the appellate process.

13. For the foregoing reasons, Monsanto will require more time than the present deadline allows in order to prepare and file the ARB/X-RB. Eighteen additional days are requested as reasonably necessary to prepare a brief that is "accurate, clear, concise, and complete" (Cal. Rules of Court,

rule 8.63(a)(2).) We believe this request is consistent with California’s policy of affording litigants “[t]he effective assistance of counsel,” which includes “adequate time for counsel to prepare briefs . . . that fully advance the party’s interests.” (*Ibid.*)

14. This application is made in good faith for the reasons set forth above and not for the purpose of delay. We believe that the grounds asserted herein establish “exceptional good cause” for the modest extension we request, as required by the court’s preference order.

I declare under penalty of perjury under California law that the foregoing is true and correct and that this declaration was executed on May 31, 2019, at San Francisco, California.



K. Lee Marshall

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is, 3601 West Olive Avenue, 8th Floor, Burbank, California 91505.

On June 3, 2019, I served true copies of the following document(s) described as **APPLICATION FOR EXTENSION OF TIME TO FILE BRIEF (CIVIL CASE)** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on June 3, 2019, at Burbank, California.



Melody Liu

SERVICE LIST
Johnson v. Monsanto Company
Case No. A155940 & A156706

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