

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

KYLE CHAPLICK, *et al.*,

Plaintiffs,

v.

MONSANTO COMPANY,

Defendant.

Case No. 19SL-CC04115

Division 1

PLAINTIFFS' MOTION FOR MULTIPLE PLAINTIFF TRIAL SETTING

COMES NOW Plaintiffs, by and through undersigned counsel, and file the instant Motion for Multiple Plaintiff Trial Setting. In support of their Motion, Plaintiffs state the following:

I. INTRODUCTION

Judge Reno, in Administrative Order No. 13 dated May 6, 2019, set forth procedures for the administration of Roundup cases. Pursuant to those procedures, and this Court's order dated October 1, 2019, the Plaintiffs request the Court to schedule the Chaplick Plaintiffs for trial as soon as practicable. The *Chaplick* Plaintiffs, formerly plaintiffs in the case captioned *Winston v. Monsanto*, Case No. 1822-CC00515 (Circuit Court of St. Louis City) (hereinafter referred to as "*Winston*"), were scheduled to begin trial together on October 15, 2019 in St. Louis City. But when, on September 3, 2019, the Supreme Court issued a preliminary writ in the *Winston* case, staying all further action of all *Winston* Plaintiffs other than plaintiff Walter Winston, the 13 remaining *Winston* Plaintiffs (the *Chaplick* Plaintiffs) withdrew their opposition to Monsanto's underlying motion seeking their severance and transfer to the County and the instant case was transferred here several days later.

The *Chaplick* Plaintiffs filed their case in St. Louis City before the Supreme Court issued its decision in *State ex rel. Johnson & Johnson v. Burlison*, No. SC96704 (Mo., Feb. 13, 2019)

(hereinafter “*J & J*”), and thus when venue in St. Louis City for all plaintiffs was in accord with Missouri law and standard venue practice in the State. Even after *J&J*, it is undecided whether venue of the 13 *Winston* plaintiffs was proper in St. Louis City; the Supreme Court did not decide the merits of the case. But because the briefing schedule for the merits of the appeal set by the Supreme Court would have extended past the then scheduled *Winston* trial date of October 15th, the Plaintiffs opted to withdraw their opposition to severance and transfer in hopes that the trial of their case would not be delayed.

Regardless of where the *Chaplick* case was pending in the past, it is now venued in this Court now, and it is trial ready. As explained below, multiple dozens of fact and expert witness depositions have been completed, discovery is complete, and most pretrial motions have been fully briefed. Accordingly, the *Chaplick* Plaintiffs respectfully request that the case be assigned for trial sometime this year and, if not in 2019, as soon thereafter as is practicable.

II. BACKGROUND

Plaintiffs filed the *Winston* petition in March 2018. In June 2018, the Circuit Court Judge for the City of St. Louis assigned to the *Winston* case, set the trial for the 14 *Winston* Plaintiffs for October 15, 2019. That date remained the trial date since that time, and the parties proceeded accordingly, even in light of the numerous procedural twists and turns, culminating in the very recent transfer to this Court.

Over the course of the past 18 months, the *Winston* case has been the subject of extensive discovery and considerable motion practice. It has also been the subject of several writs before both the appellate division and the Supreme Court. In the most recent writ application, Monsanto sought severance and transfer of the *Winston* Plaintiffs, other than Mr. Winston himself. On September 3, 2019, the Supreme Court issued its preliminary decision on the writ: it denied the

writ as to Plaintiff Walter Winston, but it granted a preliminary writ as to the other 13 plaintiffs, ordering briefing on the issues presented as to those plaintiffs only. See Exhibit 1. Wanting to preserve their trial date, the *Winston* Plaintiffs (other than Plaintiff Walter Winston) decided to withdraw their opposition to the underlying motion to transfer venue and to consent to transfer of their cases from the Circuit Court of the City of St. Louis to this Court. See Exhibit 2. Monsanto opposed Plaintiffs' withdrawal on September 9, 2019 – even though it was the relief it wanted all along -- see Exhibit 3, and the Supreme Court, three days later, quashed the writ as moot. Exhibit 4. On September 18, 2019, the 13 plaintiffs from the *Winston* petition were transferred to this Court, as *Chaplick v. Monsanto*.

On September 24, 2019, the *Chaplick* Plaintiffs moved this Court to set this case for trial on October 15, 2019. The Court denied the motion on October 1 after having reviewed the trial schedules for Division 8 and determined that the schedules did not permit a trial at that time. It also directed the *Chaplick* Plaintiffs to make a motion for multiple plaintiff trial settings in accordance with Administrative Rule 13. The *Chaplick* Plaintiffs hereby make that motion.

III. ARGUMENT

The *Chaplick* case is ready for trial. Discovery was closed prior to the transfer of the *Chaplick* petition to this Court. In addition, a substantial portion of the pre-trial briefing is done and what is still remaining could be finalized in short order. In the *Winston* case, Monsanto filed its motion for summary judgement as to plaintiff Walter Winston and motions to exclude Plaintiff's expert witnesses as they relate to Walter Winston under *Daubert* on September 11,

2019.¹ Plaintiff Winston filed his opposition to the motions on September 25, 2019. Those motions are in all respects equally applicable to *Chaplick*. For example, the general causation briefing will be the same for the *Chaplick* plaintiffs as for Mr. Winston as general causation issues are not plaintiff specific, nor are issues involving preemption and punitive damages. The general causation experts in *Winston* are the same as those in *Chaplick*.

Regarding specific causation, the experts that are the subject of the *Winston* motions are the same expert witnesses designated for the *Chaplick* Plaintiffs²; as a result, the briefing in *Winston* will not (or should not) be different in the *Chaplick* case. Thus, with little lead time, the parties can and will be ready to try *Chaplick*.

The parties in *Chaplick* have spent extraordinary time preparing for trial. There have been over 63 plaintiff-related fact depositions taken of the *Chaplick* Plaintiffs, including the Plaintiff himself or herself, his or her spouses when relevant, treating physicians and other fact witnesses. Monsanto has deposed all of Plaintiffs' expert witnesses for each of the *Chaplick* Plaintiffs.

Monsanto has no legitimate grounds to oppose a quick trial setting for the *Chaplick* Plaintiffs. Plaintiffs should not be punished for filing their case in a venue that was proper at the time of filing. What is more, given the questions raised regarding venue rules in Missouri following the *J&J* decision, the *Chaplick* Plaintiffs informed Monsanto of the possibility that their case could

¹ Monsanto's motions are nearly identical to the motions Monsanto has filed in previous cases, including those it filed in *Adams v. Monsanto*, 17SL-CC02721, pending before Your Honor and which this Court denied in orders dated July 26, 2019. While Monsanto would undoubtedly file a *Daubert* motion as to the remaining three oncologists for the *Chaplick* Plaintiffs, Monsanto informed Plaintiffs' counsel and the previously assigned judge that it had already finalized that briefing before the case was transferred from the City.

² The one exception is three oncologists from Dana Farber Institute, each of whom offer specific causation opinions regarding several of the *Chaplick* Plaintiffs. Monsanto did include a *Daubert* challenge against these experts in the *Winston* motions as to their general causation opinions but not as to their specific causation opinions relating to specific plaintiffs who are now part of the *Chaplick* petition.

be transferred from the City to the County as far back as May 2019, and their intention to seek the same or similar trial date if transfer occurred. See *Byrd v. Monsanto*, Case No. 18SL-CC03320, Response in Opposition to Defendant's Omnibus Motion for trial Selection Process ("Response"). See Exhibit 5 (filed in advance of the May 7, 2019 hearing before Judges May and Ribaud). Among the arguments Plaintiffs made was that Plaintiffs whose cases are currently *set for trial* in other Missouri state courts, and specifically in St. Louis City, but who are later transferred to the County, should have their trial date preserved:

At every turn, Monsanto has tried to sever the cases and have them transferred either to this Circuit or other Missouri state courts. To date, it has been unsuccessful and Plaintiffs believe Monsanto's efforts should and will fail. However, in the event that cases pending in St. Louis City that have been the subject of extensive discovery and/or expert disclosures are transferred to this Circuit, those cases should be given preferential trial dates. Such cases are nearly trial ready, the plaintiffs have devoted considerable time to respond to Monsanto's discovery demands, they have been deposed, their treating doctors have been deposed, and in some situations they have designated experts and Monsanto has deposed the experts. If these cases are ultimately transferred to this Circuit, efforts should be made to set trial dates immediately, with trials to commence in or around the time they would have commenced in the absence of transfer.

Response, Exhibit 5 at 3.3 And in numerous conferences before the previous trial judge, counsel for the *Winston* plaintiffs made clear to Monsanto that trial preparation should not be stayed due to writ practice because, if at any time the *Winston* Plaintiffs were transferred to the County, the Plaintiffs would be seeking the same trial date.

In sum, the efforts of the *Chaplick* parties militate in favor of a trial date in calendar year 2019 or very soon thereafter. Among the *Chaplick* Plaintiffs is a man who lost his eye sight in his

³ Plaintiffs also addressed the importance of multiple plaintiff trials, such as the *Chaplick* case, as an important mechanism for managing the Court's docket of cases. As of May 2019, when the *Byrd* plaintiffs filed their Response, there were approximately 6,000 individual plaintiffs who had filed cases in the Missouri state courts. Response, Exhibit 4 at 4. The estimate today is over three times greater than that, and the number of filed cases climbs every week.

early 50s because his non-Hodgkin lymphoma (NHL) wrapped around his ocular nerve; another man who in his early 50s can barely walk because his NHL has caused debilitating scrotal edema; a man whose NHL was so aggressive that his tumor nearly doubled in size while on his second regimen of chemotherapy and is alive today only because he was accepted into a new NHL treatment therapy referred to as CAR-T; a young man, now 25 years old, who was diagnosed with NHL at age 17; and a man whose NHL has come back six times over the last 20 years, and each time it returns has to undergo another round of chemotherapy.

The *Chaplick* Plaintiffs were also included in the petition to ensure that only a few state laws would be relevant at trial. All *Chaplick* Plaintiffs are either from Florida or Georgia, with the exception of one plaintiff who is a former Missouri farmer. Thus, the jury instructions would include only three states' laws. And all of the *Chaplick* Plaintiffs, regardless of their location of exposure – have common questions of law and fact that support their trial together “to avoid unnecessary costs or delay.” Mo. S.Ct. R. 66.01(b). Moreover, court authority over trial management “is not limited to causes arising out of the *same* transaction, occurrence or series of transactions or occurrences.” *State ex rel. Allen v. Yeaman*, 440 S.W.2d 138, 142 (Mo. 1969). Missouri trial courts have long had “considerable discretion in matters concerning the conduct of the trial.” *Holt v. Queen City Loan & Inv., Inc.*, 377 S.W.2d 393, 401 (Mo. 1964). Consolidation is appropriate “so as to avoid piecemeal litigation when it is *reasonably* possible.” *Belden v. Chicago Title Ins. Co.*, 958 S.W.2d 54, 57 (Mo. App. E.D. 1998) (emphasis in original). One such scenario involves claims by multiple plaintiffs against the same defendant or defendants. *See Hammons v. Eisert*, 745 S.W.2d 253, 258 (Mo. App. S.D. 1988) (rejecting defendant’s assignment of error that allowing the jury “to hear evidence of two alleged ‘bad acts’ instead of hearing each case on its own evidentiary merits” was improper given the language of Rule 66.01(b)); *see also Blanks v. Fluor*

Corp., --- S.W.3d ----, 2014 WL 4589815 (Mo. App. E.D. Sept. 16, 2014) (joint trial of 16 children bringing claims of lead poisoning).

The legal and factual similarities of the *Chaplick* Plaintiffs' claims are substantial in both number and significance. There is one injury, NHL; one product at issue, Roundup containing the active ingredient glyphosate and surfactants; one defendant, Monsanto; and the same causes of action, including negligence and inadequate warnings. The fact that the Plaintiffs are different ages, had different doctors, and/or applied Roundup for different purposes is inherent in virtually every injury case and does not rise to the level of "uncommon" questions of fact and law.

In the end, fairness considerations weigh heavily in favor of a multiple plaintiff trial, as do considerations of efficiency and conservation of judicial resources. The majority of evidence in the *Chaplick* case is common to all plaintiffs. Numerous, single plaintiff trials would consume a far greater amount of trial time, require needless duplication of expert testimony and liability evidence, and, on the whole, be a substantial strain on limited judicial resources, especially given the multiple thousands of Roundup cases pending in Missouri state courts.⁴ Proceeding by single-plaintiff trials could unnecessarily prolong this litigation by decades.

While the Plaintiffs believe all of the *Chaplick* Plaintiffs should be tried together, if the Court is inclined to reduce the number of plaintiffs in a given trial, the *Chaplick* Plaintiffs suggest there are options to divide the case into two trials, rather than one. For example, the *Chaplick* Plaintiffs could be divided by state, such that one trial would include Florida plaintiffs and the other trial be Georgia plaintiffs, with the Missouri plaintiff being added to one of those trials.

⁴ The Roundup trial in San Francisco in the summer of 2018, *Johnson v. Monsanto*, Case No. CGC-16-550128 (San Francisco County, CA), illustrates this point. The *Johnson* trial testimony lasted 15 trial days, with at least 12 of the 15 days addressing issues of general causation and liability. To try the *Chaplick* Plaintiffs' cases one at a time would be inefficient and consume considerable judicial resources that would be unnecessary to consume if tried together.

Monsanto has made arguments in the past that it should not have more than one trial setting at a time, and presumably will argue, as it did before, that the *Chaplick* trial should not be scheduled even in 2020. Such an argument rings hollow. As stated above, this case is trial ready. In addition, Monsanto has a deep bench of attorneys from countless law firms working on the Roundup litigation, including as trial counsel. In the first trial, in San Francisco County Court, *Johnson v. Monsanto*, Monsanto trial counsel was from the law firms of Winston & Strawn and Hollingsworth LLP. In the next trial, *Hardeman v. Monsanto*, MDL 2741, Case No. 3:16-cv-0052-VC), in the federal multi-district litigation, Monsanto trial counsel was from Wilkinson Walsh & Eskovitz. In the third trial, *Pilliod v. Monsanto*, Case No. RG17862702 (Alameda County, CA), trial counsel was from the law firms of Goldman Ishmail Tomaselli Brennan & Baum and Evans Fears & Schuttert. In the *Winston* case, Monsanto informed counsel that trial counsel would be from the law firms of McDermott, Will & Emery and Bartlitt Beck. These are but a half dozen of the law firms, that Plaintiffs' counsel is aware of, which represent Monsanto in Roundup litigation. Thus, there is no basis for Monsanto to argue that it would be prejudiced if the Court were to schedule stacked or overlapping trials. Nevertheless, based on Exhibit A to Monsanto's opposition to the *Chaplick* Plaintiffs' Motion for Trial Setting on October 15, 2019, (attached hereto as Exhibit 6), there is ample room for other trials in 2019 and 2020 if there are available judges in the County to try the *Chaplick* case. Indeed, it is even possible to have trials that are not stacked and/or only partially overlapping, and if overlapping trials were truly Monsanto's concern, it would agree to a trial date later this year in 2019, as it has no Roundup trials scheduled for the remainder of this year and no discovery left to conduct in order to try the *Chaplick* Plaintiffs.

The *Chaplick* Plaintiffs have complied with all discovery demands and have worked tirelessly to ensure that their case was trial ready. And they succeeded -- the case is, in fact, trial

ready. They should be afforded their day in court. Monsanto's repeated attempts to avoid the trial of the *Chaplick* Plaintiffs should be rejected, and the case should be set for trial in 2019 or as soon thereafter as is practicable.

IV. CONCLUSION

For the reasons stated above, Plaintiffs request that this Court schedule the *Chaplick* case in 2019 or as soon thereafter as is practicable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed and served upon all counsel of record this 3rd day of October 2019 by way of the Missouri ECF system.

/s/ Mark R. Niemeyer _____