Curtis G. Hoke (State Bar No. 282465)
THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
Telephone: (540) 672-4224
Facsimile: (540) 672-3055
choke@millerfirmllc.com

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

COORDINATION PROCEEDING SPECIAL TITLE (RULE 3.550) **ROUNDUP PRODUCTS CASES** THIS DOCUMENT RELATES TO: *Pilliod, et al. v. Monsanto Company, et al.* Alameda Superior Court Case No.: RG17862702	JCCP NO. 4953 Case No.: RG17862702 **NOTICE OF MOTION AND PLAINTIFFS ALVA AND ALBERTA PILLIOD'S MOTION FOR TRIAL PREFERENCE** **BY FAX** Hon. Judge Ioana Petrou Hearing Date: October 9, 2018 Time: 9:00 a.m. Department: 17 Reservation No.: R-1997208

TO ALL PARTIES AND THEIR COUNSELS OF RECORD:

PLEASE TAKE NOTICE that on October 9, 2018 at 9:00 a.m., or as soon thereafter as the matter can be heard in Department 17 of this Court, The Honorable Judge Ioana Petrou presiding, located at 1221 Oak Street, Oakland, CA 94612, Plaintiffs will move and hereby do respectfully move this Court for an Order granting a trial preference pursuant to Cal. R. Ct. 3.1335 and Cal. Code. Civ. Proc. § 36 (a), (c), (e), and (f).

Plaintiffs' Motion for Trial Preference is based on Cal. R. Ct. 3.1335 and Cal. Code. Civ. Proc. § 36 (a), (c), (e), and (f) and respectfully request that this honorable Court grant plaintiffs Alva Pilliod and Alberta Pilliod (hereinafter, "Mr. and Mrs. Pilliod," respectively) a joint preference trial set for December, 2018 because 1) both Mr. and Mrs. Pilliod are over 70 years of age, 2) both Mr. and Mrs. Pilliod have been diagnosed with non-Hodgkin's lymphoma and have a substantial interest in the action as a whole, and 3) Mr. and Mrs. Pilliod's advanced age and cancer diagnoses necessitate a preferential trial setting.

DATED: August 30, 2018

Respectfully submitted,

THE MILLER FIRM, LLC

By: /s/ Curtis Hoke

Curtis G. Hoke (SBN 282465)
Timothy Litzenburg (Appearance *Pro Hac Vice*)
THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
(540) 672-4224 phone
(540) 672-3055 fax
choke@millerfirmllc.com
tlitzenburg@millerfirmllc.com
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Alva Pilliod and Alberta Pilliod (respectively referred to as "Mr. Pilliod" and "Mrs. Pilliod"), both named plaintiffs in *Pilliod, et al. v. Monsanto Company, et al*, commenced this action on June 2, 2017. Mr. and Mrs. Pilliod have each been diagnosed with non-Hodgkin's lymphoma and are both over 70 years of age. Therefore, they both respectfully seek a joint preferential trial setting for December, 2018 pursuant to Cal. R. Ct. 3.1335 and Cal. Code. Civ. Proc. § 36 (a), (c), (e), and (f).

In an effort to avoid unnecessary motions practice and limit an undue waste of time, on or about August 16, 2018, Plaintiffs' counsel met and conferred with Monsanto's counsel prior to the filing of this motion. Plaintiffs have provided Monsanto with copies of all medical records currently in their possession and fully executed Plaintiff Fact Sheets and medical authorizations. Nonetheless, at this time, Monsanto opposes Plaintiffs' motion.

II. ARGUMENT

A. Applicable Law.

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

> (a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:
>
> (1) The party has a substantial interest in the action as a whole.
>
> (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.
>
> […]
>
> (c) Unless the court otherwise orders:

> (1) A party may file and serve a motion for preference supported by a declaration of the moving party that all essential parties have been served with process or have appeared.
>
> (2) At any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference.
>
> […]
>
> (e) Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.
>
> (f) Upon 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. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.

See, Cal. Cod. Civ. P. § 36 (a), (c), (e), and (f).

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."[1] *Miller v. Superior Court*, 221 Cal. App. 3d 1200, 1204 (Cal. Ct. App. 1990). *See, also, Rice v. Superior Court*, 136 Cal. App. 3d 81, 84-87 (Cal. Ct. App. 1982) (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*, 219 Cal. App. 3d 777, 781 (Cal. Ct. App. 1990) ("section 36 is mandatory, leaving no room for such courtesy and no discretion to the court.").

---

[1] Here there should be no concern that this case can be ready for trial within 120 days. Counsel for both parties have already brought a Roundup NHL case to trial in an expedited manner (*Johnson v. Monsanto*, San Francisco Sup. Ct. Case No.: CGC-16-550128) and, at this time, Plaintiff intends to name expert witnesses that have previously testified at trial or in the federal MDL *Daubert* hearing.

"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*, 212 Cal. App. 3d 1082, 1085–86 (Cal. Ct. App. 1989), 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*, 180 Cal. App. 3d 689 (Cal. Ct. App. 1986)]. 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*, 180 Cal. App. 3d 689, 694 (Cal. Ct. App. 1986).

The standard under subdivision (a), unlike under subdivision (d), which is more specific and more rigorous, includes no requirement of a doctor's declaration. To the contrary, a motion under subdivision (a) may be supported by nothing more than an attorney's declaration "based upon information and belief as to the medical diagnosis and prognosis of any party." *Fox v. Superior Court*, 21 Cal. App. 5th 529, 534 (Cal. Ct. App. 2018). For those individuals diagnosed with cancer, "the end may come quickly with little warning; years may pass with gradual, relentless decline before the battle is lost; or, happily, there may be sustained remission after

episodic periods of improvement and relapse. Anyone who has ever heard a physician say in these circumstances, "we just can't predict with any certainty," will appreciate that indeterminacy is not only inherent in the situation, but is part of the challenge of dealing with it." *Id*. at 535–36. All that is required under Section 36(a) is nothing more than an attorney's declaration "based upon information and belief as to the medical diagnosis and prognosis of any party." *Id*. at 534 [citing § 36.5; accord Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 12:247.1, p. 12(I)-44 [attorney declaration under section 36.5 "can consist entirely of hearsay and conclusions"].

Further, a showing of impending death or incapacity is *not* required under Section 36(a); rather, the analysis under Section 36(a) is more open-ended and should be liberally construed than subsection (d):

> Section 36, subdivision (a), says nothing about "death or incapacity." Whether there is "substantial medical doubt of survival ... beyond six months" is, to be sure, a matter of specific concern under subdivision (d), but the relevant standard under subdivision (a) is more open-ended. The issue under subdivision (a) is not whether an elderly litigant might die before trial or become so disabled that she might as well be absent when trial is called. Provided there is evidence that the party involved is over 70, all subdivision (a) requires is a showing that that party's "*health ... is such* that a preference is necessary *to prevent prejudicing [her] interest in the litigation*." (Italics added.) Metalclad's proposed reading of subdivision (a), requiring a showing of what amounts to likely unavailability for trial, sets the prejudice standard too high.

Id. at 534.

B. Plaintiffs' Advanced Age and Health Dictate That a Preferential Trial Setting Is Necessary to Avoid the Irrevocable Loss of Their Right to Trial by Jury.

Here, Plaintiffs Alva and Alberta Pilliod are entitled to a preferential trial date because: (1) they both are over 70 years old; (2) they both have a substantial interest in this case because they both have been diagnosed with non-Hodgkin's lymphoma, allegedly due to Roundup; and

(3) a preferential trial setting herein is necessary to avoid the prejudicial irrevocable loss of their right to a trial by jury.

1. Mr. And Mrs. Pilliod Are Both Over 70 Years Old, Conclusively Demonstrating Their Right To A Preferential Trial Setting.

Mr. and Mrs. Pilliod are both over 70 years old, conclusively demonstrating their right a preferential trial setting. Specifically, Mr. Pilliod, born May 5, 1942, is 76 years old. Mrs. Pilliod, born April 17, 1944, is 74 years old. Due to Mr. and Mrs. Pilliod's advanced age, trial preference is *mandatory*, manifesting the legislatures "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*, 180 Cal. App. 3d at 694 (emphasis added); *Swaithes*, 212 Cal. App. 3d at 1085–86 (holding that Section 36(a) "is mandatory and absolute in its application in civil cases whenever the litigants are 70 years old."). Therefore, Mr. and Mrs. Pilliod respectfully request that this Court set a joint preference trial in this case for December, 2018.

2. Plaintiffs Have a Substantial Interest In This Case Because They Both Have Been Diagnosed with Non-Hodgkin's Lymphoma.

Mr. and Mrs. Pilliod both have a substantial interest in this case because they both have been diagnosed with non-Hodgkin's lymphoma, which they allege to be caused by Monsanto's Roundup product. Specifically, after using Roundup for decades, Mr. Pilliod was diagnosed with Stage IV diffuse large B-cell lymphoma with diffuse lymphadenopathy and skeletal metastasis in 2011. Mrs. Pilliod, who also used Roundup for years, was diagnosed with diffuse large B-cell CNS (central nervous system) lymphoma in her brain in 2015.

Due to Mr. and Mrs. Pilliod's condition – given that they are both over 70 years old and both have been diagnosed with non-Hodgkin's lymphoma – Mr. and Mrs. Pilliod are entitled to a preferential trial setting, which is necessary to avoid the irrevocable loss of their right to a jury trial. The fact Mr. and Mrs. Pilliod are both over 70 years old alone "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*, 180 Cal. App. 3d at 694. Additionally, both Mr. and Mrs. Pilliod have been diagnosed with life-threatening forms of non-Hodgkin's lymphoma, further demonstrating that a preferential trial setting is necessary to preserve their right to a jury trial.

More specifically, Dr. Chadi Nabhan, M.D., M.B.A., F.A.C.P., a board-certified oncologist specializing in the diagnosis and treatment of non-Hodgkin's lymphoma has explained in a Declaration filed concurrently herewith that Mrs. Pilliod:

> currently age 74, was diagnosed in 2015 with primary central nervous system (CNS) lymphoma of the diffuse large B-Cell type. She was 71 at the time of her diagnosis. This disease is a very aggressive form of non-Hodgkin lymphoma that involves the brain and spares any other organs. Ms. Pilliod was treated in 2015 but her disease recurred in July 2016 at which point she received additional aggressive chemotherapy. She is currently on maintenance lenalidomide (a form of oral chemotherapy) to prevent relapse. She has been on lenalidomide since April 2017.
>
> Even though Mrs. Pilliod has been stable over the past year and a recent MRI from August 8, 2018 showed stable changes compared with the one prior, Ms. Pilliod remains at a substantially high risk for disease recurrence, progression, and relapse. The fact that she was initially diagnosed with cancer at 71, had deep brain lesions from her cancer, and had poor performance status at diagnosis, puts her at high-risk for recurrence at any given point, which can happen at any time. Should she relapse, the disease is likely to be fatal given her advanced age and the lack of known effective therapies for this disease upon second relapse."

See, Decl. of Chadi Nabhan, M.D., M.B.A., F.A.C.P. at ¶¶ 5-6. Further, Dr. Nabhan's Declaration explains that the "Median survival for the subtype of lymphoma that Ms. Pilliod suffers from is

less than 5 years." *Id*. at ¶ 7. Mrs. Pilliod, initially diagnosed in 2015, is quickly approaching this five-year period.

Mr. Pilliod "was diagnosed in 2011 with diffuse large b-cell lymphoma with bone involvement. Fortunately, he was treated successfully with chemotherapy and has been in remission for several years. However, he is also elderly, and if recurrence should occur, his life expectancy would be short. Notably, late relapses of large cell lymphomas have been reported in the literature." *Id*. at ¶ 8.

The California Court of Appeal has clearly stated that these facts are sufficient to trigger mandatory trial preference under Section 36(a). *See*, *Fox*, 21 Cal. App. 5th at 535–36 (noting that "we are hard pressed to see what more they would need to present to justify entitlement to calendar preference under subdivision (a)").

Simply put, Mr. and Mrs. Pilliod are entitled to a trial by jury before they die. Indeed, if Mr. and Mrs. Pilliod are not granted a preferential trial setting, their advanced age and/or their health condition might cause them to die before trial, meaning that they would irrevocably prejudiced and lose their constitutional right to a trial by jury. These considerations entitle Mr. and Mrs. Pilliod to a *mandatory* preference trial pursuant to Cal. R. Ct. 3.1335 and Cal. Code. Civ. Proc. § 36 (a), (c), (e), and (f). Therefore, Plaintiffs respectfully request that the Court grant their request for a preferential trial setting.

III. CONCLUSION

For the foregoing reasons, Mr. and Mrs. Pilliod respectfully request that the Court grant their Motion for Trial Preference and set a joint trial for Mr. and Mrs. Pilliod for December, 2018.

DATED: August 30, 2018

Respectfully submitted,

THE MILLER FIRM, LLC

By: /s/ Curtis Hoke
Curtis G. Hoke (SBN 282465)

THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
(540) 672-4224 phone
(540) 672-3055 fax
choke@millerfirmllc.com
Attorneys for Plaintiffs