

1 BRIAN PANISH, California State Bar No. 116060
panish@psblaw.com
2 PETER KAUFMAN, California State Bar No. 269297
kaufman@psblaw.com
3 PETER POLOS, California State Bar No. 149856
polos@psblaw.com
4 PANISH SHEA & BOYLE LLP
11111 Santa Monica Boulevard, Suite 700
5 Los Angeles, California 90025
Telephone: 310.477.1700
6 Facsimile: 310.477.1699

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8 Attorneys for Plaintiff
GARY DARLING

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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 COORDINATION PROCEEDING SPECIAL
13 TITLE [RULE 3.550(C)]

14 DePUY ASR HIP SYSTEM CASES
15

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17 THIS DOCUMENT RELATES TO:

18 GARY DARLING, individually,
19 (LASC Case No.: BC 471 909, Assigned to
the Honorable Rolf Treu, Dept. 58)

Judicial Council Coordination
Proceeding No.: 4649

Assigned for all purposes to Judge Richard
Kramer, Dept. 303

MEMORANDUM OF POINTS AND
AUTHORITIES RE: EX PARTE
APPLICATION FOR AN ORDER
SHORTENING TIME OR, IN THE
ALTERNATIVE, GRANTING
PLAINTIFF'S MOTION FOR
PREFERENTIAL TRIAL SETTING
PURSUANT TO CALIFORNIA CODE OF
CIVIL PROCEDURE SECTION 36(D)

[Filed concurrently with Ex Parte
Application; Declaration of Peter L.
Kaufman; Declaration of Peter Schauer,
M.D.]

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Dept.: 303

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ELECTRONICALLY

FILED

Superior Court of California,
County of San Francisco

DEC 27 2013

Clerk of the Court
BY: MICHAEL RAYRAY
Deputy Clerk

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This is a product liability case brought by Plaintiff Gary Darling for injuries he sustained as a result of the failure of an ASR hip prosthesis. Defendants Johnson and Johnson, Inc., Johnson and Johnson Services, Inc., Depuy Orthopaedics Inc. and Thomas Schmalzried, M.D., A Professional Corporation, are the manufacturers, designers, and/or distributors of the ASR hip prosthesis.

On October 20, 2008, Plaintiff Gary Darling underwent a left total hip arthroplasty, and received an ASR total hip implant device. In the summer of 2010, Mr. Darling began experiencing pain in his left hip. In August of 2010, DePuy issued a recall of the ASR hip device. Following the recall, Mr. Darling underwent various procedures to rule out infection as the source of his pain and discomfort, including: Metal Artifact Reduction Sequence MRI; X-Rays to rule out the presence of pseudotumors; and blood work to determine whether he had elevated levels of cobalt or chromium.

On July 27, 2011, Mr. Darling underwent revision surgery of his failed left hip implant. To date, he continues to have pain, discomfort and loss of the normal range of motion in his left hip. On February 21, 2012, following an abnormal result of a chest x-ray, Mr. Darling was diagnosed with Stage III inoperable lung cancer. He underwent several courses of radiation and chemotherapy treatments, which ultimately were unsuccessful. Presently, Mr. Darling suffers from Stage III non-small cell lung cancer, and is considered by his treating oncologist, Dr. Peter Schauer, to be terminal. Because Mr. Darling's physicians consider his cancer beyond treatment, he is currently receiving only hospice care. Mr. Darling is married and has three children, ages 28, 27 and 16.

2. SUMMARY OF THE ARGUMENT

Plaintiff Gary Darling respectfully moves the Court for an order for preferential trial setting pursuant to *Code of Civil Procedure* Section 36(d), and Case Management Order 9. Section 36(d) provides that the Court may grant a motion for preferential setting where it is accompanied by clear and convincing medical documentation which concludes that one of the parties suffers from a condition which raises substantial medical doubt of the party's survival beyond six months, and

which satisfies the Court that granting the motion will serve the interests of justice. On February 21, 2012, Plaintiff was diagnosed with Stage III inoperable lung cancer. Although he has undergone multiple courses of radiation and chemotherapy treatments in an attempt to extend his life, the treatments were unsuccessful. Given the current state of his cancer, there is substantial medical doubt of his survival beyond six months. Should Mr. Darling die before the trial of his case, his interests and the interests of his family will be irreparably damaged. Accordingly, Plaintiff requests that the Court remand his case to Los Angeles, with a trial date not more than 120 days from the date the motion is granted, in accordance with *Code of Civil Procedure* Section 36(f).

3. THE INTERESTS OF JUSTICE WILL BE SERVED BY GRANTING PLAINTIFF'S MOTION FOR TRIAL PREFERENCE PURSUANT TO *CODE OF CIVIL PROCEDURE* SECTION 36(d)

Code of Civil Procedure Section 36(d) provides as follows:

“(d) In its discretion, the court may ... grant a motion for preference that is accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference.”

The legislative intent of *Code of Civil Procedure* Section 36 (d) is the recognition that “justice delayed is justice denied.” *Warren v. Schechter*, (1997) 57 Cal.App.4th 1189, 1199 (citing *Laborers’ Internat. Union of North America v. El Dorado Landscape Co.* (1989) 208 Cal.App.3d 993). The Court in *Warren* found that the interests of justice clearly dictate that a litigant who may not survive the delay of a court backlog be afforded calendar preference. *Id.*

Plaintiff’s motion is accompanied by clear and convincing medical documentation that concludes that there is substantial medical doubt of his survival beyond six month given the progression of his illness and the lack of effective treatment. Mr. Darling is currently receiving hospice care, which is reserved for terminally ill patients. Hospice care involves the administration

1 of pain medication and other treatment to make the patient comfortable for the time he has
2 remaining.

3 Without Court intervention, Mr. Darling will not live to see the resolution of his case. As a
4 result, the interests of justice will be served by granting Mr. Darling's motion for preferential trial
5 setting.

6 **4. THERE IS CLEAR AND CONVINCING MEDICAL DOCUMENTATION RAISING**
7 **SUBSTANTIAL DOUBT OF GARY DARLING'S SURVIVAL BEYOND SIX**
8 **MONTHS**

9 On February 15, 2012, Plaintiff Gary Darling underwent a Computed Tomography (CT)
10 scan of his chest. The study showed a nine centimeter irregular mass in the right upper lobe. At
11 that time, the differential diagnosis included non-small cell cancer, lymphoma and Consolidative
12 Bronchioloalveolar Carcinoma. (See Declaration of Peter Kaufman (hereinafter "Kaufman Decl."),
13 para. 2, Exhibit 1). Mr. Darling was then referred to Peter Schauer, M.D., for oncology treatment.

14 Dr. Schauer is board-certified in Medical Oncology. (Declaration of Peter Schauer, M.D.,
15 para. 2) Dr. Schauer began treating Mr. Darling shortly after his diagnosis with Stage IIIA
16 Squamous cell carcinoma of the lung. Under Dr. Schauer's care, Mr. Darling underwent multiple
17 courses of radiation and chemotherapy, which proved to be unsuccessful. (Schauer Decl., para. 3)
18 It is Dr. Schauer's opinion, to a reasonable degree of medical certainty, that Mr. Darling will not
19 survive beyond six months. (Schauer Decl., para. 4)

20 For the reasons detailed above, there is substantial medical doubt of Mr. Darling's survival
21 beyond six months and the interests of justice will be served by granting Plaintiff's motion for trial
22 preference pursuant to *Code of Civil Procedure* Section 36(d).

23 **4. PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 36(f) PLAINTIFF IS**
24 **ENTITLED TO A TRIAL DATE NOT MORE THAN 120 DAYS FROM THE**
25 **DATE THE COURT GRANTS THE MOTION FOR TRIAL PREFERENCE**

26 *Code of Civil Procedure* Section 36(f) provides as follows:

27 "(f) Upon the granting of such a motion for preference, the court shall
28 set the matter for trial not more than 120 days from that date . . ."

Plaintiff has met all of the requirements for trial preference set forth in *Code of Civil Procedure* Section 36(d), and hereby requests that the Court set this case for trial not more than 120 days from the date the motion is granted, pursuant to *Code of Civil Procedure* Section 36(f).

5. GOOD CAUSE EXISTS TO GRANT THE RELIEF REQUESTED ON AN EX PARTE BASIS

Good cause exists for the Court to grant the relief requests on an *ex parte* basis or, alternatively, on shortened notice.

Plaintiff is currently suffering from terminal lung cancer and, according to his treating oncologist, has less than six months to live. If Plaintiff dies prior to the trial of this matter, his interests, as well as the interests of his wife and three children would be irreparably damaged. Consequently, time is of the essence.

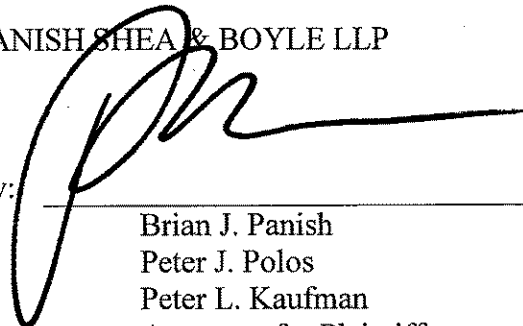
6. CONCLUSION

For all the foregoing reasons Plaintiff respectfully requests that the Court grant Plaintiff's motion for preference and set his case for trial not more than 120 days from the date the motion is granted.

DATED: December 23, 2013

PANISH SHEA & BOYLE LLP

By:



Brian J. Panish
Peter J. Polos
Peter L. Kaufman
Attorneys for Plaintiff