

PANISH SHEA & BOYLE LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax

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

7
8 Attorneys for Plaintiff
GARY DARLING

9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SAN FRANCISCO**

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

Judicial Council Coordination
Proceeding No.: 4649

14 **DePUY ASR HIP SYSTEM CASES**

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

15
16
17 **THIS DOCUMENT RELATES TO:**

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

**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.]**

20
21
22
23 DATE: December 24, 2013
24 Time: 9:15 a.m.
25 Dept.: 303

26
27
28
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)

ELECTRONICALLY

FILED

Superior Court of California,
County of San Francisco

DEC 27 2013

Clerk of the Court
BY: MICHAEL RAYRAY
Deputy Clerk

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

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

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

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

23 **2. SUMMARY OF THE ARGUMENT**

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

PANISH SHEA & BOYLE LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax

1 which satisfies the Court that granting the motion will serve the interests of justice. On February
2 21, 2012, Plaintiff was diagnosed with Stage III inoperable lung cancer. Although he has
3 undergone multiple courses of radiation and chemotherapy treatments in an attempt to extend his
4 life, the treatments were unsuccessful. Given the current state of his cancer, there is substantial
5 medical doubt of his survival beyond six months. Should Mr. Darling die before the trial of his
6 case, his interests and the interests of his family will be irreparably damaged. Accordingly,
7 Plaintiff requests that the Court remand his case to Los Angeles, with a trial date not more than 120
8 days from the date the motion is granted, in accordance with *Code of Civil Procedure* Section
9 36(f).

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

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

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

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

25 Plaintiff’s motion is accompanied by clear and convincing medical documentation that
26 concludes that there is substantial medical doubt of his survival beyond six month given the
27 progression of his illness and the lack of effective treatment. Mr. Darling is currently receiving
28 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 . . ."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.

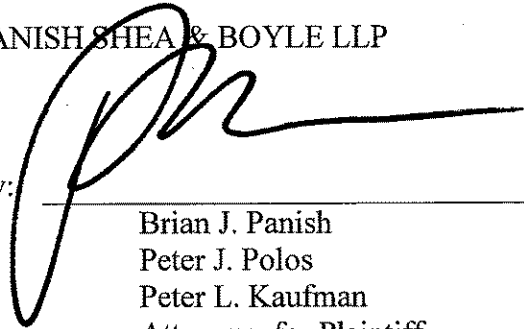
Plaintiff is currently suffering from terminal lung cancer and, according to his treating oncologist, has less than six months to live. If Plaintiff dies prior to the trial of this matter, his interests, as well as the interests of his wife and three children would be irreparably damaged. Consequently,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