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8  
 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA

11 IN RE: ROUNDUP PRODUCTS  
 12 LIABILITY LITIGATION

MDL No. 2741  
 Case No. 3:16-md-02741-VC

13 This document relates to:  
 14 *Giglio v. Monsanto Co., et al*, 3:16-cv-05658-  
 15 VC

16 **MONSANTO COMPANY’S OPPOSITION TO PLAINTIFF’S MOTION FOR TRIAL**  
 17 **PREFERENCE AND/OR REMAND**

18 Plaintiff Emmanuel Giglio’s Motion for Trial Preference (“the Motion”) seeking an  
 19 expedited trial date should be denied. As plaintiff concedes, there is no process for a  
 20 “preferential” trial setting in federal court. And 28 U.S.C. § 1657 is inapplicable to this case and  
 21 does not allow Mr. Giglio to seek such extraordinary relief.

22 Courts have repeatedly held that a plaintiff’s age and health condition do not meet the  
 23 “good cause” showing necessary to apply Section 1657. Instead, the standard approach used in  
 24 federal courts and other multidistrict litigation (“MDLs”) for the declining health of a plaintiff is  
 25 to order a preservation deposition of the plaintiff’s testimony. Monsanto would have no  
 26 objection to such a deposition here.



1 “Good cause is shown if a right under the Constitution of the United States or a Federal Statute  
2 (including rights under section 552 of title 5) would be maintained in a factual context that  
3 indicates that a request for expedited consideration has merit.” *Id.* This statute should not be  
4 applied to grant an expedited trial for Mr. Giglio for two reasons: first, he does not satisfy “good  
5 cause” within the meaning of the statute; and second, granting Mr. Giglio’s Motion in this large  
6 MDL would impede, rather than advance, the purpose of the MDL and the coordination and case  
7 management powers bestowed on MDL judges and unfairly prejudice Monsanto by permitting  
8 plaintiffs alone to dictate the order in which cases are tried.

9 **A. Mr. Giglio’s Case Does Not Satisfy The “Good Cause” Standard For An**  
10 **Expedited Trial.**

11 Mr. Giglio’s argument that the Court should grant trial preference based on his age and  
12 health condition does not meet the required showing of “good cause” under 28 U.S.C. § 1657.  
13 The Central District of California rejected this exact argument in *O’Connor v. Boeing North*  
14 *American, Inc.* In that class action personal injury case, plaintiffs argued that they were entitled  
15 to their “day in Court” and moved to expedite the trial date based on affidavits that plaintiffs  
16 suffered illnesses that raised “substantial medical doubt of their survival beyond six months.”  
17 *O’Connor*, 2004 U.S. Dist. LEXIS 31338 at \*19-\*20. Like Mr. Giglio, plaintiffs also claimed  
18 that pain and suffering damages would be extinguished upon each plaintiff’s death. *Id.*; Motion  
19 at 5. The Central District of California Court rejected these arguments and plaintiffs’ motion for  
20 an expedited trial, finding that plaintiffs’ arguments and reasoning did not meet the criteria for  
21 “good cause” under 28 U.S.C. § 1657. *Id.* at \*23. Other federal courts have similarly rejected  
22 arguments for expedited trials under 28 U.S.C. § 1657 based on the age and poor health of  
23 plaintiffs.<sup>1</sup> *See, e.g., Berenson v. Adm’rs of the Tulane Univ. Educ. Fund*, No. CV 17-329, 2017

24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiff’s Motion mischaracterizes the findings and rationale of the Court in *Wakefield v.*  
26 *Global Financial Private Capital, LLC*. First, that case was not a member case in an MDL, and  
27 thus not subject to the pretrial coordination and scheduling of MDLs such as this one. *See supra*  
28 Section IIB. Second, the parties clearly did not consider that the case was to be tried within 120  
days. The court directed the parties to confer to prepare a scheduling order. *See Wakefield v.*  
*Glob. Fin. Private Capital, LLC*, No. 15CV0451 JM(JMA), 2015 WL 12699870, at \*3 (S.D. Cal.  
Sept. 17, 2015). In a September 29, 2015 Joint Proposed Discovery Plan filed by both parties,

(Footnote continued)

1 WL 3480794, at \*2 (E.D. La. Aug. 14, 2017) (denying plaintiff's motion for an expedited trial  
2 based on his advanced age); *Achagzai v. Broad. Bd. of Governors*, 109 F. Supp. 3d 67, 72  
3 (D.D.C. 2015) (finding that plaintiffs' interest in prompt resolution of the litigation did not  
4 constitute good cause to expedite trial, where plaintiffs were all at least 60 years old and some  
5 were in poor health).

6 **B. Mr. Giglio Seeks Relief That Is Contrary To The Purpose Of This MDL –**  
7 **Managing Cases Efficiently And Equitably To Benefit All Parties – And Would**  
8 **Unfairly Prejudice Monsanto.**

9 Granting Mr. Giglio an expedited trial based on his age and health condition would  
10 permit plaintiffs' counsel to subvert the purposes of this MDL to their own ends. If granted, the  
11 Motion would materially curtail the substantial authority and broad discretion granted to this  
12 Court to coordinate and manage numerous complex cases efficiently and equitably for the  
13 benefit of all parties, including by ensuring that representative cases are selected for trial. By  
14 their very nature, the cases in this MDL likely involve many plaintiffs who are in their late  
15 sixties to seventies and who are ill. Plaintiffs' counsel could easily supply *all* cases that this  
16 Court advances for trial from this pool of plaintiffs, choosing the cases that plaintiffs' counsel  
17 consider to be particularly advantageous to them. This would defeat many of the case-  
18 management and case-selection purposes for which this MDL was formed. If the Court does not  
19 fully weigh the important case management responsibilities granted to all MDL judges when the  
20 Court exercises its discretion regarding scheduling, plaintiffs' counsel will take control of MDL  
21 case selection by attempting to unilaterally set expedited trial after expedited trial.

22 Such a one-sided approach to managing complex, coordinated cases would be antithetical  
23 to the purpose of this MDL. The purpose of multidistrict litigation is to coordinate civil actions  
24 that involve one or more common questions of fact for the convenience of parties and witnesses  
25

26 \_\_\_\_\_  
26 the parties stated that they anticipated discovery in the case could be concluded by February 1,  
27 2016, approximately five months after the cited order. *See* Joint Proposed Discovery Plan  
28 Pursuant to Federal Rules of Civil Procedure 26(f), *Wakefield v. Glob. Fin. Private Capital, LLC*,  
3:15-cv-00451-JM-JMA (S.D. Cal. Sept. 29, 2015).

1 and to promote the just and efficient conduct of such actions. *See* 28 U.S.C.A. § 1407. In  
2 creating the *In Re: Roundup Products Liability Litigation*, the Judicial Panel on Multidistrict  
3 Litigation (“JPML”) found that “[c]entralization will eliminate duplicative discovery; prevent  
4 inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel, and the  
5 judiciary.” *See In Re: Roundup Prods. Liab. Litig.*, 214 F. Supp. 3d 1346, 1348 (J.P.M.L. 2016).

6 The flexibility and broad discretion of an MDL judge would be lost here if the Court  
7 were to grant a series of trial preference motions for the plaintiffs whose claims their counsel  
8 believe are strongest. That would prevent the Court from fulfilling its obligation to focus on the  
9 overall coordinated litigation to benefit *all* parties and promote the efficient use of judicial  
10 resources.

11 The Court has already put in place procedures to appropriately analyze the cases pending  
12 in the MDL and select representative cases for trial. *See* Pretrial Order No. 50: Plaintiff Fact  
13 Sheet Completion and Deficiencies, ECF No. 1883; Pretrial Order No. 52: Group 2 Venue  
14 Questions, ECF No. 1893 (requiring Plaintiff Fact Sheets for all cases such as Mr. Giglio’s that  
15 were originally filed in districts other than the Northern District of California). If the Court were  
16 to grant the present Motion, however, that procedure would be subverted. Rather than a fair and  
17 equitable process through which the parties and the Court select representative cases in an  
18 informed and considered manner, plaintiffs would be empowered to cherry-pick and  
19 preferentially bring to trial case after case in which the age and health of the plaintiff meet  
20 certain threshold criteria. Rather than “promot[ing] the just and efficient conduct of such  
21 actions,” the present Motion would serve the strategic interest of plaintiffs and sharply prejudice  
22 defendants in their defense of the litigation.

23 **III. A PRESERVATION DEPOSITION OF MR. GIGLIO IS THE PROPER**  
24 **REMEDY.**

25 The standard and appropriate approach to address Mr. Giglio’s declining health is to  
26 schedule a preservation deposition to preserve Mr. Giglio’s testimony for trial. “When a witness  
27 is suffering from poor health and will likely be unavailable for trial, it is common for parties to  
28

1 take a ‘preservation deposition’ to memorialize the witness’ trial testimony.” *AG Equip. Co. v.*  
 2 *AIG Life Ins. Co.*, No. 07-CV-0556-CVE-PJC, 2009 WL 414046, at \*3 (N.D. Okla. Feb. 18,  
 3 2009) (citing *Hanson v. U.S. Airports Air Cargo, LLC*, 2008 WL 4426909 (D. Conn. Sept. 26,  
 4 2008)); *see also Turnage v. Humility of Mary Health Partners*, No. 4:13CV00493, 2013 WL  
 5 12139453, at \*2 (N.D. Ohio Apr. 3, 2013) (finding, in case with terminally ill plaintiff, that it  
 6 was “prudent to take full advantage of the earliest opportunities to depose Plaintiff and to  
 7 preserve the resultant sworn testimony for future use”). Courts have established procedures for  
 8 preservation depositions in MDLs in similar circumstances to those present in this case, and  
 9 Monsanto is amenable to working with plaintiffs’ Steering Committee to establish such  
 10 procedures in this MDL.<sup>2</sup> *See, e.g.*, Practice and Procedure Order No. 4, *In re: Prempro Prods.*  
 11 *Liab. Litig.*, 4:03-cv-01507 (E.D. Ark. Jan. 1, 2005), ECF No. 495; *In re Agent Orange Prod.*  
 12 *Liab. Litig.*, 96 F.R.D. 587, 588-89 (E.D.N.Y. 1983).

13 **IV. IF THE COURT GRANTS PLAINTIFF’S MOTION FOR TRIAL**  
 14 **PREFERENCE, THE CASE SHOULD BE REMANDED TO THE SOUTHERN**  
 15 **DISTRICT OF CALIFORNIA.**

16 If the Court does grant plaintiff’s Motion, which Monsanto opposes as detailed above,  
 17 Monsanto does not consent to a trial in the Northern District of California and the case must be  
 18 remanded to be tried in the Southern District of California, where it was originally filed. As set  
 19 forth in Monsanto’s Response to Plaintiffs’ Position Regarding Venue (“Monsanto’s Venue  
 20 Response”), ECF No. 1892, MDL transferee courts lack the authority to try cases that originated  
 21 outside of the district in which they sit, *see Lexecon, Inc. v. Milberg Weiss*, 523 U.S. 26, 40  
 22 (1998), and plaintiff’s consent alone is insufficient to confer trial jurisdiction on this Court over  
 23 cases originally filed in other federal districts in California under Section 1407. *See* Monsanto’s  
 24 Venue Response at 2-3 (citing cases). Because Monsanto does not consent to trial of the *Giglio*

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 26 <sup>2</sup> In *Wakefield v. Global Financial Private Capital, LLC*, the main case plaintiff relies on in his  
 27 Motion, the Court ordered a preservation deposition of plaintiff, ordering the parties to  
 28 “immediately arrange for an expedited videotaped deposition of Plaintiff in order to preserve her  
 testimony for trial.” *Wakefield v. Glob. Fin. Private Capital, LLC*, No. 15CV0451 JM(JMA),  
 2015 WL 12699870, at \*4 (S.D. Cal. Sept. 17, 2015).

1 case in the Northern District of California, the case would therefore have to be remanded to the  
2 Southern District of California.

3 **CONCLUSION**

4 For the reasons set forth above, the Court should deny the Motion for Trial Preference.<sup>3</sup>

5  
6 DATED: November 30, 2018

Respectfully submitted,

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23 <sup>3</sup> Making that ruling does not mean that *Giglio* cannot be picked later as one of the first phase  
24 trials for this MDL if the Court deems that selection appropriate (though defendants do not so  
25 concede). At the appropriate time, after defendants have received and evaluated Plaintiff Fact  
26 Sheets for the other MDL cases, the issue of whether *Giglio* should be chosen as an initial trial  
27 case can be revisited by the Court. That will allow the attorneys who represent various plaintiffs  
28 in this MDL and defense counsel to present their views regarding the process for picking trials  
and whether other cases are more representative of the universe of cases in this MDL – and  
therefore more appropriate for selection – than *Giglio*. At that point, the Court will be able to  
make informed decisions to achieve the overall purpose of this MDL by managing the cases in a  
coordinated fashion, efficiently and equitably to benefit all parties.