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CC-LA JOLLA, INC., CCW-LA JOLLA, L.L.C.,

7 CC-DEVELOPMENT GROUP, INC., AND

8 CLASSIC RESIDENCE MANAGEMENT LIMITED

PARTNERSHIP

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN DIEGO

12 DONALD R. SHORT, JAMES F. GLEASON,
13 CASEY MEEHAN, MARILYN SHORT,
14 PATTY WESTERVELT, AND DOTTIE
15 YELLE, individually, and on behalf of all others
similarly situated,

16 Plaintiff,

17 v.

18 CC-LA JOLLA, Inc., a Delaware Corporation,
19 CC-LA JOLLA, L.L.C., a Delaware limited
liability company, CC-DEVELOPMENT
20 GROUP, INC., CLASSIC RESIDENCE
MANAGEMENT LIMITED PARTNERSHIP, an
Illinois Limited Partnership, and DOES 1 to 110,
inclusive,

21 Defendants.

Case No. GIC877707

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' REQUEST FOR
TRIAL PREFERENCE**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: August 17, 2007

Time: 10:00 a.m.

Judge: Hon. Yuri Hofmann

Dept: C-60

Date Action Filed: December 29, 2006

Trial Date: Not yet set

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1 **I. INTRODUCTION.**

2 Plaintiffs' current "Request for Trial Preference"¹ is untimely and without merit. The only
3 supporting evidence, the abbreviated declaration of Michael Conger, is insufficient to meet the high
4 standard set forth in section 36(a) that requires a plaintiff to prove that "the health of the party is such
5 that a preference is *necessary to prevent prejudicing the party's interest in the litigation.*" Code Civ.
6 Proc. § 36(a) (emphasis added). Moreover, Plaintiffs' own failure to prosecute this case diligently
7 defeats their new argument that they have a compelling need for expedited proceedings.

8 **II. PLAINTIFFS' PROVIDE NO SUPPORT FOR THEIR REQUEST.**

9 California Code of Civil Procedure section 36(a) allows a party to a civil action, who is over
10 the age of 70,² to petition a court for trial preference. A court can only grant a preference if it makes
11 both of the following findings:

12 (1) The party has a substantial interest in the action as a whole.

13 (2) The health of the party is such that a preference is necessary to
14 prevent prejudicing the party's interest in the litigation.

15 Cal. Code Civ. Proc. § 36(a). Furthermore, a declaration must be filed in support of the motion
16 establishing "good cause" for the preference. Cal. Rule Ct. 3.1335(b). One court has explained that
17 the purpose of this section is "to safeguard [] litigants beyond a specified age against the legislatively
18 acknowledged risk *that death or incapacity* might deprive them of the opportunity to have their case
19 effectively tried and the opportunity to recover their just measure of damages or appropriate redress."

20

21 ¹ Plaintiffs have submitted this document as a "Request for Trial Preference." However, the
22 rules governing motions or applications to advance a case for trial require that the request be made by
23 "noticed motion" or "ex parte application." Cal. Rule Ct. 3.1335(a). Plaintiffs have failed to follow
24 these procedural requirements.

25 ² Conger's declaration in support of the "Request for Trial Preference" notes that Mr. Short
26 and Mr. Gleason are both over the age of 70. (Declaration of Michael A. Conger in Support of
27 Plaintiffs' Request for Trial Preference ("Conger Decl.") ¶¶ 2, 3.) However, this is not sufficient for
28 the purpose of establishing the age of the party making the request. Instead, motions made under
29 section 36(a) must be supported by competent proof of this fact such as certified copies of birth
30 certificates or other official records. *See Weil & Brown, CAL. PRAC. GUIDE: CIV. PROC.*
31 *BEFORE TRIAL* (The Rutter Group 2007) §§ 12:247.3 and 12:272.1 (However, *declarations by*
32 *counsel as to the party's age are incompetent hearsay* and will probably result in denial of the
33 motion.") (emphasis in original).

1 *Rice v. Super. Ct.*, 136 Cal. App. 3d 81, 89 (1982) (emphasis added); *see also Warren v. Schechter*, 57
2 Cal. App. 4th 1189 (1997) (emphasizing that the fundamental rationale for section 36(a) was to
3 provide a trial to a litigant “who may not survive the delay.”); *Weil & Brown, CAL. PRAC. GUIDE:*
4 *CIV. PROC. BEFORE TRIAL* (The Rutter Group 2007) §12.246.1 (“Trial priority is no longer
5 mandatory and absolute merely because one of the parties is age 70! The court has *discretion* to
6 determine the *extent* of that party’s interest and of any risk of that party’s death if trial is delayed.”)
7 (emphasis in original).

8 The only “evidence” provided in support of Plaintiffs’ request for trial preference is a
9 conclusory four paragraph declaration from Plaintiffs’ attorney Michael Conger. In support of the
10 argument that “the health of the party is such that a preference is necessary to prevent prejudicing the
11 party’s interest in the litigation,” Conger states that “based on information and belief” Mr. Short
12 suffers from Parkinson’s disease. (Conger Decl. ¶ 2.) He goes on to state that Mr. Short’s doctor
13 (who is unnamed and unidentified) has advised that the sooner the case is tried, the more Mr. Short
14 will be able to participate. (Conger Decl. ¶ 2.) Similarly, as to Mr. Gleason, Conger’s declaration
15 does not even refer to a doctor or a doctor’s diagnosis, but instead only states that Mr. Gleason
16 “suffers from a [unnamed] cardiological problem” which causes fatigue and is worsening with time.
17 (Conger Decl. ¶ 3.) This is insufficient. There has been no showing that an accelerated trial schedule
18 is necessary to prevent prejudice. There is no indication that Mr. Gleason or Mr. Short’s ability to
19 participate in trial will differ if the trial is held in Spring or Summer 2008, as opposed to December
20 2007.

21 Not only does Conger’s declaration fail to show that an accelerated trial schedule is
22 “necessary” to prevent prejudice, it actually proves the opposite – that both Mr. Short and Mr.
23 Gleason are active, functioning senior citizens, who are both very involved in the strategy behind this
24 litigation. As Plaintiffs’ point out in their request and the supporting declaration, Mr. Short has been
25 “very actively involved in this case” and Mr. Gleason is “the current president of the La Jolla Village
26 Towers Resident Counsel” and has been “very actively involved in this case.” (Conger Decl. ¶¶ 2,
27 3.) There has been no showing that this may change, that Mr. Gleason is stepping down as President
28

1 of the Resident Counsel due to health concerns, or that either Plaintiffs' health is deteriorating in such
2 a fashion so as to require such an advanced trial schedule. Therefore, the request should be denied.³

3 **III. PLAINTIFFS' DILATORY PROCEEDINGS IN THIS CASE BELIE THE REQUEST**
4 **FOR PREFERENCE.**

5 Plaintiffs' own conduct in this case establishes that there is no need for statutory preference.
6 Plaintiffs have complained for several years to La Jolla Village Towers' staff and executives about
7 the perceived problems that are the subject of their lawsuit. Mr. Short and Mr. Gleason waited to
8 present their grievances to the California Department of Social Services (the "DSS") until December
9 6, 2006. The DSS declined to take any responsive action. Mr. Short then filed his original complaint
10 with this Court on December 29, 2006. He subsequently filed a First Amended Complaint ("FAC")
11 on January 9, 2007. After service of Defendants' Demurrer to the FAC on March 9, 2007, Mr.
12 Conger was told that Defendants would consider withdrawing the Demurrer if he provided
13 Defendants with the Second Amended Complaint ("SAC") and attempted to fix the defects in the
14 FAC. Instead of promptly taking the Defendants up on their offer, Mr. Short and the other named
15 Plaintiffs waited months, until June 13, 2007, to file an *ex parte* request with the Court to file the
16 SAC. That *ex parte* was never heard by the Court because Defendants did what they said they would
17 do months earlier, and agreed to take their original Demurrer off calendar and stipulate to the filing of
18 the SAC.

19 In the SAC, Plaintiffs greatly expanded the nature and scope of their allegations – going from
20 the 66-paragraph FAC to the 197-paragraph SAC. The new SAC has significantly increased the
21 issues in the case and, in turn, the discovery that will be required to refute Plaintiffs' allegations.
22 Moreover, for all of the reasons set forth in the recently filed Demurrer and Motion to Strike, ten of

23
24 ³ If this Court is inclined to consider Plaintiffs' Request, Defendants request that this Court
25 allow them to conduct discovery into the health of Mr. Gleason and Mr. Short to determine whether
26 their "health" is such that a preference is "necessary" to prevent prejudicing their interests. *See Weil*
27 *& Brown, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL* (The Rutter Group 2007) §12.247.4
28 ("To controvert [a motion for preference], *opposing counsel* must obtain *competent medical* or other
evidence") (emphasis in original). In order to obtain competent evidence to oppose this motion,
Defendants need the ability to conduct discovery into the Plaintiffs' health, including depositions of
the Plaintiffs' physicians.

1 the eleven causes of action in the SAC are defective and the SAC will, more than likely, not be the
2 final complaint in this action.

3 As set forth in their Request, "Counsel for the plaintiffs has informed defense counsel since
4 February, 2007, that the plaintiffs would be seeking a trial preference." (Request ¶ 5; Conger Decl. ¶
5 4.) However, without any explanation, Plaintiffs have waited more than six months after apparently
6 deciding to seek an early trial date to file their Request for Statutory Preference to raise this issue
7 with the Court. This delay belies Plaintiffs' claim that either Mr. Short or Mr. Gleason will be
8 prejudiced if their cases are not resolved before the end of 2007. If that truly was the case, they
9 would not have waited six months to act.

10 Finally, Plaintiffs recently requested an extension to respond to outstanding discovery and,
11 based on this extension, Defendants will not receive documents or substantive information from
12 Plaintiffs until September 2007. Likewise, just within the last two weeks, Plaintiffs served additional
13 substantial discovery upon Defendants, consisting of form interrogatories, special interrogatories, and
14 more than 190 requests for production of documents.

15 Rather than supporting expedited proceedings, this background of delay demonstrates that
16 Plaintiffs have been in no hurry to advance the progress of this case. Their history of failing to
17 prosecute this case diligently contradicts their newly expressed need for an accelerated schedule.
18 *Landry v. Berryessa Union School Dist.*, 39 Cal. App. 4th 691, 696-697 (1995) ("[t]he underlying
19 assumption behind section 36 is that the plaintiff has diligently engaged in preparation for trial or
20 settlement; . . . Where the plaintiff has been dilatory in efforts to move the case along, however, the
21 trial court retains jurisdiction to dismiss under section 583.410 et seq.").

22 **IV. GRANTING PLAINTIFFS' REQUEST WOULD GREATLY PREJUDICE THE**
23 **DEFENDANTS AND DEPRIVE THEM OF DUE PROCESS.**

24 This is a complicated case, including over 500 potential class members, multiple and ever-
25 changing theories of liability, and allegations spanning over nine years. Granting the Plaintiffs'
26 current Request for Trial Preference would deprive Defendants of due process of law.

27 Given the breadth of Plaintiffs' allegations and requests for class certification, it will take
28 months to complete the discovery necessary for class certification briefing, let alone to complete all

1 fact discovery.⁴ Class certification discovery may not be completed or the issues briefed before
2 December, let alone the fact discovery and a trial. And, if Plaintiffs are eventually able to state
3 legally cognizable claims, Defendants will move for summary judgment, given the lack of any facts
4 to support Plaintiffs' allegations. If there is a viable Complaint, Defendants may bring cross-
5 complaints against some or all of the Plaintiffs. Setting the trial for December 2007 would deprive
6 Defendants of a reasonable opportunity for discovery and pre-trial preparation and, thus, would
7 deprive Defendants of due process of law. *Roe v. Super. Ct.*, 224 Cal. App. 3d 642, 643, fn. 2
8 (recognizing that it may not be possible to bring matter to trial within limits of section 36 because of
9 due process implications); *Weil & Brown, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL* (The
10 Rutter Group 2007) § 12:248.2 (discussing due process as a possible limitation on a request for trial
11 preference).

12 **V. PLAINTIFFS' REQUEST SHOULD ONLY BE CONSIDERED FOR MR. GLEASON**
13 **AND MR. SHORT.**

14 Even if this Court were inclined to grant Plaintiffs' premature motion for statutory preference
15 (which should not be granted until Defendants have the opportunity to conduct discovery on this
16 issue), Plaintiffs base their motion on two of the named Plaintiffs only, Mr. Short and Mr. Gleason.
17 Despite the narrow nature of their request, Plaintiffs appear to request that the Court set the entire
18 case for trial within 120 days. (Request ¶ 5.) Instead, if statutory preference is granted, the claims of
19 Mr. Short and Mr. Gleason should be bifurcated and tried separately.

20 Section 36(a) of the California Code of Civil Procedure was amended in 1990. This
21 amendment evidences that the legislature only intended to grant statutory preference to those
22 individuals who personally qualify. Whereas the former version of section 36(a) gave preference to
23 *an entire case* upon the motion of "any party" age 70 or older, the revised section meaningfully
24 changed this language. The current section states that "[a] party to a civil action who is over the age
25

26 ⁴ As noted in the previous section, Plaintiffs have not yet served Defendants with any
27 substantive discovery responses. Instead, Plaintiffs have requested a month extension of time to
28 respond which means that Defendants will not receive any documents or substantive information
until well after the date of this hearing.

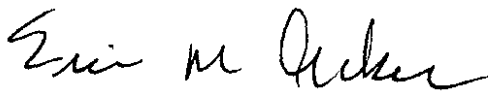
1 of 70 years may petition the court for a preference” Cal. Code Civ. Proc. § 36(a) (emphasis
2 added)⁵; *see also Koch-Ash v. Super. Ct.*, 180 Cal. App. 3d 689, 698 (1986) (granting preference
3 under former section 36(a) and severing the affected plaintiffs’ actions from the other actions in order
4 to set an early trial date). Therefore, although Plaintiffs broadly frame their request for trial
5 preference for the entire case, only the claims of Mr. Gleason and Mr. Short should be considered in
6 determining the expedited schedule.

7 **VI. CONCLUSION**

8 For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs’
9 Request for Trial Preference.

10 Dated: August 10, 2007

ERIC M. ACKER
LINDA L. LANE
MORRISON & FOERSTER LLP

13 By: 
14 Eric M. Acker

15 Attorneys for Defendants
16 CC-LA JOLLA, INC., CCW-LA JOLLA,
17 L.L.C., CC-DEVELOPMENT GROUP,
18 INC., AND CLASSIC RESIDENCE
19 MANAGEMENT LIMITED
20 PARTNERSHIP

21
22
23
24 ⁵ The modification to section 36(a) can be contrasted to section 36(b). Prior to amendment,
25 section 36(b) provided: “A civil case . . . shall be entitled to preference upon the motion of any party
26 to the action who is under the age of 14 years” The 1990 revision left section 36(b) substantially
27 unchanged, substituting only the phrase “A civil action” for “A civil case” at the beginning of the
28 section. The fact that the legislature changed the language in section 36(a) from “A civil action” to
“A party” while leaving it unchanged in section 36(b) establishes that the modification to section
36(a) was deliberate.

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7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO
10

11 DONALD R. SHORT, individually, and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.
14

15 CC-LA JOLLA, Inc., a Delaware Corporation,
CC-LA JOLLA, L.L.C., a Delaware limited
liability company, and DOES 1 to 70, inclusive,

16 Defendants.
17

Case No. GIC877707

DECLARATION OF SERVICE

Judge: Hon. Linda B. Quinn
Dept: 74

Date Action Filed: December 29, 2006
Trial Date: Not yet set

18 I, the undersigned, declare that I am employed with the law firm of Morrison & Foerster LLP,
19 whose business address is 12531 High Bluff Drive, Suite 100, San Diego, California 92130. I am
20 over the age of eighteen years and not a party to the within action. On August 10, 2007, I served the
21 documents named below on the parties in this action as follows:
22

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR TRIAL
23 PREFERENCE,**

24 SERVED UPON:

25 Michael A. Conger
LAW OFFICE OF MICHAEL A. CONGER
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Mailing: P.O. Box 9374
27 Rancho Santa Fe, CA 92067
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28

Attorneys for Plaintiff DONALD R. SHORT

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1 ☐ (BY OVERNIGHT DELIVERY) I am readily familiar with the practice of Morrison &
2 Foerster LLP for collection and processing of correspondence for overnight delivery and know that
3 the document(s) described herein will be deposited in a box or other facility regularly maintained by
4 UPS for overnight delivery.


5 ☒ (BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in
6 the United States mail at San Diego, California. I am readily familiar with the practice of Morrison
7 & Foerster LLP for collection and processing of correspondence for mailing, said practice being that
8 in the ordinary course of business, mail is deposited in the United States Postal Service the same day
9 as it is placed for collection.

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11 transmission and the transmission was reported as complete and without error. The facsimile
12 machine I used complied with California Rules of Court, Rule 2003(3) and no error was reported by
13 the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a
14 transmission record of the transmission, a copy of which is attached to this declaration.

15 ☐ (BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by
16 Worldwide Network, Inc., 701 B Street, Suite 324, San Diego, California 92101, to receive
17 documents to be delivered on the same date. A proof of service signed by the authorized courier will
18 be filed with the court upon request.

19 ☒ BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6] by electronically mailing a true
20 and correct copy through Morrison & Foerster LLP's electronic mail system to the e-mail address(s)
21 set forth above, or as stated on the attached service list per agreement in accordance with Code of
22 Civil Procedure section 1010.6.

23 I declare under penalty of perjury under the laws of the State of California and United States
24 of America that the foregoing is true and correct, and that this declaration is executed on August 10,
25 2007, at San Diego, California.

26 
27 Rose B. Sheehan
28