Sandra A. Edwards (State Bar No. 154578)
Joshua W. Malone (State Bar No. 301836)
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400; Fax: (415) 954-4480
sedwards@fbm.com
jmalone@fbm.com

Joe G. Hollingsworth (appearance *pro hac vice*)
Martin C. Calhoun (appearance *pro hac vice*)
Kirby T. Griffis (appearance *pro hac vice*)
William J. Cople (appearance *pro hac vice*)
Hollingsworth LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800; Fax: (202) 682-1639
jhollingsworth@hollingsworthllp.com
mcalhoun@hollingsworthllp.com
kgriffis@hollingsworthllp.com
wcople@hollingsworthllp.com

George C. Lombardi (appearance *pro hac vice*)
James M. Hilmert (appearance *pro hac vice*)
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5969; Fax: (312) 558-5700
glombard@winston.com
jhilmert@winston.com

Attorneys for Defendant
MONSANTO COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

DEFENDANT MONSANTO COMPANY'S MOTION *IN LIMINE* NO. 10 TO EXCLUDE DR. CHARLES BENBROOK'S OPINIONS REGARDING PERSONAL PROTECTIVE EQUIPMENT

Trial Date: June 18, 2018
Time: 9:30 a.m.
Department: TBD

I. INTRODUCTION

Defendant Monsanto Company ("Monsanto") respectfully requests that this Court preclude Plaintiff's experts, specifically but not limited to Dr. Charles Benbrook, from offering opinions at trial related to alleged deficiencies in the warnings regarding personal protective equipment ("PPE") in or on Monsanto product labeling. These criticisms are irrelevant to any disputed fact of consequence, and discussing them at trial would undoubtedly result in prejudice to Monsanto, confusion of the jury, and a waste of the jury's and this Court's time and resources. Accordingly, any such evidence should be excluded. *See* Cal. Evid. Code §§ 210, 350, 352.

II. BACKGROUND

In his report, Plaintiff's expert Dr. Charles Benbrook criticizes the Ranger PRO® and Roundup PRO® labeling for not requiring the use of gloves, chemical resistant shoes, goggles, and a face shield during application. *See* Declaration of Sandra A. Edwards ("Edwards Decl.") at ¶ 14, Ex. 13 (Expert Report of Charles Benbrook at ¶¶ 520, 527-28, 544-48 (Dec. 21, 2017)). Monsanto believes Plaintiff intends to offer such opinions at trial to demonstrate an alleged inadequacy in the product labels or failure to warn. Even if Dr. Benbrook were qualified to offer such conclusions, which he is not, his opinions about what PPE should or should not have been included in the labels have no relevance in this lawsuit. Dr. Benbrook readily admits that "Mr. Johnson [Plaintiff] went well beyond the PPE required on the product labels. He wore a Tyvek suit, googles [sic], and a face mask . . . ." *Id.* at ¶ 540. Plaintiff himself likewise testified that he "always" wore PPE when spraying, Edwards Decl. at ¶ 15, Ex. 14 (Dep. of Dewayne Johnson ("Johnson Workers' Compensation Dep.") at 17:8-11; 19:5-10 (October 28, 2015)) noting that the PPE he wore while applying Ranger PRO® and Roundup PRO® included goggles and a helmet, Edwards Decl. at ¶ 4, Ex. 3 (Dep. of Dewayne Johnson at 48:3-18 (December 7, 2017)), a Tyvek suit, chemical resistant clothes, boots, and a paper mask, *id.* at 198:21 – 199:7, and gloves, Edwards Decl. at ¶ 15, Ex. 14 (Johnson Workers' Compensation Dep. at 80:20). Plaintiff's co-workers also observed his consistent use of extensive PPE, noting they would "always see him wearing" the Tyvek suit, gloves, rubber boots, and glasses. Edwards Decl. at ¶ 16, Ex. 15 (Dep. of Edwin Martinez at 36:6-23 (Jan. 19, 2018)). Because Plaintiff already wore PPE, Dr. Benbrook's

claims that PPE should have been recommended on the label are irrelevant. Inclusion of such a warning on the products would have made no difference to Plaintiff's decision to apply Monsanto's products and bear no relevance to the issues in dispute in this matter. Accordingly, Plaintiff should not be permitted to offer Dr. Benbrook's opinions about PPE at trial.

III. ARGUMENT

In order for Dr. Benbrook's opinions to be considered relevant and thus admissible at trial, Plaintiff must establish that the alleged lack of inclusion of warning information about PPE in the Roundup PRO® and Ranger PRO® labels was the proximate cause of his injuries. *See, e.g., Setliff v. E.I. Du Pont de Nemours & Co.*, 32 Cal. App. 4th 1525, 1533 (1995) ("Proximate cause is a necessary element of actions for both negligence and strict products liability."). To meet this burden, Plaintiff would have to prove "not only that no warning was provided or the warning was inadequate, but also that the inadequacy or absence of the warning caused [his] injur[ies]." *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 991 (C.D. Cal. 2001) (applying California law), *aff'd*, 358 F.3d 659, 660-61 (9th Cir. 2004) ("[W]e agree with the district court that even if [the manufacturer's] warnings . . . were deficient, on the facts of this case, [the plaintiff] failed to establish that [the manufacturer's] allegedly inadequate warnings contributed to her husband's suicide."). Plaintiff's burden of proof requires affirmative evidence (as opposed to speculation) that additional warnings would have prevented the injury. *See Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 402 (1985) (under California law, if "speculation or conjecture" is required to prove "proximate cause then the granting of a nonsuit is proper").

Because Plaintiff indisputably wore all the PPE that Dr. Benbrook criticizes Monsanto for failing to include in the label, he cannot show that any alleged deficiencies in Monsanto's labeling regarding PPE were a proximate cause of his injuries. Therefore, opinion testimony concerning the adequacy of Monsanto's label warnings regarding PPE, offered by Dr. Benbrook or any other witness, has no bearing on any issue in this lawsuit and is thus irrelevant. *See* Cal. Evid. Code § 210; *People v. De La Plane*, 88 Cal. App. 3d 223, 242 (1979), *cert. denied*, 444 U.S. 841 (1979), *disapproved on other grounds in People v. Green*, 27 Cal. 3d 1, 39 n.25 (noting that evidence that produces "only speculative inference" is irrelevant and thus inadmissible).

Allowing Plaintiff to introduce this evidence at trial would serve only to confuse and mislead the jury into focusing on evidence that has no relevance to whether Plaintiff's use of Roundup PRO® and Ranger PRO® caused his mycosis fungoides. *See* Cal. Evid. Code §§ 350, 352. Allowing Plaintiff to offer evidence alleging an additional supposed deficiency of Monsanto's product despite the lack of relevance would be unduly prejudicial to Monsanto as it would allow Plaintiff another avenue of attack on Monsanto's products and serve as a potential basis for the jury to decide against Monsanto. Furthermore, because the undisputed evidence has established that Plaintiff cannot prevail on any such claim, the evidence is of no probative value.

The introduction of evidence regarding Monsanto's product labeling regarding PPE is also likely to waste the jury's and this Court's time and resources. If such evidence is introduced, Monsanto would be forced to spend valuable trial time putting on evidence to explain that Plaintiff wore all the PPE Dr. Benbrook claimed was needed. The waste of time and resources is more pronounced in light of the fact that the undisputed evidence shows that Plaintiff cannot prevail on such a claim. It is well-established that evidence of little to no probative value should be excluded if it will result in a waste of resources. *See Lemer v Boise Cascade, Inc.*, 107 Cal. App. 3d 1, 10 (1980) (evidence is to be excluded when its "marginal value . . . [is] more than outweighed by the heavy costs in trial time and expense" that would ensue). Given the potential for prejudice to Monsanto, the lack of any probative value, and the resulting waste of juror and judicial time and resources, Plaintiff should not be permitted to offer opinion testimony from Dr. Benbrook, or any other witness, concerning the inclusion of additional warnings about PPE in the Monsanto product labels.

//

//

//

//

//

//

//

IV. CONCLUSION

For the foregoing reasons, the Court should exclude Dr. Benbrook's opinions about PPE.

Dated: May 24, 2018

Respectfully submitted.

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY