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17 MONSANTO COMPANY

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20 DEWAYNE JOHNSON,
21 Plaintiff,

22 vs.

23 MONSANTO COMPANY,
24 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
MOTION *IN LIMINE* NO. 19 TO
EXCLUDE EVIDENCE, ARGUMENT, OR
REFERENCE TO CAREY GILLAM'S
BOOK AND ALL OTHER NEWSPAPER,
BROADCASTS, AND OTHER MEDIA
PUBLICATIONS AND PRODUCTIONS**

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

1 **I. INTRODUCTION**

2 Defendant Monsanto Company (“Monsanto”) respectfully submits this motion *in limine* to
3 exclude any evidence, argument, or reference to a book authored by Carey Gillam titled
4 *Whitewash: The Story of a Weed Killer, Cancer, and the Corruption of Science*, and any and all
5 news articles, features, reports, broadcasts, videotapes, documentaries, productions created by or
6 published by any newspaper, magazine, television station, network or other media concerning this
7 case, or any litigation against Monsanto, or any other issues related to Monsanto (“Media”).

8 Monsanto anticipates that Plaintiff Dewayne Johnson (“Plaintiff”) may attempt to
9 introduce evidence or refer to Ms. Gillam’s book, or other Media concerning glyphosate,
10 Monsanto, or its products. Such evidence should be excluded because the Media constitutes
11 hearsay, and any statements made within them constitute hearsay within hearsay and are thus
12 inadmissible.

13 Additionally, any statements in Ms. Gillam’s book or any other such Media are
14 secondhand, sensationalized summaries – they are not scientific or verified factual evidence that
15 have any bearing on whether this specific Plaintiff’s use of Ranger Pro[®] or Roundup PRO[®] caused
16 his mycosis fungoides; the evidence must also be excluded on relevance grounds.

17 Admission of the Media would serve only to prejudice Monsanto and distract the jury by
18 inducing it to focus on sensationalized news reports rather than the scientific issues in this case,
19 and would expend an enormous amount of the jury’s and this Court’s time as Monsanto would be
20 required to put on evidence to rebut these reports. The evidence should be excluded.

21 **II. ARGUMENT**

22 **A. Evidence Concerning Books, Newspaper Articles, Broadcasts, Documentaries,**
23 **And Other Publications or Productions Constitutes Inadmissible Hearsay**

24 By definition, all written evidence is hearsay and California Evidence Code § 1200 makes
25 such hearsay inadmissible absent some exception. Cal. Evid. Code § 1200 (“Hearsay evidence is
26 evidence of a statement that was made other than by a witness while testifying at the hearing and
27 that is offered to prove the truth of the matter stated.”).

28 “It is axiomatic to state that newspaper articles are by their very nature hearsay evidence

1 and are thus inadmissible if offered to prove the truth of the matter asserted.” *AFMS LLC v.*
2 *United Parcel Serv. Co.*, 105 F. Supp. 3d 1061, 1070 (C.D. Cal. 2015), *aff’d sub nom. AFMS LLC*
3 *v. United Parcel Serv., Inc.*, 696 F. App’x 293 (9th Cir. 2017) (internal quotations omitted).
4 “Generally, ‘newspaper articles and television programs are considered hearsay under [Federal
5 Rules of Evidence] Rule 801(c) when offered for the truth of the matter asserted.’” *McMahon v.*
6 *Valenzuela*, No. 2:14-cv-02085-CAS (AGRx), 2015 WL 7573620, at *11 (C.D. Cal. Nov. 25,
7 2015) (quoting *Green v. Baca*, 226 F.R.D. 624, 637 (C.D. Cal. 2005)).¹

8 These Media statements were not made under oath, and Monsanto had no opportunity to
9 cross-examine any declarant; the trustworthiness and reliability of these reports and articles cannot
10 be validated. *See Baker v. Beech Aircraft*, 96 Cal. App. 3d 321, 338 (1979). In *Baker*, the trial
11 court excluded evidence of a newspaper article referencing other litigation related to several
12 unrelated accidents. *Id.* The trial court excluded the article and the Court of Appeal affirmed,
13 finding that “nothing in the article” discussed the accident at issue, the references to other
14 settlements and lawsuits were misleading, and the information as a whole was “of a highly
15 prejudicial nature,” stating: “[B]ecause of the unsubstantiated innuendoes in the article and
16 because of the reference to other litigated cases and the verdicts in those cases, it is our view that
17 the Wall Street Journal article was properly excluded by the trial court under section 352 of the
18 Evidence Code.” *Id.*

19 Federal courts have also routinely excluded newspaper articles, television reports, and
20 other media publications as inadmissible hearsay. *See, e.g., Estate of Miller v. Ford Motor Co.*,
21 No. 2:01-cv-545-FtM-29DNF, 2004 U.S. Dist. LEXIS 29846 at *45-46 (M.D. Fla. July 22, 2004)
22 (granting defendant’s motion to preclude evidence concerning newspaper articles, television
23 reports and other media publications because “it is irrelevant, prejudicial, and inadmissible
24 hearsay.”); *Chi. Firefighters Local 2 v. City of Chi.*, 249 F.3d 649, 654 (7th Cir. 2001) (“The
25

26 ¹ Federal Rule of Evidence 801 is almost identical to Cal. Evid. Code § 1200: “‘Hearsay’ means a
27 statement that (1) the declarant does not make while testifying at the current trial or hearing; and
28 (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R.
Evid. § 801(c).

1 evidence consists of a newspaper article, which is inadmissible hearsay . . .”).

2 The dangers of admitting such evidence was highlighted in *New England Mutual Life Ins.*
3 *v. Anderson*, 888 F.2d 646 (10th Cir. 1989), in which the court affirmed the trial court’s exclusion
4 of a newspaper article that included alleged “admissions” by the Defendant:

5 These purported admissions in the article were recounted in statements of a third
6 party reporter, who was unavailable for cross-examination, and the statements were
7 offered to prove the truth of the matters asserted. The fact that the statement was in
8 the form of a newspaper account reinforces its hearsay character, for the final
9 product is not the reporter’s alone, and it was not demonstrated that the statements
10 as reported were accurate.

11 *Id.* at 650.

12 Not only is this Media hearsay, but it is almost certain to contain “multiple hearsay,” which
13 is likewise inadmissible. *See* Cal. Evid. Code § 1201; *see, e.g., In re Oracle Corp. Sec. Litig.*, No.
14 C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995, at *45 n.16 (N.D. Cal. June 16, 2009) (sustaining
15 defendant’s objection to plaintiffs’ attempt to introduce a book describing corporate defendant
16 because it was inadmissible hearsay within hearsay)²; *McMahon*, 2015 WL 7573620, at *11
17 (“Furthermore, even when the actual statements quoted in a newspaper article constitute non-
18 hearsay, or fall within a hearsay exception, their repetition in the newspaper creates a hearsay
19 problem.”) (internal quotations omitted); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (finding
20 newspaper articles to be inadmissible as they constitute hearsay within hearsay); *Democratic Party*
21 *of United States v. Nat’l Conservative Political Action Comm.*, 578 F. Supp. 797, 829 (E.D. Pa.
22 1983), *rev’d on other grounds*, 470 U.S. 480 (1985) (“Because these press reports are entirely
23 hearsay, if not hearsay within hearsay that fails to satisfy [the bar against hearsay within hearsay],
24 we cannot admit them to show that [the alleged actions] in fact occurred.”); *see also People v.*
25 *Arias*, 13 Cal. 4th 92, 149 (1996) (“[M]ultiple hearsay is admissible for its truth *only if* each
26 hearsay layer separately meets the requirements of a hearsay exception.”) (emphasis added).

27 ² Federal courts analyze hearsay within hearsay as defined by Federal Rule of Evidence 805,
28 which has the same requirements as Cal. Evid. Code §1201 – that each level of hearsay must meet
a valid exception to the bar against hearsay. “Hearsay within hearsay is not excluded by the rule
against hearsay if each part of the combined statements conforms with an exception to the rule.”
Fed. R. Evid. §805.

1 Further, no exception to the bar against hearsay applies to this evidence. *See McMahon*,
2 2015 WL 7573620, at *11 (dismissing plaintiff’s argument that newspaper articles were
3 admissible to show plaintiff’s state of mind regarding the statements in the article); *Anderson*, 888
4 F.2d at 650 (holding newspaper articles do not qualify for admission under the residual hearsay
5 exception); *In re Cindy L.*, 17 Cal. 4th 15, 27 (1997) (“California, unlike federal courts and some
6 state jurisdictions, does not have a ‘residual hearsay’ exception.”).

7 **B. Introduction of This Evidence Would Prejudice Monsanto, Confuse and**
8 **Distract the Jury, and Waste This Court’s Time**

9 Even if this evidence were relevant or admissible on other grounds – which it is not –the
10 Media should be excluded as prejudicial, confusing, and a waste of this Court’s and the jury’s
11 time. *See* Cal. Evid. Code § 352. (evidence may be excluded when its probative value is
12 substantially outweighed by an undue consumption of time or by the risk of confusion of the
13 issues or undue prejudice).

14 This evidence would serve only to attack Monsanto’s reputation as a corporation, by
15 introducing sensationalized claims of profits and revenue, claims about other lawsuits or litigation,
16 and unverified accounts regarding glyphosate that would inflame the passions of the jury and
17 distract jurors from their task at hand: a rational, dispassionate review of the scientific and factual
18 evidence regarding this Plaintiff in this case. *See People v. Waidla*, 22 Cal. 4th 690 (2000)
19 (exclusion of relevant evidence is proper when its probative value is outweighed by its potential
20 for creating an emotional bias against a defendant); *Hernandez v. Cty. of Los Angeles.*, 226 Cal.
21 App. 4th 1599, 1613 (2014) (explaining that California courts exclude even relevant evidence
22 when it tends to evoke an emotional bias against one party, and would motivate the jury to use the
23 information for an illegitimate purpose – *i.e.*, to reward or punish one party because of the jurors’
24 emotional reaction).

25 Courts have recognized the highly prejudicial nature of newspaper articles and other media
26 publications or productions, and have excluded such evidence on these grounds. *See, e.g.*,
27 *McMahon*, 2015 WL 7573620, at *11 (finding introduction of newspaper articles, even if not used
28 to establish the truth of the matters in the articles, would carry substantial risk of undue prejudice

1 to defendants); *Hanson v. Parkside Surgery Ctr.*, 872 F.2d 745, 751 (6th Cir. 1989) (finding
2 statements in a newspaper article should be excluded as unfairly prejudicial and misleading
3 evidence); *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1512 (10th Cir. 1997) (affirming
4 trial court exclusion of magazine article that negatively described product at issue in products
5 liability action because its probative value was substantially outweighed by its potential for
6 prejudice).

7 Further, if this evidence was admitted, Monsanto would be forced to put on evidence to
8 rebut and correct the information presented in these media stories, which would be an unnecessary
9 waste of the jury's and this Court's time. The Court should exclude this irrelevant and highly
10 prejudicial evidence.

11 **III. CONCLUSION**

12 For the aforementioned reasons, the Court should grant this motion *in limine* and exclude
13 any evidence, argument, or reference to the Media, which includes the Carey Gillam book titled
14 *Whitewash: The Story of a Weed Killer, Cancer, and the Corruption of Science*, and any and all
15 news articles, features, reports, broadcasts, videotapes, documentaries, productions created by or
16 published by any newspaper, magazine, television station, network or other Media..

17
18 Dated: May 24, 2018

Respectfully submitted,

19 FARELLA BRAUN + MARTEL LLP

20
21 By: 

22 Sandra A. Edwards

23 Attorneys for Defendant
24 MONSANTO COMPANY