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

21 DEWAYNE JOHNSON,
22 Plaintiff,
23 vs.
24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
MOTION *IN LIMINE* NO. 9 TO
EXCLUDE OR LIMIT EVIDENCE,
ARGUMENT, OR REFERENCE TO
ADVERSE EVENT REPORTS**

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 preclude Plaintiff Dewayne Johnson (“Plaintiff”) from introducing any evidence, in the form of
4 testimony or documents, argument, or reference to the irrelevant and unfairly prejudicial adverse
5 event reports (“AERs”).

6 **II. BACKGROUND**

7 As a part of its regulatory responsibilities, Monsanto reports adverse events and complaints
8 involving its products to the U.S. Environmental Protection Agency. *See* 40 C.F.R. § 159.184.
9 AERs are submitted to manufacturers primarily by practicing physicians, but also by researchers,
10 customers, and lawyers. These are generally unverified patient reports of experiences with various
11 products and are anecdotal in nature. They are not verified by physicians or other medical
12 personnel, and are not the result of a differential diagnosis or medical analysis of causation.
13 Monsanto employees and contracted poison control centers compile these AERs with written
14 notations to reflect what these personnel are told by others, either in telephone conversations or
15 through correspondence. These AERs include anecdotes involving a variety of Monsanto’s
16 products, including Ranger Pro[®] and Roundup PRO[®], the herbicides that Plaintiff claims he used.
17 They include reports by customers who used various products and claimed to develop various
18 injuries. The AERs should be excluded.

19 **III. ARGUMENT**

20 **A. Adverse Event Reports Are Inadmissible Hearsay**

21 The AERs are out-of-court statements that Plaintiff likely will attempt to use to prove the
22 truth of the matter asserted (*i.e.*, that Monsanto’s product caused whatever injury is identified
23 therein) and, as such, they constitute hearsay. *See* Cal. Evid. Code § 1200. The reports are not
24 subject to any hearsay exceptions, and reflect the statements of third parties such as physicians,
25 patients, and others who are not subject to cross-examination. AERs fail to identify the patients
26 and often it is not possible to verify information from these reports. *See e.g. Kinney v. Sacramento*
27 *City Emp. Ret. Sys.*, 77 Cal. App. 2d 779, 781-83 (1947) (excluding a report as incompetent
28 hearsay where it was based on unauthenticated accounts of physicians that allegedly examined the

1 plaintiff).

2 Furthermore, the AERs contain inadmissible hearsay within hearsay because the personnel
3 responsible for compiling the reports do not witness the events and most are third party physicians
4 merely recounting what their patients had told them. *See, e.g., Saari v. Merck & Co.*, 961 F. Supp.
5 387, 398 (N.D.N.Y. 1997) (explaining that an AER “was simply a report of what plaintiff told [the
6 doctor] about what she believed was her reaction to the vaccine, and by making that report [the
7 doctor] was neither confirming nor denying that there is any relationship between her symptoms
8 and the vaccine.”); *see also DeLuca v. Merrell Dow Pharm., Inc.*, 791 F. Supp. 1042, 1050
9 (D.N.J. 1992) (finding that AERs “have inherent biases as they are second-or-third hand reports,
10 are affected by medical or mass media attention, and are subject to other distortions”), *aff’d*, 6 F.3d
11 778 (3d Cir. 1993).

12 **B. Adverse Event Reports Not Relating To Cancer Are Irrelevant**

13 Even if the AERs did not constitute inadmissible hearsay, virtually all AERs are irrelevant
14 on their face because they do not involve the Plaintiff’s condition. Plaintiff has been diagnosed
15 with mycosis fungoides, a subtype of non-Hodgkin lymphoma (“NHL”). AERs involving
16 unrelated events— eye irritation, skin rashes, or other non-cancer injuries—have no bearing on the
17 central question in this case: whether Plaintiff’s use of Ranger Pro[®] or Roundup PRO[®] caused his
18 mycosis fungoides. Furthermore, since Plaintiff makes no claim that glyphosate causes human
19 cancers other than NHL, AERs not involving NHL are also irrelevant. AERs dissimilar to
20 Plaintiff’s claims do not have “any tendency in reason to prove or disprove any disputed fact that
21 is of consequence to the determination of the action,” and are, therefore, irrelevant and
22 inadmissible. Cal. Evid. Code §§ 210; 350 (irrelevant evidence is inadmissible).

23 California courts look for a finding of “substantial similarity” to determine that evidence of
24 other injuries or defects are relevant. *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 403-404 (1982);
25 *see also Brokopp v. Ford Motor Co.*, 71 Cal. App. 3d 841, 852 (1977) (finding evidence of an
26 alleged car defect irrelevant where the plaintiff’s injury was allegedly caused by an “entirely
27 dissimilar” defect). As such, Plaintiff must make a showing of “substantial similarity” between
28 his mycosis fungoides and the injuries alleged in the AERs. Plaintiff cannot meet this burden; his

1 experts admit that they do not claim that Ranger Pro[®] or Roundup PRO[®] cause other cancers. *See*
2 Declaration of Sandra A. Edwards (“Edwards Decl.”) at ¶ 13, Ex. 12 (Dep. of Chadi Nabhan,
3 M.D. at 102:13-103:7 (August 23, 2017)) (stating he does not claim glyphosate causes any cancer
4 other than NHL).

5 **C. Adverse Event Reports Not Relating To Cancer Are Unduly Prejudicial and**
6 **Would Mislead The Jury**

7 Even if the Court finds that certain AERs could have some minimal relevance to this case
8 – which they do not – the probative value is substantially outweighed by the substantial danger of
9 undue prejudice, confusing the issues, and misleading the jury. *See* Cal. Evid. Code § 352. The
10 non-cancer AERs distract from the specific issue, *i.e.*, whether the Plaintiff’s exposure to
11 Monsanto’s Ranger Pro[®] caused his alleged injury, and will induce the jury to award damages for
12 injuries that have not been claimed in this case. *See Coursen v. A.H. Robins Co.*, 764 F.2d 1329,
13 1334 (9th Cir. 1985) (excluding evidence related to a side-effect other than the only alleged injury
14 to avoid the “prejudice and confusion [that] would be generated by innuendos of collateral
15 misconduct); *see also O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1012-13 (10th
16 Cir. 1992) (excluding evidence of cancer where the alleged injuries did not include mesothelioma
17 or other carcinogenic disease because these “purely speculative” damages are non-recoverable).

18 **IV. CONCLUSION**

19 For the aforementioned reasons, the Court should preclude Plaintiff from introducing any
20 evidence, in the form of testimony or documents, argument, or reference to the irrelevant and
21 unfairly prejudicial AERs.

22 Dated: May 24, 2018

Respectfully submitted.

23 FARELLA BRAUN + MARTEL LLP

24 By: 

25 Sandra A. Edwards

26 Attorneys for Defendant
27 MONSANTO COMPANY

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