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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. 25 TO
EXCLUDE EVIDENCE, ARGUMENT, OR
REFERENCE TO OTHER LITIGATION**

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

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
05/24/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION**

2 In its April 3, 2018 order, the Court denied, in part, defendant Monsanto Company
3 (“Monsanto”)’s motion *in limine* No. 3 to exclude all evidence of prior lawsuits alleging that
4 glyphosate caused other individuals’ cancers. See 04/03/2018 Order on Motions in Limine at 6.
5 In so holding, the Court stated that “these complaints could be treated as notice to Monsanto of the
6 alleged connection between glyphosate and the injury at issue in this case,” but that the total
7 number of cases “would plainly create a substantial risk of undue prejudice that outweighs any
8 probative value.” *Id.* at 6 & n.2. Significantly, the Court also explained that “[r]ulings on motions
9 *in limine* are by definition not binding and subject to reconsideration at trial,” and “[t]his is
10 especially true when, as is the case for some of the motions below, *there is no apparent foundation*
11 *for the contested evidence.*” *Id.* at 3 (emphasis added).

12 Monsanto respectfully asks the Court to reconsider its April 3, 2018 Order and to exclude
13 all evidence of prior lawsuits alleging glyphosate exposure caused cancer. First, there is no
14 foundation for evidence of other lawsuits. There is no proffering witness for such evidence and no
15 evidentiary basis showing the requisite “notice” identified in the Court’s order. No expert relies
16 on other lawsuits for any purpose, and there is no witness who can provide testimony showing that
17 they involve similar circumstances to the present case. For that reason alone, the evidence should
18 be excluded.

19 Second, the Court should reconsider its statements that prior complaints could be relevant
20 to Monsanto’s alleged notice of a product defect. This case involves allegations of exposure to a
21 product that Plaintiff alleges causes cancer. In cases where there is no direct, observable link
22 between a product and a harm, the only type of evidence that could conceivably provide “notice”
23 of a cancer link is competent scientific evidence. Bare allegations in legal pleadings—in cases
24 involving different products, different diseases, and different exposures—cannot provide notice to
25 Monsanto that glyphosate causes cancer, particularly where such claims are contradicted by
26 decades of established science and regulatory approvals.

27 Third, even if the existence of prior lawsuits could be relevant, the probative value is far
28 outweighed by the substantial prejudice to Monsanto and confusion of the issues. There is a

1 danger the jury will consider these bare allegations as relevant to the cause of Plaintiff’s cancer
2 (even with a cautionary instruction), and infer from the mere existence of other lawsuits that his
3 allegations are substantiated in this case. The only way to combat this prejudice is to engage in
4 multiple “trials within a trial,” defending against the merits of those other complaints (albeit
5 without the benefit of discovery or evidence developed in any of those other cases, which have
6 only passed the initial pleading phase.) This is the antithesis of § 352 of the Evidence Code. By
7 letting in evidence of these other complaints, plaintiffs’ counsel—simply by filing multiple
8 complaints around the same timeframe alleging the same basic allegations on behalf of different
9 individuals—concocts jury prejudice and bias against Monsanto under the auspice of “notice.”
10 Such tactics should not be allowed. For all of these reasons, evidence of other complaints and
11 lawsuits should be excluded.

12 **II. ARGUMENT**

13 **A. There is No Foundation for Evidence about Other Litigations**

14 As the Court previously observed, “there is no apparent foundation for the contested
15 evidence” in several of the motions at issue. *See* 04/03/2018 Order on Motions in Limine at 3.
16 That is clearly true for the six or seven complaints filed between March 2015 and Plaintiff’s last
17 glyphosate exposure in late 2015. Plaintiff has no sponsoring witness for such evidence. No
18 expert in this case has relied on these other complaints or lawsuits for any purpose. No disclosed
19 fact witness in this case has any relevant connection to those cases, and there is no pertinent
20 deposition testimony about any of them.

21 There is also no evidentiary basis for other lawsuits to be considered by the jury. The only
22 theory of relevance articulated in the Court’s Order would be as “*notice* to Monsanto of the
23 *alleged connection* between glyphosate and *the injury at issue* in this case.” *Id.* at 6 (emphasis
24 added). But there is no possibility of Plaintiff or any witness showing that any prior litigation
25 involved a person with mycosis fungoides (the “injury at issue in this case”). Likewise, there is no
26 testimony or evidence about the circumstances involved in any of the prior lawsuits, or that they
27 are similar to the circumstances in this case so as to provide “notice” to Monsanto of anything
28 relevant to Plaintiff’s claimed injury. There is no possible evidentiary foundation to show that the

1 product in question was the same product as used by Plaintiff (Ranger Pro®), or that the
2 circumstances of use were the same as Plaintiff's (professional application by a certified
3 applicator, use of personal protective equipment, the quantity or duration of exposure, etc.).

4 Simply put, the other complaints that Plaintiff seeks to put before the jury are
5 unsubstantiated, unadjudicated legal pleadings containing allegations by different individuals
6 about different products, different exposures, and different diseases. And California courts "have
7 categorically refused to take judicial notice of the truth asserted in court records[,]” such as
8 complaints. *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal. App. 4th
9 875, 886 (2001). As such, there is no proper evidentiary foundation or basis by which such
10 lawsuits can be admitted to show “notice” of any particular product “defect” associated with the
11 Ranger Pro® to which Plaintiff was exposed. *Cf. Blecker v. Wolbart*, 167 Cal. App. 3d 1195,
12 1205 (1985) (affirming exclusion of evidence for lack of foundation absent evidentiary link to
13 prior incident); *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 338 (1978) (affirming exclusion of
14 testimony based on a lack of foundation and unproven assumptions).

15 **B. Other Lawsuits Are Not Relevant to Notice of Defect**

16 Even assuming there could somehow be an evidentiary foundation properly laid, these
17 other lawsuits are irrelevant as a matter of law. In this respect, the Court should reconsider its
18 statement that, “[w]hether substantiated or not, [other] complaints could be treated as notice to
19 Monsanto of the alleged connection between glyphosate and the injury at issue in this case.”
20 04/03/2018 Order on Motions in Limine at 6. That is incorrect, particularly in a case involving
21 claims of cancer due to chemical exposure.

22 First, the handful of cases Plaintiff has cited involve notice of a product defect under very
23 different circumstances. They all involve situations where there was a *direct and observable*
24 *cause and effect relationship* between the consumer product defect and an injury that occurred
25 under a *similar* prior circumstance of product failure. For example, *Ault v. International*
26 *Harvester Co.*, 13 Cal. 3d 113, 117 (1974), involved a broken gear box in a car. The Court
27 permitted expert “opinion [that] the physical properties of all three gear boxes [in the present case
28 and the other litigation] were *similar* and that the failure in the present case was also due to metal

1 fatigue.” *Id.* at 122. *Buell-Wilson v. Ford Motor Co.*, 141 Cal. App. 4th 525, 531 (2006), also
2 allowed evidence of a “related product” to prove notice of a vehicular defect.

3 Unlike a case involving a defective car, in a toxic tort case, a cancer link cannot be shown
4 by observation. A product “defect” based on a cancer link—and thus, any “notice” thereof—can
5 only be established through scientific evidence. And case law establishes that “[e]pidemiology ...
6 is generally considered to be the best evidence of causation in toxic tort actions.” *Rider v. Sandoz*
7 *Pharm. Corp.*, 295 F.3d 1194, 1198 (11th Cir. 2002); *Lopez .v Wyeth-Ayerst Lab.*, No. C 94-4054
8 CW, 1996 WL 784566 at *3 (N.D. Cal. Dec. 13, 1996) (citations omitted), *aff’d.*, 139 F.3d 905
9 (9th Cir. 1998). The jury will be presented with such scientific evidence, including the findings of
10 the International Agency for Research on Cancer (“IARC”) on which each of the complaints in the
11 other lawsuits rely.

12 Second, the filings of several complaints within several months by the same group of
13 plaintiffs’ counsel alleging a defect does not provide purported notice of such defect to Monsanto.
14 The complaints simply repeat what IARC stated; thus, to the extent there was “notice” to
15 Monsanto in 2015 of the alleged defective nature of glyphosate as carcinogenic, it came from
16 IARC and not the filing of various complaints later in the same calendar year. The jury will no
17 doubt hear from Plaintiff and his experts that Monsanto was put on “notice” of the alleged
18 defective nature of glyphosate at least by IARC’s findings. Legal complaints filed later in 2015
19 that simply adopt and incorporate IARC’s statements would be unnecessarily cumulative or
20 duplicative (and hence prejudicial) evidence of such notice.

21 Moreover, unlike the component parts of automobiles, glyphosate and glyphosate-based
22 herbicides are heavily regulated. Per federal law, they are tested and routinely reviewed to insure
23 they present no harm to human or environmental health. That has been glyphosate’s history for
24 over 40 years. A bare allegation—even among six or seven complaints—that a person developed
25 cancer based on exposure to glyphosate does not logically provide “notice” to Monsanto that there
26 was a defect in glyphosate in the face of decades of scientific studies and the unanimous
27 conclusions of the U.S. Environmental Protection Agency and foreign regulatory agencies that
28 glyphosate does not cause cancer, all given within and after the same timeframe of these

1 complaints.

2 Given these legal standards and Plaintiff’s burden to prove that glyphosate caused *his*
3 cancer, the unsubstantiated allegations of other plaintiffs in other lawsuits, which have not
4 progressed past the pleadings stage, are not probative of any notice of a defect to Monsanto. *See*,
5 *e.g.*, *Genrich v. State of California*, 202 Cal. App. 3d 221, 228 (1988) (explaining that evidence of
6 other accidents before and after the accident at issue in the case were not proper “to show the State
7 had notice of the hazardous condition.”); *see also Nissan Motor Co. v. Armstrong*, 145 S.W.3d
8 131, 142 (Tex. 2004) (rejecting argument that evidence from other lawsuits is relevant to show
9 notice or knowledge of a defective condition because “product defects must be proved; they
10 cannot simply be inferred from a large number of complaints. If the rule were otherwise, product
11 claims would become a self-fulfilling prophecy—the more that are made, the more likely all must
12 be true.”); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d
13 251, 254–55 (S.D.N.Y. 2012) (excluding evidence of similar lawsuits because “courts generally
14 exclude evidence of other related lawsuits” and plaintiff could not point to “a single case for the
15 proposition that mere *allegations* of misconduct are probative”); *Foster v. Berwind Corp.*, No.
16 CIV. A. 90-0857, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (excluding such evidence
17 because “the complaints in these other actions are just that: allegations” that “are dispositive of
18 nothing and would confuse the complex issues already present.”).¹

19 **C. Reference to Other Litigations is Unduly Prejudicial**

20 Even if allegations in other lawsuits could theoretically have some minimal probative
21 value, and even if there was an evidentiary foundation for them here, their probative value “is
22 substantially outweighed by the probability that [their] admission will (a) necessitate undue
23 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,
24 or of misleading the jury.” Cal. Evid. Code § 352; *LAOSD Asbestos Cases*, 5 Cal. App. 5th 1022,

25 _____
26 ¹ Plaintiff’s allegations of “reprehensibility” are neither relevant to notice nor punitive damages,
27 which must be based on conduct that harmed Plaintiff specifically. *See Johnson v. Ford Motor Co.*,
28 35 Cal. 4th 1191, 1204 (2005) (“[a] defendant’s dissimilar acts, independent from the acts upon which
liability was premised, may not serve as the basis for punitive damages. A defendant should be
punished for the conduct that harmed the plaintiff. . . .”) (citation omitted) (internal quotation marks
omitted).

1 1044–45 (2016) (the “weighing process under [Evidence Code] section 352 depends upon the trial
2 court’s consideration of the unique facts and issues of each case[.]”) (citations omitted) (internal
3 quotation marks omitted).

4 Plaintiff bears the burden of proving—through competent testimony based on scientific
5 evidence—that glyphosate is capable of causing cancer generally and that it specifically caused his
6 cancer. Presenting evidence of other plaintiffs’ individual allegations presents a serious danger of
7 confusing the issues. There is a significant danger that jurors may conclude that there is a cancer
8 link based on the mere existence of other such claims.

9 Moreover, Monsanto would be forced to defend against each such claim, requiring
10 consideration into the specifics of other cases and the allegations therein to provide necessary
11 context, show that each plaintiff did not get cancer from glyphosate exposure, or to show that the
12 circumstances were different from this case.² To the extent this is even possible (which it is not,
13 given none of those cases has proceeded to even the discovery phase), doing so would require an
14 inquiry into collateral issues and create several “trial[s] within a trial.” *Notrica v. State Comp. Ins.*
15 *Fund*, 70 Cal. App. 4th 911, 928 (1999) (internal quotation marks omitted). Courts have
16 consistently excluded such evidence on these grounds. *See, e.g., Lowenthal v. Mortimer*, 125 Cal.
17 App. 2d 636, 643 (1954) (“If we were to hold that a businessman is to be penalized in a personal
18 injury case because of precedent commercial litigation, we would be jeopardizing the rights of ...
19 [others] who are frequently subjected to the vagaries of legal proceedings.”); *Brown v. Affonso*,
20 185 Cal. App. 2d 235, 238 (1960) (“It is true that ordinarily evidence of prior litigation is not
21 admissible in an action for injuries in a subsequent accident as it involves the danger of both
22 undue prejudice and time-wasting confusion of issues”); *Randolph v. Akanno*, No.
23 112CV00392LJOMJS, 2016 WL 8731161, at *5 (E.D. Cal. Aug. 12, 2016) (“[I]ntroducing such
24 evidence would consume an inordinate amount of time, as it would require Dr. Barnett to explain
25 each case and his role in each case, and would likely cause confusion for the jury.”); *see also*
26 *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 409 (5th Cir. 2004) (excluding

27
28 ² A limiting instruction would be insufficient here, as it would only draw attention to the other lawsuits and bolster the improper inference that Plaintiff seeks to advance.

1 evidence of other lawsuits because of “its tendency to confuse the jury with tangential litigation.”);
2 *Smith v. E-backgroundchecks.com, Inc.*, No. 1:13-CV-02658-RGV, 2015 WL 11233453, at *2
3 (N.D. Ga. June 4, 2015) (“Even if plaintiff could demonstrate some probative value from
4 allegations in other lawsuits, presenting evidence of these other cases would lead to a series of
5 mini-trials that would likely confuse and mislead the jury from the task at hand of evaluating
6 plaintiff’s claims in this case and result in a waste of time and judicial resources.”); *In re Ethicon,*
7 *Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, No. 2:12-CV-4301, 2014 WL 505234, at *6 (S.D.W.
8 Va. Feb. 5, 2014) (“Although other lawsuits may ultimately [be probative], the jury must still find
9 that the TVT caused Ms. Lewis’s injuries. Evidence of other lawsuits is likely to confuse and
10 mislead the jury from that task, and it is highly prejudicial.”)

11 **III. CONCLUSION**

12 For all of these reasons, the Court should exclude any evidence of, or reference to, other
13 litigation or complaints about glyphosate.

14
15 Dated: May 24, 2018

Respectfully submitted.

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17
18 By: 

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