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ELECTRONICALLY
**FILED**
*Superior Court of California,*
*County of San Francisco*
**05/24/2018**
**Clerk of the Court**
BY: SANDRA SCHIRO
Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN FRANCISCO**

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY, STEVEN D. GOULD, WILBUR-ELLIS COMPANY LLC, and WILBUR-ELLIS FEED, LLC,

Defendants.

Case No. CGC-16-550128

**NOTICE OF MOTION AND PLAINTIFF'S MOTION *IN LIMINE* NO. 4 TO EXCLUDE EVIDENCE AND ARGUMENT THAT PLAINTIFF FAILED HIS QUALIFIED APPLICATOR TEST ON THREE OCCASIONS**[1]

Trial Judge: TBD

Hearing Date: TBD
Time: TBD
Department: TBD

Trial Date: June 18, 2018

[Filed concurrently with Declaration of Curtis Hoke and [Proposed] Order]

[1] Plaintiff previously filed his Motions *in Limine* Nos. 1-3 before the Honorable Curtis E.A. Karnow. Those motions have already been heard and adjudicated.

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that, at a date and time set by the trial judge assigned to this matter of the above-entitled Court located at 400 McAllister St. San Francisco, CA 94102-4515, Plaintiff Dewayne Johnson will and hereby does move *in limine* to exclude argument and evidence at trial that Mr. Johnson failed his Qualified Applicator Certificate test on three occasions.

This motion *in limine* has been brought pursuant to Cal. Evid. Code §§ 210, 350 and 352 and is based on the grounds that any evidence or argument relating to whether Mr. Johnson failed his Qualified Applicator Certificate (QAC) test is irrelevant to the issues to be decided in this case (whether Monsanto's glyphosate-based herbicides caused Mr. Johnson to develop non-Hodgkin's lymphoma and whether Monsanto adequately warned of the known or knowable risks of non-Hodgkin's lymphoma associated with its glyphosate-based herbicides), and the probative value of such evidence would be greatly outweighed by a substantial danger of undue prejudice to Plaintiff.

This Motion *in Limine* is based on this Notice of Motion, the Motion and accompanying Memorandum of Points and Authorities, the concurrently-filed Declaration of Curtis Hoke, the concurrently-filed Proposed Order, all pleadings and papers on file in this matter, and such further oral and documentary evidence and papers as the Court may consider at the time of the hearing.

Respectfully Submitted,

Dated: May 24, 2018

**THE MILLER FIRM, LLC**

By: */s/ Curtis G. Hoke*

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

In August of 2014, Dewayne Johnson was diagnosed with non-Hodgkin lymphoma ("NHL") at age 43 after spraying glyphosate-based herbicides, Roundup and RangerPRO, (collectively referred to herein as "GBHs") while employed with Benicia Unified School District for over two years. Mr. Johnson's frequency of exposure to GBHs was intense, involving approximately 20-40 days per year at about 2-5 hours per day and starting in June of 2012. Mr. Johnson also suffered acute exposures due to spills which left him soaked to the skin in GBHs. Mr. Johnson suffers from a sub-type of NHL called mycosis fungoides, which is an aggressive variant of NHL involving lymphocytes located in his skin.

At Mr. Johnson's December 7, 2017 deposition, he testified that he failed California's Qualified Applicator Certificate ("QAC") test a total of three times, before passing on his fourth attempt. *See*, Decl. of Curtis Hoke, **Exhibit A**, Johnson's December 7, 2017 deposition at pp. 37-40. The number of times Mr. Johnson failed his QAC test – before ultimately passing – is completely irrelevant to the disputed facts at issue herein – namely, whether Monsanto's GBHs caused Mr. Johnson's NHL or whether Monsanto adequately warned Mr. Johnson of the known or knowable risks of NHL associated with use of Monsanto's GBHs; yet Plaintiff anticipates that Monsanto will attempt to unfairly and prejudicially imply that Mr. Johnson's three failed attempts at passing his QAC test show that he is an incompetent or "failed" Roundup/RangerPRO applicator and the fact that Mr. Johnson failed his QAC test three times somehow demonstrates Mr. Johnson is to blame for his own exposure to Monsanto's GBHs.

Any mention of evidence that Mr. Johnson failed his QAC test three times is irrelevant and unduly prejudicial to Mr. Johnson, and should therefore be excluded pursuant to Cal. Evid. Code §§ 210, 350, and 352.

## II. ARGUMENT

### A. Only Relevant Evidence Is Admissible.

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. *See*, Cal. Evid. Code § 210; *People v. Pearson*, 56 Cal. 4th 393, 438 (2013); *People v. Wheeler*, 4 Cal. 4th 284, 295 (1992). No evidence is admissible except relevant evidence. Cal. Evid. Code § 350 (West). A court "has no discretion to admit irrelevant evidence." *See*, *People v. Babbitt*, 45 Cal. 3d 660, 681 (1988), as modified on denial of reh'g (Aug. 25, 1988).

### B. Overly Prejudicial Evidence Should Be Excluded.

California Evidence Code Section 352 states that "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *See*, Cal. Evid. Code § 352. Evidence is not inadmissible under Section 352 unless the probative value is "substantially' outweighed by the probability of a 'substantial danger' of undue prejudice." *See*, *People v. Fruits*, 247 Cal. App. 4th 188, 205 (2016), review denied (Aug. 10, 2016); *People v. Quang Minh Tran*, 51 Cal. 4th 1040, 1046 (2011).

### C. Any Argument Or Evidence That Mr. Johnson Failed His QAC Test Three Times Is Irrelevant To Whether Monsanto's GBHs Caused Mr. Johnson's NHL, Nor Whether Monsanto Failed To Adequately Warn Of The Known Or Knowable Risks Of NHL Associated With Use Of Its GBHs.

Any argument or evidence that Mr. Johnson failed his QAC test three times is completely irrelevant and inadmissible because it has no tendency to prove or disprove whether Monsanto's GBHs caused Mr. Johnson's NHL, nor whether Monsanto failed to adequately warn of the known or knowable risks of NHL associated with use of its GBHs. A court "has no discretion to admit irrelevant evidence" and such evidence should therefore be excluded as irrelevant. *See*, *Babbitt*, 45 Cal. 3d at 681.

In addition to the above, the fact that Mr. Johnson failed his QAC training three times is additionally irrelevant because Mr. Johnson's QAC testing and training was *over and above* the requisite training and testing needed to spray Roundup/RangerPRO under California law. Indeed, California law has deemed some pesticide products to be "restricted materials," which may only be purchased or applied by trained, certified applicators or those under their direct supervision. *See*, Title 3, C.C.R. § 6400. There are two types of restricted materials: 1) Federally "Restricted Use Pesticides", and 2) California "Restricted Materials." A list of the EPA's Restricted Use Product Summary Report (as of October 12, 2017) is attached to the concurrently-filed Declaration of Curtis Hoke, **Exhibit B**. Under California's framework, Title 3, C.C.R. § 6400 designates certain pesticides as "Restricted Materials." *See*, Decl. of Curtis Hoke, **Exhibit C**; **Exhibit D**; Title 3, C.C.R. § 6400. Notably, Monsanto's Roundup/RangerPRO formulations are absent from the federal list of "Restricted Use Pesticides" and California's list of "Restricted Materials," therefore rendering Mr. Johnson's QAC test irrelevant and inapplicable *Id.* Indeed, Mr. Johnson's QAC training and test was *above and beyond* what was required of him to spray Roundup/RangerPRO in California.

Additionally, even if California law required Mr. Johnson to pass the QAC test to apply Roundup/RangerPRO, which Plaintiff does not concede that it does, Mr. Johnson's QAC testing is additionally irrelevant because California law permits a "noncertified applicator" to spray a restricted material while supervised by a certified applicator. *See*, Title 3, C.C.R. § 6406. Indeed, Mr. Johnson testified at deposition that he first began spraying Roundup/RangerPRO *without* a QAC because his boss, Roy, had already obtained a "certified applicator certificate, I didn't need one." *See*, Decl. of Curtis Hoke, **Exhibit A** (December 7, 2017 Deposition of Dewayne Johnson) at 41:20 – 42:12.

Therefore, for the reasons discussed above, California law did not even require Mr. Johnson to obtain a QAC to spray Roundup/RangerPRO because 1) these products are neither listed in California's list of "Restricted Materials" nor the federal list of "Restricted Use Pesticides" and 2) Mr. Johnson applied Roundup/RangerPRO under his boss' supervision, obviating the need for him to obtain a QAC entirely.

Indeed, Mr. Johnson's QAC testing went *above and beyond* that required under California law and has nothing to do with whether Monsanto's GBHs cause NHL, nor whether Monsanto adequately warned of the known or knowable risks of NHL with use of its GBHs. Therefore, Plaintiff respectfully requests that evidence relating to the number of times Mr. Johnson failed his QAC be excluded as irrelevant.

**D. Any Argument Or Evidence That Mr. Johnson Failed His QAC Test Three Times Has No Probative Value And Is Outweighed By The Risk Of Undue Prejudice.**

As discussed above, any argument or evidence that Mr. Johnson failed his QAC test three times is completely irrelevant to whether Monsanto's GBHs caused Mr. Johnson's NHL or whether Monsanto adequately warned Mr. Johnson of the known or knowable risks of NHL associated with its Roundup/RangerPRO products. Therefore, there is absolutely no probative value in such evidence. Yet there is a substantial risk of unfair prejudice here: Plaintiff anticipates that Monsanto will use the completely irrelevant fact that he failed the QAC test three times to greatly prejudice Plaintiff by unfairly painting him as an incompetent or "failed" Roundup/RangerPRO applicator – yet, Mr. Johnson's QAC training and testing went *above and beyond* what was required of him under California law. Further, allowing such evidence before the jury will devolve into a time-consuming and wasteful trial-within-a-trial where the jury will be asked to stray away from whether Monsanto's GBHs cause NHL and whether Monsanto adequately warned Mr. Johnson of the known or knowable risks of NHL associated with its GBHs.

## III. CONCLUSION

Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an Order granting this motion *in limine*.

Respectfully submitted,

Dated: May 24, 2018

**THE MILLER FIRM, LLC**

By: */s/ Curtis G. Hoke*
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