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13 **DEWAYNE JOHNSON**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY

Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION IN SUPPORT OF MOTION *IN
LIMINE NO. 13 TO EXCLUDE EVIDENCE
OF SMOKING, AND DRUG USAGE***

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]

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

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

2 **PLEASE TAKE NOTICE** that, at a date and time set by the trial judge assigned to this matter
3 of the above-entitled Court located at 400 McAllister St. San Francisco, CA 94102-4515, Plaintiff
4 Dewayne Johnson will and hereby does move *in limine* to exclude evidence and testimony regarding
5 smoking and drug usage.

6 This motion *in limine* has been brought pursuant to Evid. Code §§ 350 and 352 and is based on
7 the grounds that Mr. Johnson's history of smoking and drug usage is irrelevant in this case. This Court
8 should exclude *in limine* any evidence or argument suggesting that smoking or drug usage caused Mr.
9 Johnson's injuries and such evidence should be excluded in its entirety. Such remarks are inflammatory
10 and are an improper attempt to prejudice the jury by suggesting that Plaintiff other causes of Plaintiff's
11 lymphoma with no medical basis. This evidence is irrelevant and unduly prejudicial.

12 This motion *in limine* is based on this notice of motion, the motion and accompanying
13 memorandum of points and authorities, the concurrently filed Declaration of Curtis Hoke, the
14 concurrently filed proposed order, all pleadings and papers on file in this matter, and such further oral
15 and documentary evidence and papers as the Court may consider at the time of the hearing.

16
17 Respectfully Submitted,

18 Dated: May 24, 2018

THE MILLER FIRM, LLC

19
20 By: /s/ Curtis G. Hoke

Michael J. Miller (appearance *pro hac vice*)
Timothy Litzenburg (appearance *pro hac vice*)
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DEWAYNE JOHNSON

1 **MEMORNADUM OF POINTS AND AUTHORITIES**

2 Plaintiffs hereby submit his memorandum of points and authorities in support of his motion in
3 limine to preclude any mention of smoking or drug usage by Dewayne Johnson.

4 **I. ARGUMENT**

5
6 **A. Monsanto Is Unable To Proffer Any Evidence, To A Reasonable Degree Of Medical
7 Certainty, The Mr. Johnson’s Usage Of Cigars Or Marijuana Caused Or
8 Substantially Contributed To His Diagnosis Of Micosis Fungoides.**

9 In August of 2014, Dewayne Johnson was diagnosed with non-Hodgkin lymphoma (“NHL”) at
10 age 43 after spraying glyphosate-based herbicides (GBHs) for over two years. Mr. Johnson's frequency
11 of exposure to GBHs was intense, involving approximately 20-40 days per year at about 2-5 hours per
12 day and starting in June of 2012. Mr. Johnson also suffered acute exposures due to spills which left
13 him soaked to the skin in GBHs. Mr. Johnson’s NHL subtype is t-cell lymphoma mycosis fungoides,
14 an aggressive variant, which involves lymphocytes located in the skin.

15 Mr. Johnson has a history of being a previous cigar smoker prior to quitting in 2006 and
16 occasionally using marijuana. It is highly likely that Defense counsel will attempt to sway the jury that
17 such social history may cause mycosis fungoides although such arguments have no scientific basis.

18 Mr. Johnson testified that he previously smoked black and mild cigars daily. *See*, Hoke Decl.,
19 Exhibit A at 75:15-76:16. He stated he did this for a two-year period and quit in 2006. *Id.*
20 Additionally, there is a medical record reference to a history of a little marijuana usage. *See* Hoke
21 Exhibit B.

22 All such social history has no linkage to the development of mycosis fungoides. Defendant’s
23 own causation expert, Timothy Kuzel, M.D., does not support that smoking or drug use caused the
24 development of mycosis fungoides. In discussing an epidemiological study of smoking causing
25 mycosis fungoides, Dr. Kuzel noted “he does not put a lot a faith” in the study. *See*, Hoke Decl.
26 Exhibit C at 167:24-168:4. He further confirmed that it is his belief that there are zero known causes
27 of mycosis fungoides. *Id.* at 168:5-8. Thus, Defense is unable to proffer any evidence to a reasonable
28 medical certainty that Mr. Johnson’s usage of cigars or marijuana caused or contributed to his mycosis
fungoides.

1 Nonetheless, it is very likely that Defendants will attempt to use Mr. Johnson's social history to
2 prejudice a jury into speculating that such behaviors could be the cause of mycosis fungoides. Further,
3 unrelated to causation, Defendants will attempt to prejudice Plaintiff by using such information to
4 attack Mr. Johnson's morality.

5
6 **B. Under California Evidence Code Section 352, Plaintiff's Smoking And Drug Usage Is**
7 **Irrelevant And Prejudicial, And Thus Such Evidence Or Argument Should Be**
8 **Precluded At Trial.**

9 To be admissible under Evidence Code section 352, providing that the court in its discretion
10 may exclude evidence if its probative value is substantially outweighed by the probability that its
11 admission will create substantial danger of undue prejudice or confusion, the evidence must be
12 relevant, that is, it must tend logically, naturally and by reasonable inference to establish a material
13 fact. *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d 841 (1977).

14 Here, there is no material fact that may be established by presenting Mr. Johnson's history of
15 smoking and drug usage at trial and only prejudice will result. Defendant's specific causation expert is
16 unable to testify to a reasonable degree of medical certainty that any of these behaviors cause mycosis
17 fungoides. The admittance of this evidence is highly prejudicial because such facts may create in the
18 jurors' minds an untrue inference - that such behaviors resulted, in whole or in part, in Mr. Johnson's
19 diagnosis of mycosis fungoides, of which there is absolutely no evidence. Such evidence would
20 confuse the jurors and consume additional time.

21 Plaintiff Johnson's social history of smoking and drug usage is neither material, nor relevant,
22 nor necessary. Such facts would create undue prejudice, as Ms. Johnson's social history has no effect
23 on the issues. See *O'Mary v. Mitsubishi Electronics America, Inc.* 59 Cal.App.4th 563, 575 (1997).
24 Thus, the Court should move to exclude all such evidence.

1 **II. CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that this Court exclude this evidence in
3 its entirety.

4
5 Dated: May 24, 2018

Respectfully submitted,

THE MILLER FIRM, LLC

By: /s/ Curtis G. Hoke

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