

1 Michael J. Miller (appearance *pro hac vice*)
2 Timothy Litzenburg (appearance *pro hac vice*)
3 Curtis G. Hoke (State Bar No. 282465)
4 **THE MILLER FIRM, LLC**
5 108 Railroad Ave.
6 Orange, VA 22960
7 Phone: (540) 672-4224
8 Fax: (540) 672-3055
9 mmiller@millerfirmllc.com
10 tlitzenburg@millerfirmllc.com
11 choke@millerfirmllc.com

12 *Attorneys for Plaintiff*
13 **DEWAYNE JOHNSON**

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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. 5 TO EXCLUDE
EVIDENCE, TESTIMONY AND
ARGUMENT REGARDING ATTORNEY
RETENTION AND ADVERTISING**

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

NOTICE OF MOTION AND PLAINTIFF'S MOTION IN LIMINE NO. 5 RE: EXCLUDE EVIDENCE
OF ATTORNEY RETENTION AND ADVERTISING

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 attorney retention and attorney advertising.

6 This motion *in limine* has been brought pursuant to Evid. Code §§ 350 and 352 and is based on
7 the grounds that attorney retention and attorney advertising are irrelevant in this case. This Court should
8 exclude *in limine* any evidence or argument suggesting that this case was generated by attorneys, or any
9 other evidence or argument of attorney involvement. Such remarks are inflammatory and are an improper
10 attempt to prejudice the jury by suggesting that Plaintiff is pursuing his claims only because an attorney
11 advised it. 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 Respectfully Submitted,

17
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*)

Curtis G. Hoke (State Bar No. 282465)

THE MILLER FIRM, LLC

108 Railroad Ave.

Orange, VA 22960

Phone: (540) 672-4224

Fax: (540) 672-3055

mmiller@millerfirmllc.com

tlitzenburg@millerfirmllc.com

choke@millerfirmllc.com

Attorneys for Plaintiff

DEWAYNE JOHNSON

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

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

9 During the deposition of Mr. Johnson on January 7, 2018, it was disclosed that Mr. Johnson's
10 friends told him that he needed to get an attorney and that Mr. Johnson saw commercials in regards to
11 Roundup and Ranger PRO after he retained his current counsel. *See*, Declaration of Curtis Hoke in
12 Support of Motion *in limine*, Ex. A. (Dewayne Johnson Deposition) at 173:18-176:20.

13
14 **II. ARGUMENT**

15 **A. Evidence Of Attorney Retention And Advertising Is Irrelevant, Highly Prejudicial, And**
16 **Should Be Excluded.**

17
18 Plaintiff anticipates that Defendant will attempt to introduce evidence or argument 1) suggesting
19 that this case is attorney-driven; 2) advertisements by attorneys regarding Ranger PRO and Roundup; 3)
20 that Plaintiff's counsel specializes in litigating pharmaceutical and product liability cases and/or that
21 Plaintiff's counsel represents plaintiffs in a large volume of Roundup or other pending product liability
22 lawsuits; and 4) the role of counsel's advice in Plaintiff's decision to file his claims.

23 Statements regarding an attorney's involvement in a lawsuit encroaches on the attorney-client
24 privilege. It has no relevance to the issues at trial, and it is unfairly prejudicial to plaintiffs. Cal. Evid.
25 Code § 350. Such evidence or argument has no bearing on whether Defendant's product was defective and
26 was a likely cause of Ms. Johnson's injuries.

1 While in other litigations, courts have allowed evidence of attorney advertisements on the limited
2 issue of statute of limitations, this Court should not allow such evidence in this case because the statute of
3 limitations is not an issue in this case. In the *Crouse* case, the Pennsylvania court allowed limited use of
4 advertising to determine when the plaintiff should have been put on reasonable notice of the existence of
5 a cause of action thus beginning the running of the statute of limitations. *Crouse v. Cyclops Indust.*, 745
6 A.2d 606 (Pa. 2000). It did not, however, allow the defendant to use such evidence to imply that the case
7 was attorney driven. *Id.* In fact, courts are very hesitant to allow even limited evidence of attorney
8 advertisements, seeking to protect attorney-client privilege and to provide a fair trial for plaintiffs. *In re*
9 *Norplant Contraceptive Products Liab. Litig.*, MDL 1038, 1997 WL 81087, at *1 (E.D. Tex. Feb. 21,
10 1997)(court granted plaintiffs' motion *in limine* to exclude defendants' experts' opinions regarding
11 negative media stories and attorney advertisements); *In re Prempro Products Liab. Litig.*, 4:04CV01169,
12 2007 WL 3125106, at *1 (E.D. Ark. Oct. 24, 2007).

13 Since there is no material question to consider if or when the statute of limitations has run in this
14 case, attorney advertising is utterly immaterial here. Likewise, Mr. Johnson's testimony clearly states that
15 he had already retained an attorney before he saw any commercials or advertisements. See Declaration
16 of Curtis Hoke in Support of Motion *in limine*, Ex. A. (Dewayne Johnson Deposition) at 174:14-18, 175:2-
17 6.

18 **B. Evidence of Attorney Retention and Advertising is Protected by Attorney-Client
19 Privilege.**

20 The attorney-client privilege is "carefully safeguarded with only a few specific exception." *Rosso,*
21 *Johnson, Rosso & Ebersold v. Super. Ct.*, 237 Cal. Rptr. 242, 244 (Cal. App. 1st Dist. 1987). With the
22 privilege applying during preliminary negotiations with the attorney, even if employment is declined. *In*
23 *re Dupont's Est.*, 140 P.2d 866, 872 (Cal. App. 1st Dist. 1943).

24 Thus, any conversations Plaintiff has had with his counsel in responding to any advertisements
25 falls squarely within the attorney-client privilege, as does any information Plaintiff received from counsel.
26 Accordingly, evidence concerning Plaintiff's decision to file a claim based on his communications with
27 his attorneys are protected and must be excluded.

1 **III. CONCLUSION**

2 Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an
3 Order granting this motion *in limine* and excluding evidence or testimony suggesting that this case was
4 generated by attorneys, or any other evidence or argument of attorney involvement. Such remarks are
5 inflammatory and are an improper attempt to prejudice the jury by suggesting that Plaintiff is pursuing his
6 claims only because an attorney advised it. This evidence is irrelevant and unduly prejudicial.

7 Respectfully submitted,

8
9 Dated: May 24, 2018

THE MILLER FIRM, LLC

10
11 By: /s/ Curtis G. Hoke

12 Michael J. Miller (appearance *pro hac vice*)
13 Timothy Litzenburg (appearance *pro hac vice*)
14 Curtis G. Hoke (State Bar No. 282465)
15 **THE MILLER FIRM, LLC**
16 108 Railroad Ave.
17 Orange, VA 22960
18 (540) 672-4224 phone; (540) 672-3055 fax
19 mmiller@millerfirmllc.com
20 tlitzenburg@millerfirmllc.com
21 choke@millerfirmllc.com

Attorneys for Plaintiff

DEWAYNE JOHNSON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28