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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
OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND CASE
MANAGEMENT ORDER NO. 7**

Trial Date: June 18, 2018
Time: 9:30 a.m.
Department: 504

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/18/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION AND BACKGROUND**

2 Defendant Monsanto Company (“Monsanto”) respectfully requests that this Court strike
3 Plaintiff Dewayne Johnson’s (“Plaintiff”) untimely Amended Witness List, served on Monsanto
4 on the eve of trial and long after the Court’s required deadline.

5 On October 5, 2017, Judge Curtis E. Karnow issued Case Management Order #7 (“CMO
6 #7”), which set pretrial deadlines for the parties’ motions *in limine*, deposition designations,
7 exhibit and witness lists, jury instructions, and other pretrial filings. That Order provided that the
8 parties’ deposition designations were due on April 2, 2018, with counter-designations and
9 objections due the following week and responses to objections a week later. Counsel for Plaintiff
10 and Monsanto then met face-to-face over multiple days to negotiate the parties’ deposition
11 designations. CMO #7 also required parties’ trial witness lists be served and lodged on or before
12 May 25, 2018, and the parties each complied with that deadline. On June 8, 2018, little more than
13 a week before the first day of trial in this case, Plaintiff served on Monsanto an Amended Witness
14 List that purported to add another two witnesses – Drs. Charles Jameson and Mark Martens.¹ In
15 the same email, Plaintiff also belatedly designated portions of Dr. Martens’ deposition transcript
16 and requested that Monsanto provide counter-designations and objections a week later.

17 Monsanto objected and promptly alerted Judge Karnow to the issue in an informal call
18 with both parties on June 11, 2018. Plaintiff sought to justify the amendment by claiming that its
19 new trial counsel reviewed Plaintiff’s witness list and noticed Drs. Jameson and Martens were
20 missing, and thus made the decision to disclose them late. Judge Karnow reprimanded Plaintiff
21 for his tactics but delegated the final decision to the Trial Judge when assigned; Judge Karnow
22 suggested that Plaintiff file a Motion for leave to file a tardy amended witness list, particularly to
23 address the prejudice to Monsanto arising from the tardy designation, and noted that he saw no

24 ¹ Plaintiff’s Amended Witness List listed Drs. Jameson and Martens as additional witnesses but
25 did not specify whether Plaintiff intended to call them live at trial versus introducing their video
26 deposition testimony. In Plaintiff’s Separate Statement Regarding Trial Time Limits, served on
27 June 13, 2018, Plaintiff noted that he was introducing only the video depositions of both witnesses
28 and reiterated that Dr. Jameson would testify as a fact witness. Monsanto, which does not take
issue with Plaintiff introducing Dr. Jameson’s fact testimony through his video deposition,
requests that this Court hold Plaintiff to his position on Dr. Jameson as stated in his Separate
Statement Regarding Trial Time Limits.

1 cause to amend.

2 **II. ARGUMENT**

3 **A. Plaintiff's Actions Are in Clear Violation of CMO #7, and He Has No Excuse**
4 **for the Late Disclosures**

5 This court possesses an “inherent power to control litigation” before it and “to exercise
6 reasonable control over all proceedings connected with pending litigation.” *Elkins v. Superior*
7 *Court*, 41 Cal. 4th 1337, 1351 (2007). A Court may use this inherent authority to prevent
8 testimony from an eleventh-hour witness, *see Castaline v. City of Los Angeles*, 47 Cal. App. 3d
9 580, 592 (1975), or to prevent “trial by ambush” and other “unfair results” stemming from
10 “abus[ive] litigation tactics.” *People v. Bell*, 118 Cal, App. 4th 249, 256 (2004).

11 Treating court orders as mere suggestions, Plaintiff’s actions defy Judge Karnow’s CMO
12 #7 and aim to undermine Monsanto’s preparation for trial. Plaintiff has failed to advance any
13 good cause for the untimely modification of its witness list, and Monsanto would be prejudiced by
14 the late additions. For these reasons, the Court should preclude Plaintiff from amending his list at
15 this time.

16 CMO #7 set April 2, 2018 as the deadline for deposition designations and specifically
17 states that these are “to be ruled upon in Department 304.” The parties went through a lengthy
18 objection and counter-designation process – these deadlines also set by CMO #7 – and Judge
19 Karnow issued an order over a month ago ruling on the parties’ objections. *See* 05/16/2018 Order
20 on Deposition Designations and Certain Proposed Jury Instructions.² Similarly, on May 25, 2018
21 (CMO #7’s deadline for witness lists), Plaintiff served his original witness list without mention of

22 _____
23 ² In his email to Monsanto, Plaintiff notes in his email that his supplemental designations for Dr.
24 Martens are made “pursuant to Local Rule 6.3,” but this is off the mark. Local Rule 6.3 allows a
25 party to lodge deposition designations “[a]t least ten (10) days prior to trial, or later as soon as the
26 trial judge is known.” This deadline – and the deadline for lodging a witness list – was modified
27 by CMO #7. Plaintiff cannot make any logical argument that the deadlines in CMO #7 are
28 somehow superseded by the Local Rules – if this were the case, CMO #7 would be entirely
meaningless, and judges would be left without the “inherent rulemaking authority” to “control all
proceedings connected with [the] litigation.” *Elkins*, 41 Cal. 4th at 1351 (also stating that a “trial
court is without authority to adopt local rules or procedures that conflict with statutes or with rules
of court adopted by the Judicial Counsel,” but *not* that a trial court is without authority to modify
Local Rules).

1 either witness – but most crucially for Monsanto, without mention of Dr. Martens. Plaintiff has
2 known about both witnesses for more than a year before its witness list deadline – for example,
3 Dr. Martens and Jameson were deposed in April and May 2017, respectively, in the federal MDL
4 proceeding. There are no new facts justifying Plaintiff’s untimely additions, and Plaintiff cannot
5 now simply point to mistake or the admission of new counsel as a justifiable excuse for his
6 oversight.

7 **B. Plaintiff’s Late Additions Unduly Prejudice Monsanto’s Preparation for Trial**

8 Allowing Plaintiff to introduce the designated video testimony of Dr. Martens or Dr.
9 Jameson as a live witness would unduly prejudice Monsanto. Aside from the precious time
10 Monsanto would now have to spend on counter-designations and objections to Dr. Martens’
11 testimony instead of other trial-related tasks, in the two weeks between receiving Plaintiff’s
12 original witness list and its amended version, Monsanto had already moved forward with
13 preparing a defense that did not include the testimony of Dr. Martens or additional live testimony
14 from Dr. Jameson. Their testimony would reverberate throughout Monsanto’s preparation of
15 other witnesses, and in the case of Dr. Martens, rebutting it properly is not as simple as merely
16 providing certain counter-designations. For example, had Plaintiff designated Dr. Martens’
17 testimony on time, Monsanto would have had time to contemplate adding new or different trial
18 exhibits or witnesses. Monsanto would have prepared its own witnesses to rebut Dr. Martens’
19 expected testimony. Both of these would affect Monsanto’s presentation of its opening statement.
20 And with respect to Dr. Jameson, Monsanto does not object to the introduction of his video
21 testimony. But if Plaintiff does seek to examine him live, Monsanto would be forced to prepare
22 for an additional cross-examination that it did not anticipate. Dr. Jameson’s cross-examination
23 would also intersect with Monsanto’s preparation for Plaintiff’s experts Drs. Christopher Portier
24 and Aaron Blair, two other witnesses who participated side-by-side with Dr. Jameson in the
25 International Agency for Research on Cancer’s monograph on glyphosate. Accordingly, it is
26 Plaintiff, and not Monsanto, that should live with the consequences of Plaintiff’s mistake. Dr.
27 Jameson’s live testimony, and all of Dr. Martens’ testimony, should be excluded.

28

1 **III. CONCLUSION**

2 For the foregoing reasons, Monsanto requests that the Court strike Plaintiff's Amended
3 Witness and preclude live testimony from Dr. Jameson and all testimony from Dr. Martens.

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Dated: June 18, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY