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MONSANTO COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

DEFENDANT MONSANTO COMPANY'S REPLY IN SUPPORT OF MOTION *IN LIMINE* NO. 9 TO EXCLUDE OR LIMIT EVIDENCE, ARGUMENT, OR REFERENCE TO ADVERSE EVENT REPORTS

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

I. INTRODUCTION

Nothing in Plaintiff Dewayne Johnson's ("Plaintiff") opposition to Defendant Monsanto Company's ("Monsanto") motion *in limine* changes the fact that out-of-court statements reporting adverse events that other individuals allegedly suffered under other circumstances are incompetent evidence. The irrelevant and unfairly prejudicial adverse event reports ("AERs") are hearsay (and double-hearsay), have nothing to do with the issues in this case, are calculated to distract the jury from the actual issues, and admission of which would prejudice Monsanto. The AERs should be excluded.

II. ARGUMENT

A. AERs Are Not Admissible to Prove "Notice" of a Product Defect or Dangerous Condition

Plaintiff does not dispute that AERs are inadmissible hearsay when offered for the truth of the matters asserted within them. Instead, Plaintiff argues that AERs can escape the hearsay rule if they are being offered to provide "notice" to Monsanto of putative "safety concerns" with Roundup PRO® and Ranger PRO®. *See* Pl.'s Opp'n to MIL No. 9 at 2. Plaintiff's argument is fatally flawed.

First, AERs cannot legitimately provide "notice" to Monsanto of anything relevant without being offered for the truth of the matters asserted in the AERs. In order to show "notice" to Monsanto of an alleged product defect, the jury would have to conclude that allegations in AERs were true—a hearsay purpose. The mere fact that Monsanto supposedly received notice about a particular circumstance is irrelevant unless the circumstances alleged in the AER were true.

Second, even if Plaintiff was correct that the AERs could be relevant to a non-hearsay purpose, they cannot logically or scientifically prove "notice" of the specific type of product defect alleged in this case. A causal cancer link can only be shown through well-controlled scientific studies, not anecdotal, out-of-court assertions by third-party declarants. As Plaintiff's own cited case explains, AERs "have inherent biases as they are second-or-third hand reports, are affected by medical or mass media attention, and are subject to other distortions." *Soldo v. Sandoz Pharm. Corp.*, 244 F. Supp. 2d 434, 539 (W.D. Pa. 2003). For these and many other reasons, such

"[a]necdotal reports ... are not reliable bases to form a scientific opinion about a causal link." *Id.* at 541 (citing *Muzzey v. Kerr-McGee Chem. Corp.*, 921 F. Supp. 511, 519 (N.D. Ill. 1996)). Because AERs are irrelevant to showing a cancer link, they are likewise irrelevant to showing "notice" to Monsanto of a cancer link.

The handful of cases that Plaintiff has cited—all non-California decisions—find AERs relevant to showing "notice" of product defect only where the AERs involve a similar circumstance to the type of accident involved in the underlying litigation. Significantly, they all involve prior reports of acute injuries that involve observable cause-and-effect situations that might be logically probative of the same condition that the plaintiff alleged to have encountered. *E.g., Benedi v. McNeil–P.P.C., Inc.*, 66 F.3d 1378, 1385–86 (4th Cir. 1995) (cited by Plaintiff) (admitting six similar instances of acute injuries following administration of Tylenol contemporaneous with alcohol consumption because that was the circumstance of the claimed injury). This case is obviously very different because it alleges a long term injury, the cause of which is not capable of direct cause-and-effect observation. Further, Plaintiff does not even allege that he has evidence of an AER that relates to mycosis fungoides, or involves exposures to the same products as Plaintiff under similar circumstances to what Plaintiff claims here.

B. The Evidence is Unduly Prejudicial and Confusing to the Jury

The prejudice that Monsanto would suffer from having to litigate extraneous issues is manifest. Plaintiff's opposition confirms that he does not intend to provide any AER relating to the claimed injury in this case, but rather, seeks to show that Monsanto was aware of vague, unspecified "dangers" with its products. Any allegation of a putative danger other than a cancer link is irrelevant to any material issue of Plaintiff's proof. Vague allegations that other individuals alleged unrelated injuries, using unspecified products in other ways, creates the possibility for a myriad of side shows that can only be calculated to distract the jury from the actual issues in this case.

Any small probative value is vastly outweighed by the prejudice to Monsanto. Monsanto has had no ability to cross-examine the declarants in any of the AERs. The jury may well be influenced into believing that the allegation of the third-party-declarants are true, contrary to the

purposes of the hearsay rule, and to Monsanto's prejudice. This prejudice exists regardless of any admonition or instruction by the Court not to consider the statements for the truth of the matter asserted, and far outweighs any supposed probative value the hearsay statements might have.

III. CONCLUSION

For the foregoing reasons, the Court should preclude Plaintiff from introducing any evidence, in the form of testimony or documents, argument, or reference to the irrelevant and unfairly prejudicial AERs.

Dated: June 12, 2018

Respectfully submitted,

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