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17 MONSANTO COMPANY

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20
21 DEWAYNE JOHNSON
22 Plaintiff,
23 vs.
24 MONSANTO COMPANY,
25 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

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/12/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION**

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

9 **II. ARGUMENT**

10 **A. AERs Are Not Admissible to Prove “Notice” of a Product Defect or Dangerous**
11 **Condition**

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

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

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

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

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

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

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

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

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

4 **III. CONCLUSION**

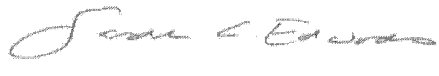
5 For the foregoing reasons, the Court should preclude Plaintiff from introducing any
6 evidence, in the form of testimony or documents, argument, or reference to the irrelevant and
7 unfairly prejudicial AERs.

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Dated: June 12, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

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MONSANTO COMPANY