

1 Sandra A. Edwards (State Bar No. 154578)
Joshua W. Malone (State Bar No. 301836)
2 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
3 San Francisco, CA 94104
Telephone: (415) 954-4400; Fax: (415) 954-4480
4 sedwards@fbm.com
jmalone@fbm.com

5 Joe G. Hollingsworth (appearance *pro hac vice*)
6 Martin C. Calhoun (appearance *pro hac vice*)
Kirby T. Griffis (appearance *pro hac vice*)
7 William J. Cople (appearance *pro hac vice*)
Hollingsworth LLP
8 1350 I Street, N.W.
Washington, DC 20005
9 Telephone: (202) 898-5800; Fax: (202) 682-1639
jhollingsworth@hollingsworthllp.com
10 mcalhoun@hollingsworthllp.com
kgriffis@hollingsworthllp.com
11 wcople@hollingsworthllp.com

12 George C. Lombardi (appearance *pro hac vice*)
James M. Hilmert (appearance *pro hac vice*)
13 Winston & Strawn LLP
35 West Wacker Drive
14 Chicago, IL 60601
Telephone: (312) 558-5969; Fax: (312) 558-5700
15 glombard@winston.com
jhilmert@winston.com

16 *Attorneys for Defendant*
17 MONSANTO COMPANY

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 *IN LIMINE* NO. 14 TO
EXCLUDE ANY EVIDENCE,
TESTIMONY, AND ARGUMENT
RELATING TO PLAINTIFF'S
UNRELATED MEDICAL HISTORY**

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

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/07/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson (“Plaintiff”) seeks to exclude areas of inquiry into and evidence
3 of Plaintiff’s medical history at trial—including Plaintiff’s liver enzyme testing, car accident
4 injuries, arthritis, wrist fracture, hernia, and back injury—by attempting to invoke the physician-
5 patient privilege, arguing the additional disclosure at trial of his medical history unrelated to non-
6 Hodgkin lymphoma (“NHL”) would violate Plaintiff’s privacy rights. Yet, Plaintiff has long since
7 waived his physician-patient privilege by voluntarily signing contracts to consent to the disclosure
8 of his medical history and by failing to claim the privilege when testifying to his medical history at
9 deposition. Even had Plaintiff properly invoked the privilege, the patient-litigant exception to the
10 privilege would still compel disclosure of his medical history as Plaintiff opened the door to his
11 medical history by initiating the litigation. Evidence of Plaintiff’s medical history and preexisting
12 conditions are entirely relevant to the proceeding, and in particular, the issues of causation.
13 Accordingly, the Court should deny Plaintiff’s motion *in limine* to exclude Plaintiff’s medical
14 history.

15 **II. LEGAL STANDARD**

16 The physician-patient privilege allows a patient to refuse to disclose and to prevent another
17 from disclosing confidential communication between the patient and physician. *See* Cal. Evid.
18 Code, § 994. Such privilege is waived where the patient voluntarily consents to disclosure and
19 where a plaintiff fails to claim the privilege with respect to a protected communication. *See* Cal.
20 Evid. Code § 912(a). In addition, the physician-patient privilege cannot be asserted where the
21 communication is relevant to an issue concerning the patient’s condition if tendered by the patient,
22 known as the “patient-litigant” exception to the privilege. *See* Cal. Evid. Code, § 996.

23 **III. ARGUMENT**

24 **A. Plaintiff waived his claim to the physician-patient privilege by voluntarily**
25 **consenting to disclosure of his medical records**

26 Plaintiff voluntarily consented to the disclosure of all of his medical records by signing
27 contractual authorizations for release of his medical history (“Authorizations”), which were in turn
28 properly attached to Monsanto’s subpoenas duces tecum to his medical providers. The documents

1 Monsanto received pursuant to the medical subpoenas include records concerning Plaintiff's liver
2 enzyme testing, car accident injuries, arthritis, wrist fracture, hernia, and back injury. Plaintiff has
3 long-since waived his claim that the records are now subject to the physician-patient privilege and
4 cannot assert Monsanto's use of those records, already voluntarily disclosed, could now somehow
5 violate Plaintiff's right to privacy. *See* Cal. Evid. Code § 912(a).

6 Specifically, Plaintiff signed two types of Authorizations depending on the medical facility
7 where his records were located since Kaiser Permanent hospitals require authorization to be made
8 on Kaiser-generated consent forms. The first type of Authorization for the non-Kaiser hospitals
9 includes language specific to this litigation whereby Plaintiff expressly authorized the medical
10 provider subject to the subpoena to release his "entire medical record file" to Monsanto's counsel,
11 including but not limited to his "medical history or examination reports and notes [etc.] . . .
12 regarding [Plaintiff's] injuries, diseases, diagnoses, or treatment, specifically including but not
13 limited to cancer diagnoses and treatment." *See* Sandra A. Edwards Declaration ("Edwards
14 Decl.") at ¶ 8 , Ex. 7 (Exemplar of Monsanto's Subpoena for Medical Records with Executed
15 Authorization for Release of Medical Records for Non-Kaiser Permanent Records (Identification
16 Information Has Been Redacted)). As stated, Plaintiff agreed that the Authorizations remain in
17 effect through the entire pendency of the litigation, including the resolution of any and all appeals,
18 and will not expire until a final resolution by all parties occurs. *See id.* The second type of
19 Authorization on the required Kaiser Permanente form demonstrates that Plaintiff permitted the
20 release of all his records from 9/1/1992 through present. *See* Edwards Decl. at ¶ 9 , Ex. 8
21 (Exemplar of Monsanto's Subpoena for Medical Records with Executed Authorization for Release
22 of Medical Records for Kaiser Permanent Records (Identification Information Has Been
23 Redacted)).

24 Through the signed Authorizations, Plaintiff unambiguously and voluntarily waived his
25 claim to the physician-patient privilege concerning his medical history and Monsanto properly
26 obtained his medical records through his informed consent. *See Torbensen v. Family Life Ins. Co.*,
27 163 Cal. App. 2d 401, 404 (1958) (patient waived the physician-patient privilege by signing
28 authorization to disclose medical records); *Inabnit v. Berkson*, 199 Cal. App. 3d 1230, 1239

1 (1988) (plaintiff's failure to take any action whatsoever to claim the psychotherapist-patient
2 privilege upon receiving notice of a subpoena duces tecum constitutes waiver under Evidence
3 Code section 912 subdivision (a)).

4 To the extent Plaintiff seeks to exclude Plaintiff's own testimony concerning his medical
5 history, as is suggested by the Declaration of Curtis G. Hoke In Support of Plaintiff's Motion *In*
6 *Limine* No. 14 To Exclude Evidence of Unrelated Medical History, Plaintiff similarly waived any
7 right to assert the physician-patient privilege by expressly consenting to the Authorizations, and
8 through Plaintiff's failure to timely assert the privilege when offering the testimony. *See* Cal.
9 Evid. Code § 912(a); *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 446 (1897) (privilege must be
10 claimed and evidence objected to at the time the evidence is given); *see* Declaration of Curtis G.
11 Hoke In Support of Plaintiff's Motion *In Limine* No. 14 To Exclude Evidence of Unrelated
12 Medical History (Exhibits A and B) (plaintiff's counsel made no objection to testimony).

13 Plaintiff cites to no authority in support his argument that the physician-patient privilege
14 can be re-invoked following his express waiver and consent to disclosure of his medical history.
15 The sum of cases cited by Plaintiff merely acknowledge the existence of a physician-patient
16 privilege, but all are inapposite.¹ For example, Plaintiff relies most heavily on *Britt v. Superior*
17

18 ¹ Plaintiff cites to the following cases, and fails to acknowledge the subsequent disapproving
19 authority. *See e.g. Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 842 (1986) (finding a patient
20 could sustain a claim for damages against his psychotherapist for voluntarily disclosing privileged
21 communications in a separate action) disapproved of by *Jacob B. v. Cty. of Shasta* 40 Cal. 4th 948
22 (2007); *Bd. of Med. Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678 (1979) (hospital
23 had standing to claim the physician-patient privilege on behalf of absent-non-consenting patients)
24 disapproved of by *Williams v. Superior Court*, 3 Cal. 5th 531 (2017); *City & Cty. of San Francisco*
25 *v. Superior Court*, 37 Cal. 2d 227, 231 (1951) (attorney-client privilege could be invoked rather
26 than the physician-patient privilege where physician had provided examination at request of
27 injured party's attorneys); *Rudnick v. Superior Court*, 11 Cal. 3d 924,933 fn1 (1974) (physician's
28 disclosure of patient information to a third person to whom disclosure is reasonably necessary
confers upon the third person the right to claim the physician-patient privilege on behalf of
patient); *Slagle v. Superior Court*, 211 Cal. App. 3d 1309, 1313 (1989) (denial of motion to quash
subpoena for medical records upheld finding such medical records discoverable despite physician-
patient privilege, given the facts of the case); *Hallendorf v. Superior Court*, 85 Cal. App. 3d 553,
557 (1978) (finding trial court's order compelling answers to interrogatories and compliance with
subpoena duces tecum to lifetime of medical history overbroad, given the facts of the case);
accord. *Davis v. Superior Court*, 7 Cal. App. 4th 1008, 1014 (1992); *Lantz v. Superior Court*, 28

1 *Court*, where the Supreme Court of California held that the trial court’s order requiring plaintiffs
2 to make unlimited disclosures of their lifetime medical histories was impermissibly overbroad in
3 an action where plaintiffs sought damages for diminution of property values, personal injuries, and
4 emotional disturbances allegedly caused by operation of a nearby international airport. *See Britt v.*
5 *Superior Court*, 20 Cal. 3d 844, 849 (1978). Unlike here, where Plaintiff unambiguously
6 consented to the disclosure of his medical history during discovery, the plaintiffs in *Britt* had
7 timely objected to the interrogatories requesting plaintiffs’ medical histories and never consented
8 to the disclosure of nor disclosed such medical histories upon asserting the physician-patient
9 privilege. *Id.* at 850-851 (plaintiffs refused to answer deposition questions and moved the court
10 for a protective order to restrain defendant’s investigation into medical histories).

11 Accordingly, because Plaintiff has expressly waived his claim to the privilege, the Court
12 should deny Plaintiff’s motion *in limine* to exclude his medical history properly disclosed.

13 **B. Plaintiff’s Medical History is Relevant to the Litigation**

14 Even if Plaintiff had timely objected to the disclosure of his medical history under the
15 physician-patient privilege, which he did not, Plaintiff’s medical history is relevant to the litigation
16 and should be admissible at trial.

17 Plaintiff seeks significant general damages for pain, suffering, and inconvenience,
18 emotional distress, and loss of consortium as well as special damages for medical expenses, loss of
19 earnings, loss of future earning capacity, and loss of household services. Plaintiff allegedly seeks
20 such damages due to his use of glyphosate-based herbicide (“GBH”) products between June 2012
21 and early 2016 as the Integrated Pest Manager for Benicia Unified School District that he alleges
22 caused him to be diagnosed with mycosis fungoides in August of 2014. *See Edwards Decl.* at ¶ 2,
23 Ex. 1 (Dep. of Dewayne Johnson (“Johnson Dep.”) at 15:20-22; 16:13-18; 325:2-14 (Dec. 7,
24 2017)); *see Complaint* at ¶ 75.

25 _____
26 Cal. App. 4th 1839, 1853 (1994) (court of appeal directed trial court to balance plaintiff’s privacy
27 interest against need for improperly subpoenaed medical records) disapproved of by *Williams v.*
28 *Superior Court*, 3 Cal. 5th 531 (2017); *Tylo v. Superior Court*, 55 Cal. App. 4th 1379, 1387-38
(1997) (plaintiff did not waive her right to privacy solely because she is a public figure, but certain
deposition questions objected to were relevant to plaintiff’s claims).

1 Plaintiff, as the litigant, opened the door to his medical history by filing the lawsuit. The
2 nature of Plaintiff's claims to be decided by a jury, namely whether his use of GBH products
3 caused his mycosis fungoides, warrants the presentation of *all* medical history. The history of his
4 health is directly relevant to identifying causal relationships. *See* Evid. Code §§ 210, 350, and
5 996. The medical records are also relevant to the issues of pain, suffering, and emotional distress
6 damages, as well as to damages for loss of income and household services: the jury must have the
7 opportunity to understand Plaintiff's scope of medical history to determine whether such general
8 damages are appropriate. *See* Cal. Evid. Code §§ 210 and 350. Moreover, the records will assist
9 the jury in understanding the timeline of Plaintiff's work and health history, including the
10 diagnosis of mycosis fungoides. Plaintiff expressly consented to disclosing his medical history
11 and willingly offered testimony throughout the discovery process, and cannot now claim the
12 information offered to the jury would invade his right to privacy. *See* Cal. Evid. Code §§ 996;
13 912(a).

14 The only authority Plaintiff cites to argue his medical history is not relevant to this
15 litigation is dissimilar and concerns a personal injury action between drivers resulting from a
16 vehicle collision. There, the court considered whether it was proper for defendant to cross-
17 examine the plaintiff on her involvement in a prior vehicle accident. *Downing v. Barrett Mobile*
18 *Home Transp., Inc.*, 38 Cal. App. 3d 519, 524-525 (1974). The court acknowledged that in
19 personal injury actions "evidence that a litigant was involved in a prior accident is inadmissible
20 when its only purported relevance is to show a propensity for negligent acts, thus enhancing the
21 probability of negligence on the occasion in suit." *Id.* at 524. Thus, the Court of Appeal found
22 reversible error where the defense counsel was permitted to cross-examine plaintiff on her prior
23 accident and resulting kidney condition, finding the evidence had no probative value given the
24 facts of the case. *Id.* at 525. Unlike *Downing*, this litigation does not concern a personal injury
25 action related to a vehicle collision or allegations of a propensity for negligent acts by Plaintiff,
26 and its holding has no relevance to the facts of this case.

27 //

28 //


1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should deny Plaintiff's Motion *In Limine* No. 14 to
3 exclude areas of inquiry into and evidence of Plaintiff's medical history at trial.

4
5 Dated: June 7, 2018

Respectfully submitted,

6 FARELLA BRAUN + MARTEL LLP

7
8 By: 

9
10 Sandra A. Edwards

11
12 Attorneys for Defendant
13 MONSANTO COMPANY
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28