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

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

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

Attorneys for Defendant
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. 25 TO EXCLUDE EVIDENCE OR ARGUMENT REGARDING OTHER LITIGATION

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

I. INTRODUCTION

Plaintiff Dewayne Johnson's ("Plaintiff") motion does nothing to justify the presentation of irrelevant, foundationless evidence about other litigations. The evidence is highly misleading, and any remote probative value that it could possibly have is far exceeded by the risk of unfair prejudice to Monsanto and distraction of the jury. All evidence about other lawsuits should be excluded.

II. ARGUMENT

A. There is No Possible Foundation for Evidence of Other Litigations

Plaintiff's brief makes clear that there is no foundation for any evidence about the unrelated litigations. Aside from offering the vague comment that there are "various potential avenues of foundation for the evidence," Plaintiff has absolutely no response to the fact that (1) there is no sponsoring witness for the six or seven lawsuits at issue, (2) no expert in this case has relied on these other lawsuits for any purpose, (3) no disclosed fact witness in this case has any relevant connection to those cases, (4) no pertinent deposition testimony exists about any of the lawsuits, and (5) the Court cannot take judicial notice of disputed facts in other pleadings.. *See* Monsanto's MIL No. 25 at 2-3.

The totality of Plaintiff's response on this point is a plea to the Court to defer the issue of foundation to trial, rather than address it in a motion *in limine*. *Id.* However, a motion *in limine* is entirely appropriate to allow "careful consideration of evidentiary issues" on the front end, and "minimize side-bar conferences and disruptions during trial." *Kelly v. New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70 (1996). Excluding reference to extraordinarily misleading and prejudicial evidence that inarguably lacks foundation is an appropriate subject of an *in limine* motion, particularly considering Plaintiff has had every opportunity to identify a possible foundation for the proffered evidence, and has provided none.

B. Evidence of Other Lawsuits is Completely Irrelevant

Plaintiff's brief also makes clear that he no meaningful explanation for how the proffered evidence could be relevant to his claims. As the sole putative support for his argument that prior litigations demonstrate "Monsanto's awareness regarding the association between glyphosate-

containing formulations and cancer," Plaintiff cites an email exchange among Monsanto employees discussing "post-IARC personal injury lawsuits." Ex. B. to Hoke Decl. ISO Opp'n to MIL No. 25 at 2. That email is totally irrelevant. All it indicates is that Monsanto employees anticipated that Monsanto was about to be the target of an orchestrated campaign by contingency-fee attorneys to leverage IARC's misclassification of glyphosate, given that two lawsuits were on file and "Plaintiffs' attorneys have been advertising for additional plaintiffs in other areas." *Id.* The email speaks solely to Monsanto' anticipation of impending litigation and says nothing about notice of any defect. It is absolutely irrelevant to the elements of Plaintiff's claims, and the presentation of it for the jury's consideration of liability would invite reversible error.

Plaintiff has no meaningful argument for how prior lawsuits are possibly relevant in proving a cancer link or any "notice" thereof. Plaintiff has failed to cite any case from any jurisdiction that admits evidence of other litigations as relevant to "notice" that a product can cause cancer. Instead, Plaintiff continues to rely on a handful of vehicular accident cases. Pl.'s Opp'n to MIL No. 25 at 3-4. Obviously, proving a cancer link is very different from proving a dangerous condition of an SUV rolling over on a highway, or a dangerous condition at a given intersection. As Monsanto explained in its opening brief, and Plaintiff wholly ignores, proof of cancer—and any "notice" thereof—can *only* be established through scientific studies. Monsanto's MIL No. 25 at 4.

In the context of herbicides, the EPA specifically mandates carcinogenicity bioassays to test for the possibility of cancer. Glyphosate was found to be negative in all of these tests over and over again, and worldwide regulators have repeatedly concluded—before and after the IARC monograph—that glyphosate poses no cancer risk. In that light, it makes little sense to contend that a lawsuit, or an orchestrated campaign of numerous lawsuits, could provide "notice" of a defect contrary to the results of numerous scientific studies worldwide regulators required for the very purpose of testing for a carcinogen. Monsanto made precisely these points in its opening brief, Monsanto's MIL No. 25 at 4, and Plaintiff has provided no response, tacitly agreeing that Monsanto's position is correct.

Apart from the lack of logic in Plaintiff's position, Plaintiff has the independent problem that he has no evidence that any of the prior lawsuits involve similar circumstances to the claims in this case. *Salas v. California Dep't of Transp.*, 198 Cal. App. 4th 1058, 1072–73 (2011) ("[I]t must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question.") Plaintiff asserts that one prior lawsuit involved a plaintiff claiming mycosis fungoides, Monsanto's MIL No. 25 at 3, but provides the Court with no information about how he could ever prove that fact, no information about the nature of the plaintiff in that litigation, what his lifestyle was, what carcinogens he was exposed to, and what his family history of cancer was. All of these elements are important to understanding the possible cause of the alleged cancer in the prior case and to establishing even a theoretical possibility that the prior allegation could be relevant here. Indeed, the allegations of the prior lawsuit refute any suggestion of similarity: Plaintiff was claiming that his mycosis fungoides resulted from exposure to collective exposure to a broad group of herbicides, including picloram, 2,4-D, Arsenal, and Oust. *See* Ex. C to Hoke Decl. ISO Opp'n to MIL No. 25 at 9 (see XIV).

In the end, the only thing that is "well settled in California," Pl.'s Opp'n. to MIL No. 25 at 3, and elsewhere,[1] is that "Courts have been wary of permitting evidence of other lawsuits *even for impeachment purposes*." *Lowenthal v. Mortimer*, 125 Cal. App. 2d 636, 641 (1954) (emphasis added). There is no reason to depart from this general rule of exclusion here. The introduction of the "other lawsuits could have [] no effect other than to prejudice the jury." *Id.* at 642. Introducing this evidence could induce the jury to infer that Plaintiff's lawsuit must have merit simply because others have filed suit in the past, and it is therefore inadmissible under the

---

[1] *See also Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 142 (Tex. 2004) (rejecting argument that evidence from other lawsuits is relevant to show notice because "product defects must be proved; they cannot simply be inferred from a large number of complaints. If the rule were otherwise, product claims would become a self-fulfilling prophecy—the more that are made, the more likely all must be true."); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 254–55 (S.D.N.Y. 2012) (excluding evidence of similar lawsuits because "courts generally exclude evidence of other related lawsuits" and plaintiff could not point to "a single case for the proposition that mere *allegations* of misconduct are probative"); *Foster v. Berwind Corp.*, No. CIV. A. 90-0857, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (excluding such evidence because "the complaints in these other actions are just that: allegations" that "are dispositive of nothing and would confuse the complex issues already present.").

Evidence Code. *See* Cal. Evid. Code §§1101(a), 1104. Plaintiff has no meaningful response to this manifest prejudice because there is none. All evidence concerning the filing of other lawsuits should be excluded.

III. CONCLUSION

Monsanto's motion *in limine* should be granted.

Dated: June 12, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: _____
Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY