

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**

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. 18 TO EXCLUDE
EVIDENCE OF PRODUCTS NOT AT
ISSUE IN THIS LITIGATION**

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 AND ARGUMENT**

2 Defendant Monsanto Company (“Monsanto”) seeks to exclude evidence of any Monsanto
3 products not at issue in this case, including evidence of litigation involving those products. Such
4 evidence is irrelevant, unduly prejudicial, and a waste of this Court’s time. Plaintiff Dewayne
5 Johnson (“Plaintiff”) opposes Monsanto’s motion for several reasons, all of which miss the mark.

6 First, Plaintiff argues that evidence of past litigation involving other glyphosate-based
7 herbicides (“GBHs”) is relevant as notice to Monsanto of the carcinogenicity of its products. Pl.’s
8 Opp’n to MIL No. 18 at 3. This is the subject of Monsanto’s Motion *in Limine* No. 25, and
9 Monsanto need not restate all of its arguments here. However, it is worth noting that Plaintiff’s
10 own authority states that these other incidents are admissible “provided that the circumstances of
11 the other accidents are similar and not too remote.” *Ault v. Int’l Harvester Co.*, 13 Cal. 3d 113,
12 121 (1974); *see also Buell-Wilson v. Ford Motor Co.*, 141 Cal. App. 4th 525 (2006) (allowing
13 evidence of a “related product” to prove notice of a vehicular defect). Plaintiff cannot provide any
14 evidentiary basis that unadjudicated allegations in other lawsuits – involving plaintiffs with
15 different (non-cancer) diseases and different exposures – are sufficiently “similar” to the
16 circumstances in this case such to provide notice to Monsanto that glyphosate causes cancer,
17 especially in light of decades of scientific studies and regulatory approvals to the contrary. Such
18 evidence is irrelevant to this case and should be excluded.

19 Second, Plaintiff wants to have it both ways, as evidenced by his position on Agent
20 Orange. First, Plaintiff argues that Monsanto’s motion is overly broad because it attempts to
21 exclude evidence of other glyphosate-based products, which he contends is relevant to this
22 litigation. Pl.’s Opp’n to MIL No. 18 at 4-5. But Plaintiff then asserts that evidence of the
23 carcinogenicity of *non*-glyphosate based herbicides, like Agent Orange, should have put Monsanto
24 on notice of the danger of *all* of its herbicides – including those with entirely different properties,
25 like Roundup PRO® and Ranger PRO®. Moreover, Plaintiff concedes that, to provide notice of
26 the existence of a danger, the other product must be “substantially similar.” Pl.’s Opp’n to MIL
27 No. 18 at 4 (citing *Chlopek v. Fed Ins. Co.*, 499 F.3d 692, 699) (7th Cir. 2007); *see also Dowdy v.*
28 *Coleman Co.*, No. 1:1CV45DAK, 2012 WL 5944232, at *7 (D. Utah Nov. 28, 2012) (excluding

1 evidence of manufacturer’s other products because “there is no evidence that the other types of
2 [products] . . . are substantially similar” and therefore such products are “not relevant.”). Plaintiff
3 can proffer no evidence showing that any non-GBH, including Agent Orange, is “substantially
4 similar” to GBH products such as Roundup PRO® or Ranger PRO®. And contrary to Plaintiff’s
5 claim that Monsanto’s motion is overbroad, Monsanto does not contest the relevance of other
6 GBHs. But Plaintiff cannot credibly argue that evidence of any non-GBH products, including
7 Agent Orange or PCBs, bears any weight on the primary issue of causation before this Court.

8 Third and finally, Plaintiff argues that he should be able to introduce evidence of Agent
9 Orange, PCBs, and a litany of allegedly “bad” corporate acts if Monsanto offers any evidence that
10 “New Monsanto is green and earth friendly” – presumably evidence that Roundup PRO® and
11 Ranger PRO® have beneficial effects. Pl.’s Opp. to MIL No. 18 at 5-6. But evidence of
12 glyphosate’s benefits – i.e., its effectiveness in controlling weeds without harming the
13 environment or those who apply it – is essential background information for the jury and directly
14 relevant to the jury’s assessment of Plaintiff’s allegations, including his purported exposure and
15 causation, his claims for punitive damages, and to rebut Plaintiff’s suggestions that Monsanto’s
16 employees acted with improper motives. Indeed, Judge Curtis E. Karnow has already denied
17 Plaintiff’s motion *in limine* to exclude evidence regarding the efficacy and benefits of glyphosate.
18 *See* 4/3/2018 Motion *in Limine* Order at 3. Monsanto should thus be able to introduce relevant
19 information about glyphosate’s benefits – or as Plaintiff characterizes it, of “the New Monsanto” –
20 without Plaintiff prejudicially introducing evidence of Agent Orange and other irrelevant products
21 that have no bearing on the facts of this case.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 **II. CONCLUSION**

2 For the foregoing reasons, the Court should exclude Plaintiff from introducing evidence of
3 products not at issue in this litigation.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 12, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY