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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11
12 DEWAYNE JOHNSON,
13 Plaintiff,
14 vs.
15 MONSANTO COMPANY,
16 Defendant.

Case No.: CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MOTION IN LIMINE
NO. 18**

Trial Judge: TBD

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

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2 **I. INTRODUCTION**

3 Defendant Monsanto Company (“Monsanto”) seeks to exclude “any evidence of any
4 Monsanto products other than Ranger PRO® ("Ranger PRO") and Roundup PRO® ("Roundup
5 PRO"), and any litigation relating to products that are not at issue in this case.” Def’s Mot. at 1.
6 Monsanto’s sweeping motion is overly broad and not limited in the scope of the evidence that
7 Monsanto seeks to exclude. While Plaintiff does not contest that, under California law, certain
8 evidence would be properly excluded from the trial of this matter including: (1) the final
9 outcomes (including jury verdicts) of past or pending lawsuits; and (2) prior judicial decisions,
10 opinions, and findings of fact from other cases. Plaintiff does contest that any and all evidence
11 should be excluded of litigations involving similar products.
12

13
14 A blanket exclusion of any and all evidence that relates in any way to other products that
15 are not Ranger PRO and Roundup PRO is overly broad and it is even likely to exclude some of
16 Monsanto's own studies on Glyphosate-based products. As it is likely that some of Monsanto's
17 own studies evaluated glyphosate-based products other than Ranger PRO and Round PRO.
18 Monsanto should be more reserved in its Motions. Furthermore, IARC evaluated all glyphosate
19 products, not limiting its thorough analysis to only Ranger PRO and Round PRO and general
20 causation experts all talk about glyphosate-based products rather than one brand. This Court
21 should resist Monsanto's attempt to suppress relevant evidence and deny Monsanto's motion.
22

23 **II. ARGUMENT**

24 Only evidence that is relevant to the issues before the Court is admissible. California
25 Evidence Code Section § 350. However, evidence need not bear directly on any issue, and it is
26

1 still "admissible if it tends to prove the issue, or constitutes a link in the chain of proof." *Dike v.*
2 *Golden State Co.*, 269 P.2d 619, 622 (Cal. App. 3d Dist. 1954)(quoting *Firlotte v. Jessee*, 172
3 P.2d 710, 711 (Cal. App. 3d Dist. 1946).

4
5 **A). Evidence Of Past Litigation Is Admissible To Prove Knowledge And Duty**

6 Evidence of prior lawsuits alleging that Monsanto's glyphosate-based formulations
7 caused cancer is directly related to Monsanto's knowledge of the carcinogenicity of its products.
8 It is well settled in California that other similar incidents are admissible to prove "a defective
9 condition, knowledge, or the cause of the accident, provided that the circumstances of the other
10 accidents are similar and not too remote." *Ault v. International Harvester Co.*, (1974) 13 Cal.3d
11 113, 121-22; *Genrich v. State of California* (1988) 202 Cal.App.3d 221, 228. Furthermore,
12 "when evidence of prior similar incidents are offered to show notice of a dangerous condition,
13 the requirement of similarity of circumstances is relaxed: [A]ll that is required is that the
14 previous injury should be such as to attract the defendant's attention to the dangerous situation
15 ..." *Buell-Wilson v. Ford Motor Co*, 141 Cal.App.4th 525, 543, (cert. granted and
16 vacated on other grounds by *Ford Motor Co. v. Buell-Wilson*. 550 U.S. 931) (quoting from
17 *Husson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 404) (emphasis added).

18
19
20 It is undisputed that the labeling for Monsanto's glyphosate-based products, including but
21 not limited to Roundup PRO and Ranger PRO, have never included information warning
22 consumers that use of the product could cause cancer. Monsanto's failure to act in response to
23 reports of its products causing cancer in consumers is directly relevant to Plaintiff's claim for
24 negligent failure to warn.
25
26

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2 **B). Evidence Of Monsanto's Past Products Is Admissible To Prove Knowledge**
3 **And Duty**

4 Evidence of substantially similar products "is relevant to show the existence of a danger,
5 the defendant's notice of the danger, and the cause. . . ." *Chlopek v. Fed. Ins. Co.*, 499 F.3d 692,
6 699 (7th Cir. 2007). Precluding testimony of prior accidents has been held to constitute
7 fundamental error. *Perret v. Seaboard Coast Line R. Co.*, 299 So. 2d 590, 592 (Fla. 1974)
8

9 Monsanto seeks to exclude evidence of products such as poly-chlorinated biphenyls
10 ("PCBs") and Agent Orange. At trial, Plaintiff does not intend to introduce evidence of PCBs,
11 unless Monsanto attempts to paint itself as good corporate citizen, and as such, opens the door to
12 past product manufacturing practices. Although, PCBs have been found to cause cancer and this
13 evidence shows that Monsanto is willing to sell carcinogenic compounds without warning of a
14 cancer risk. *See* Declaration of Curtis Hoke, **Ex. A.** (IARC Monograph of PCBs).
15

16 In contrast, any attempt to exclude evidence regarding Agent Orange, a herbicide, should
17 not be allowed. Agent Orange is a herbicide that was manufactured by Monsanto.¹ Agent
18 Orange was made of a mixture of two herbicides, 2, 4-D and 2, 4,S-T. *See* Declaration of Curtis
19 Hoke, **Ex. B.** (Article on Monsanto's Website) April 7, 2017. Monsanto has manufactured 2, 4-
20 D since the 1960's, failing to provide the proper labeling of the product from the very beginning.
21
22

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24
25 ¹ From 1965 to 1969, the Monsanto Company manufactured Agent Orange. Monsanto has
26 maintained responsibility for this product. Last visited on June 4, 2018.
<https://monsanto.com/company/media/statements/agent-orange-background/>

1 *See* Declaration of Curtis Hoke, **Ex. C.** (Label for 2,4-D) June 8, 1969.

2 At trial Plaintiff will seek to introduce evidence that Monsanto's long history of
3 manufacturing herbicides, including Agent Orange, puts Monsanto on notice of the dangers that
4 herbicides present. In fact, Agent Orange has been found to cause cancer, as well, and that
5 Monsanto failed to warn the public about its carcinogenic. *See* Declaration of Curtis Hoke, **Ex.**
6 **D.** (Article on U.S. Department of Veterans Affairs website). Monsanto with the knowledge that
7 its prior herbicides caused cancer, introduced glyphosate formulated products to the market
8 without proper testing. Evidence of this can be seen in Monsanto's own Admissions. *See*
9 Declaration of Curtis Hoke, **Ex. E.** (Monsanto's Response to Requests for Admissions). In its
10 own Admissions, Monsanto states that it has not conducted toxicity studies of glyphosate
11 formulated products for 12 months or longer. *Id.* However, the EPA requires that
12 carcinogenicity tests extend from 18 months to 24 months. *See* Declaration of Curtis Hoke, **Ex.**
13 **F.** (EPA's Guidelines for Carcinogen Risk Assessment). Monsanto failed to properly test
14 glyphosate formulated products, although it knew of the dangers that herbicides present. As such,
15 Monsanto's motion should be denied because such evidence is relevant to show the existence of a
16 danger and Monsanto's notice of the danger.
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19

20 **C). Evidence Of Prior Products And Litigations Is Necessary To Rebut**
21 **Monsanto's Insinuations And Claims**

22 At trial, it is likely that Monsanto will attempt to introduce evidence or argument seeking
23 to paint itself as a corporation that will "Feed the World and Protect the Planet". *See* Declaration
24 of Curtis Hoke, **Ex. G.** (Monsanto Advertisement on its Website). A litigant opens the door to
25 prejudicial testimony when he submits evidence that leaves a false or misleading impression if
26

1 not corrected by the prejudicial testimony he seeks to exclude. *United States v. Maldonado* (5th
2 Cir. 1994) 472 F.3d 388, 398 abrogated on other grounds, *Kentucky v. King*, (2011) 563 U.S.
3 452, 131 S.Ct. 1849.

4
5 It has become clear that Monsanto is determined to paint itself as the "New Monsanto."
6 Where the "old Monsanto" once manufactured Agent Orange, the New Monsanto is green and
7 earth friendly. *Id.* Monsanto should not be allowed to parade its alleged good citizenry while at
8 the same time seeking to exclude evidence of its harmful products and the litigations that
9 followed. If Monsanto attempts to paint itself as a good corporate citizen, in rebuttal, Plaintiff
10 should be entitled to cross-examine Monsanto's witnesses about its corporate citizen status by
11 introducing evidence of prior products and litigations. If there are significant differences between
12 the prior products and litigations to the current litigation, Monsanto can make note of them
13 during re-direct. *Dowdy v. Coleman Co., Inc.*, 1:11CV45DAK, 2012 WL 5944232, at *7 (D.
14 Utah Nov. 28, 2012)(Court allowed a party to explore the significance of any differences on
15 cross examination.)
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18 **IV. CONCLUSION**

19 For the above stated reasons, the Court should deny Monsanto's Motion *in limine* No. 18.

20 Respectfully submitted,

21 **THE MILLER FIRM, LLC**

22
23 DATED: June 7, 2018

24 By:/s/ Timothy Litzenburg
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