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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
06/07/2018
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF SAN FRANCISCO**

15 DEWAYNE JOHNSON,

16 Plaintiff,

17 v.

18 MONSANTO COMPANY ET. AL,

19 Defendants.

20 Case No. CGC-16-550128

21 **PLAINTIFF'S OPPOSITION TO**
22 **DEFENDANT'S MOTION *IN LIMINE***
23 **NO. 9 TO EXCLUDE OR LIMIT**
24 **EVIDENCE, ARGUMENT, OR**
25 **REFERENCE TO ADVERSE EVENT**
26 **REPORTS**

27 Trial Judge: TBD

28 Trial Date: June 18, 2018

Time: 9:30 a.m.

Department: TBD

1
2 **I. INTRODUCTION**

3 In Monsanto's Motion *in Limine* 9, the Defendant attempts to exclude from the Court
4 evidence, argument, or reference to adverse event reports (AERs) and complaints involving its
5 products. Adverse event reporting is an invaluable tool in monitoring the safety of herbicides and
6 the exclusionary request found within the Defendant's Motion seeks to bar highly relevant and
7 probative evidence that goes to the very heart of the knowledge and notice that Monsanto has
8 possessed with regards to their product safety.
9

10 Monsanto has a duty to report adverse events and complaints involving its products to the
11 U.S. Environmental Protection Agency. See 40 C.F.R. § 159.184. The Defendant alleges that
12 introduction of such evidence would distract and confuse the Jury by focusing on irrelevant and
13 prejudicial evidence and result in an undue consumption of time. Nothing could be further from
14 the truth as Mr. Johnson simply wishes for the Jury to hear the relevant facts when procedurally
15 and legally appropriate.
16

17 At trial, Mr. Johnson intends to introduce evidence to illustrate that Monsanto has
18 continued to sell its products despite having notice and knowledge for decades of their potential
19 safety issues. Monsanto's knowledge of these safety concerns and its failure to warn Mr. Johnson
20 of the risks associated with glyphosate exposure is and has always been one of the essential claims
21 in this case.
22

23 **II. ARGUMENT**

24 **A. Evidence of Monsanto's Adverse Event Reports Products Is Highly Relevant, And**
25

1 (W.D.Pa.2003)(quoting Brief Description with Caveats of System, Surveillance and Data
2 Processing Branch of the Division of Epidemiology and Surveillance, Division of Epidemiology
3 & Surveillance, Dec. 1988, at p. 1).

4 With this in mind, AERs should be admissible to show notice. See *Benedi v. McNeil-*
5 *P.P.C., Inc.*, 66 F.3d 1378, 1385–86 (4th Cir.1995)(“[T]he district court did not abuse its
6 discretion in admitting the DERs and case summaries, because the plaintiff offered the evidence
7 solely to prove notice.”); *In re Gadolinium–Based Contrast Agents Products Liability*, 956
8 F.Supp.2d 809, 815 (N.D. Ohio Jul. 25, 2013), *affirmed by Decker v. GE Healthcare Inc.*, 770
9 F.3d 378 (6th Cir.2014)(citations omitted); *In re Fosamax Prods. Liab. Litig.*, No. 06 MD
10 1789(JFK), 2013 WL 174416, at *4 (S.D.N.Y. Jan. 15, 2013)(“Adverse event reports received
11 by Merck until the time of Plaintiff’s injury are admissible if used as evidence that Merck was on
12 notice of potentially serious jaw injuries.”); *Wolfe v. McNeil–PPC, Inc.*, No. 07–348, 2012 WL
13 38694, at *2 (E.D.Pa. Jan. 9, 2012)(“However, reports submitted to the FDA before plaintiff’s
14 alleged injury occurred would not be hearsay if offered on the issue of defendants’ notice of
15 potential safety risks from the use of Children’s Motrin.”); *Schedin v. Ortho–McNeil–Janssen*
16 *Pharm., Inc.*, 808 F.Supp.2d 1125, 1139 (D.Minn.2011)(“The Court had denied its previously
17 filed motion in limine regarding AERs, finding that the evidence was admissible to show notice
18 and could also support a finding of causation.”); See *In re Tylenol (Acetaminophen) Mktg., Sales*
19 *Practices & Prod Liab. Litig.*, 181 F. Supp. 3d 278, 306 (E.D. Pa. 2016)(“Even if the AERs are
20 hearsay, the plaintiff argues they are relevant to showing notice. The defendants argue that these
21 AERs are not admissible to show “notice” because they are unreliable. This argument misses the
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25
26

1 point. An AER is notice of some event or problem. The “reliability” issue is more one of weight
2 than of relevance. Reliable or not, they are notice of some event of significance to this case and
3 that likely takes them out of the hearsay rule.”)

4
5 Furthermore, the Supreme Court has held that evidence of actual harm to nonparties can
6 help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the
7 general public, and so was particularly reprehensible. See *Philip Morris USA v. Williams*, 127 S.
8 Ct. 1057, 1064 (U.S. 2007).

9
10 Here, Defendants argue under the premise that AERs are either hearsay or irrelevant on
11 their face because they do not involve the Plaintiff’s condition and are therefore inadmissible. As
12 illustrated in the cases above AERs are relevant as to notice to the Defendants of a safety issue
13 with Roundup products and are therefore relevant to failure to warn claims. Therefore, the Court
14 should reject Defendants arguments and allow these reports in as admissible evidence.

15
16
17 **B. The Plaintiff’s Use of The Evidence in Contention Will Not Unduly Prejudice the**
18 **Defendant or Produce A Time-Wasting Confusion of Issues.**

19 Evidence Code section 352, allows trial courts to exclude otherwise admissible evidence
20 whose “probative value is substantially outweighed” by its potential for unfair prejudice, confusion,
21 or undue consumption of time. *People v. Beagle* (1972) 6 Cal.3d 441, 451–453, 99 Cal.Rptr. 313,
22 492 P.2d 1; California Evidence Code §352.

23
24 Prejudice as contemplated by Evidence Code section 352 is not so sweeping as to include
25 any evidence the opponent finds inconvenient. Evidence is not prejudicial merely because it

1 undermines the opponent's position or shores up that of the proponent. *People v. Doolin* (2009)
2 45 Cal.4th 390, 417, 87 Cal.Rptr.3d 209, 198 P.3d 11.

3 Defendants face no prejudice beyond the culpable evidence the AERs demonstrate. This is
4 that Defendants had prior knowledge of the safety issues with their products. Thus, since the
5 evidence is both probative and non-prejudicial it should be admitted.
6

7 Also depending on the utilization of the specific AER in question, the Court at its discretion
8 may use specifically fashioned limiting instructions to guard against the Jury possibly conflating
9 issues or being unduly influenced. *Shade Foods, Inc. v. Innovative Products Sales & Marketing,*
10 *Inc.* (2000) 78 Cal.App.4th 847, 915, 93 Cal.Rptr.2d 364.
11

12 **III. CONCLUSION**

13 For the above stated reasons, the Court should deny Defendant Monsanto Company's
14 Motion *in limine* No. 9.
15
16

17 DATED: June 7, 2018

18 By:/s/ Curtis Hoke
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Attorneys for Plaintiff,
DEWAYNE JOHNSON

1 **PROOF OF SERVICE**

2 I, Curtis G. Hoke, declare as follows:

3 I am a citizen of the United States and am employed in Orange County, Virginia. I am over the
4 age of eighteen years and not a party to the within action. My business address is 108 Railroad
5 Avenue, Orange, Virginia 22960. On June 7, 2018 _____, I served the following
6 documents by the method indicated below:

7 **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 9 TO**
8 **EXCLUDE OR LIMIT EVIDENCE, ARGUMENT, OR REFERENCE TO ADVERSE**
9 **EVENT REPORTS**

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14
15 **By Electronically Serving** the document(s) described above via LexisNexis File & Serve
16 by 7:00 p.m. Pacific Standard Time on all parties appearing on the LexisNexis File & Serve
17 service list.

18 **SEE ATTACHED SERVICE LIST**

19 I declare under penalty of perjury under the laws of the State of California that the above
20 is true and correct.

21 Executed on this June 7, 2018 at Orange, Virginia.

22 

23
24 Curtis G. Hoke,
25 Declarant

1 *Johnson v. Monsanto Company, et al.*
2 **San Francisco Superior Court Case No.: CGC-16-550128**

3 **SERVICE LIST**

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28 PROOF OF SERVICE