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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
TRIAL BRIEF TO EXCLUDE EXPERT
TESTIMONY FROM DR. OPE OFODILE**

Honorable Judge Suzanne R. Bolanos

Department: 504
Trial Date: June 18, 2018

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
07/23/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION AND ARGUMENT**

2 On the morning of Friday, July 20, Plaintiffs’ counsel advised Monsanto that one of the
3 Plaintiff’s numerous treating physicians, Dr. Onaopemipo “Ope” Ofodile, would be flying in from
4 Atlanta to testify on the morning of Monday, July 23. Although Dr. Ofodile was not included on
5 Plaintiff’s most recent submission of trial witnesses, Monsanto has no objection to Dr. Ofodile
6 testifying as a fact witness regarding her treatment of Plaintiff. However, Monsanto does object to
7 the extent Plaintiff may seek to proffer expert testimony, because (1) Plaintiff did not designate
8 Dr. Ofodile (who is not an oncologist) as an expert witness, and (2) Dr. Ofodile disavowed any
9 opinion or basis for opinion as to the cause of plaintiff’s mycosis fungoides. Monsanto
10 respectfully requests that this Court exclude any such opinion testimony at trial.

11 **A. Plaintiff Failed to Properly Disclose Dr. Ofodile as an Expert Witness**

12 A party must provide “[a] list setting forth the name and address of a person whose expert
13 opinion that party expects to offer in evidence at the trial.” Cal. Code Civ. Proc. § 2034.260(a)
14 (emphasis added). “[O]n objection of any party who has made a complete and timely compliance
15 with Section 2034.260, the trial court *shall* exclude from evidence the expert opinion of any
16 witness that is offered by any party who has unreasonably failed to . . . list that witness as an
17 expert under Section 2034.260.” Cal. Code Civ. Proc. § 2034.300(a) (emphasis added).

18 Here, Plaintiff did not give Monsanto any notice that Dr. Ofodile would be offering expert
19 testimony. Plaintiff’s most recent expert disclosure simply says he “reserves the right to elicit
20 testimony at trial from any of Plaintiff’s treating physicians to the full extent allowable under
21 California law.” *See* Edwards Decl. at ¶ 2, Ex. 1 (12/29/2017 Designation/Declaration of Expert
22 Witnesses by Plaintiff). This disclosure fails to meet the express requirements of CCP §
23 2034.260(a), and does not provide any meaningful notice to Monsanto that Plaintiff would call Dr.
24 Ofodile as an expert, especially given that there are *eight* treating physicians in this case. *See*
25 *Kalaba v. Gray*, 95 Cal. App. 4th 1416, 1418 (2002) (“[T]he transformation from treating
26 physician to expert does not occur unless the treating physician is identified by name and address
27 in the proponent’s designation, and *it is not enough that a plaintiff has ‘designated’ as experts*
28 *‘all past or present examining and/or treating physicians.’*”) (emphasis added).

1 *Kalaba* is on point. There, the plaintiff specifically identified two medical experts but
2 “reserve[d] the right to call as potential experts any and all [of her] past or present examining
3 and/or treating physicians” without specifying them by name. *Id.* The Court of Appeal agreed
4 that the treating physicians were properly excluded from testifying as experts: “Where, as here, the
5 treating physicians are not listed or identified by name but simply referred to in the designation as
6 ‘all past or present examining and/or treating physicians,’ there has been no compliance with the
7 letter or spirit of Section 2034, and the trial court acts within its discretion when it excludes expert
8 testimony by the non-designated doctors.” *Id.* at 1423.

9 Given that Dr. Ofodile was not properly disclosed as an expert, she cannot testify on the
10 cause of Plaintiff’s disease. Dr. Ofodile also cannot testify to any hypothetical treatments she
11 would have recommended to Plaintiff. Questions calling for speculative answers are appropriate
12 only for expert witnesses, and even then, such questions “must be rooted in facts shown by the
13 evidence.” *People v. Moore*, 51 Cal. 4th 386, 405 (2011). Any such testimony would render her
14 an expert witness, and Plaintiff failed to properly disclose her as an expert. Thus, this Court
15 should exclude Dr. Ofodile from offering any expert testimony.

16 **B. Dr. Ofodile Cannot Broaden Her Deposition Testimony to Now Offer a**
17 **Causation Opinion**

18 Further, Dr. Ofodile should be barred from offering causation testimony because it would
19 exceed the scope of her deposition testimony. “[A] party’s expert may not offer testimony at trial
20 that exceeds the scope of his deposition testimony if the opposing party has no notice or
21 expectation that the expert will offer the new testimony, or if notice of the new testimony comes at
22 a time when deposing the expert is unreasonably difficult.” *Easterby v. Clark*, 171 Cal. App. 4th
23 772, 780 (2009). In particular, “[w]hen an expert deponent testifies as to specific opinions and
24 affirmatively states those are the only opinions he intends to offer at trial, it would be grossly
25 unfair and prejudicial to permit the expert to offer additional opinions at trial.” *See Jones v.*
26 *Moore*, 80 Cal. App. 4th 557, 565 (2000).

27 Here, Dr. Ofodile did not opine that glyphosate-based herbicides (“GBHs”) caused
28

1 Plaintiff's cancer.¹ At her deposition, Dr. Ofodile testified only about a generalized association
2 between environmental exposures and cutaneous t-cell lymphoma ("CTCL"), the general category
3 of lymphoma involving the skin,² and even then testified that CTCL has no known cause.³ She
4 testified that she was unfamiliar with Ranger Pro or Roundup⁴ or any specifics regarding
5 Plaintiff's exposure history,⁵ and she never testified about any scenarios under which Plaintiff
6 should avoid spraying GBHs. And she specifically testified that, if called at trial, she would *not*
7 opine that environmental exposures caused Mr. Johnson's cancer. *Id.* at 170:1-12. ("Q: Okay.
8 And if you were called to testify at trial, then that's the same opinion you would offer, I take it?
9 A: Yeah. That there is no definitive proof. Q: Okay. A: Correct."). She cannot now contradict
10 her earlier testimony and spring upon Monsanto a new opinion at trial, including hypothetical
11 scenarios under which she would have advised Plaintiff to stop spraying GBHs.

12 Any change in Dr. Ofodile's testimony would come with no notice to Monsanto, which –
13 having had no opportunity to depose her again on the basis of her changed opinion – would be
14 unfairly and substantially prejudiced at trial. Here, Monsanto will have had no opportunity to
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16 ¹ See Edwards Decl. at ¶ 3, Ex. 2 (Dep. of Ope Ofodile at 58:23-59:1-5 (Jan. 8, 2018)) ("Q: Okay.
17 So you're not offering the opinion, then, that his exposure to glyphosate or Ranger Pro or
18 Roundup definitively caused his mycosis fungoides? A: Definitively . . . I cannot say that,
19 correct."); *id.* at 169:24-170:170:1-5 ("[L]ike I said before, there is no definitive proof. I don't
know what exactly – what type of exposures Mr. Johnson had. So I, you know, I definitely cannot
say specifically whether it's related or not.").

20 ² See Edwards Decl. at ¶ 3, Ex. 2 (Dep. of Ope Ofodile at 55:15-22) ("Q: And so it sounds like,
21 then, your overall characterization of the literature, that you've seen at least, on environmental
22 exposures and C.T.C.L. is that some suggest – there is some suggestion based on geographical
clustering but that the evidence overall is not conclusive. Is that fair? A: Yeah."); *id.* at 58:3-10.
23 ("Q: And when you say 'association is definitely there' but you can't say it definitively, that
24 environmental exposures definitively cause C.T.C.L., so then it sounds like you're recognizing
25 there's a difference between association and causation. Is that correct? A: Yeah, there is.").

26 ³ See Edwards Decl. at ¶ 3, Ex. 2 (Dep. of Ope Ofodile at 23:3-14) ("Q: So then the etiology or
27 causation of [CTCL] is multi-factoral, correct, from what you said? A: Well, I think it's, right
28 now it's idiopathic, honestly. Q: Okay. A: But I think – Q: What do you mean by 'idiopathic'?
A: Idiopathic meaning that we don't know what causes it.").

⁴ See Edwards Decl. at ¶ 3, Ex. 2 (Dep. of Ope Ofodile at 43:16-18) ("Q: Are you familiar at all
with Ranger Pro or Roundup products? A: No.").

⁵ Edwards Decl. at ¶ 3, Ex. 2 (Dep. of Ope Ofodile at 164:5-10) ("Q: But again, you never got into
the details in your conversations with Mr. Johnson about the specifics of any of his claimed
exposures to the Ranger Pro or the pesticides; correct? A: Correct.").

1 take Dr. Ofodile's deposition in light of her changed opinion and prepare for cross-examination
2 and rebuttal of her testimony. Any such changed testimony would be contrary to the purpose of
3 the expert discovery statutes, "to permit parties to adequately prepare to meet the opposing expert
4 opinions that will be offered at trial." See *Jones*, 80 Cal. App. 4th at 565. ("The need for pretrial
5 discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses because
6 the other parties must prepare to cope with witnesses possessed of specialized knowledge in some
7 scientific or technical field. They must gear up to cross-examine them effectively, and they must
8 marshal the evidence to rebut their opinions.") (citations omitted).

9 **II. CONCLUSION**

10 For the foregoing reasons, the Court should preclude Dr. Ofodile from offering any expert
11 testimony, including on what caused Plaintiff's disease and any other expert testimony that was
12 not expressed in her deposition.

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Dated: July 22, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY

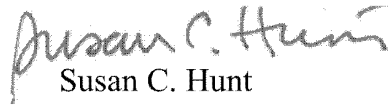
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2018, I electronically filed the foregoing

- **DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF TO EXCLUDE CAUSATION TESTIMONY FROM DR. OPE OFODILE**
- **DECLARATION OF SANDRA A. EDWARDS IN SUPPORT OF DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF TO EXCLUDE CAUSATION TESTIMONY FROM DR. OPE OFODILE**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Susan C. Hunt