

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**

21 DEWAYNE JOHNSON,
22 Plaintiff,

23 vs.

24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
MOTION *IN LIMINE* NO. 24 TO
EXCLUDE REFERENCE TO A "MAGIC
TUMOR"**

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

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FILED
*Superior Court of California,
County of San Francisco*
05/24/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION**

2 Monsanto respectfully requests that the Court exclude any inflammatory reference to the
3 results of the 1983 Bio/dynamics mouse study as involving a “magic tumor.” This pejorative term
4 is prejudicial and would serve to mislead the jury.

5 **II. FACTUAL BACKGROUND**

6 In the early 1980s, Monsanto engaged the laboratory Bio/dynamics to conduct a long-term
7 carcinogenicity study in mice to support the registration of glyphosate. The U.S. Environmental
8 Protection agency (“EPA”) and Monsanto discussed the results of the study and, at the EPA’s
9 suggestion, Monsanto engaged an outside consulting pathologist, Dr. Marvin Kushner, to re-
10 examine the slides prepared by Bio/dynamics. Upon re-evaluation, Dr. Kushner detected a
11 previously unidentified kidney tumor in the mouse control group.

12 In 1986, a Scientific Advisory Panel (“SAP”) reviewed the evidence, including Dr.
13 Kushner’s evaluation, and unanimously concluded that glyphosate should *not* be categorized as a
14 possible human carcinogen based on the mouse study. *See* Declaration of Sandra A. Edwards
15 (“Edwards Decl.”) at ¶ 35, Ex. 34, (Scientific Advisory Panel Report) (EPA_02241986-001-006).
16 The EPA adopted the SAP recommendations in June of 1986. Since then, numerous worldwide
17 regulatory bodies relying on dozens of epidemiological, animal, and genotoxicity studies have
18 rejected any link between glyphosate and cancer.

19 During discovery in the federal court multi-district litigation (“MDL”) *In re Roundup*
20 *Prods. Liab. Litig.*, No. 3:16-md-2741-VC (N.D. Cal.), plaintiffs demanded and received access to
21 the original pathology slides that Dr. Kushner reviewed from the 1983 study. Having received
22 access to these slides, none of Plaintiff’s technical experts express any disagreement with Dr.
23 Kushner’s pathology review. Nevertheless, Plaintiff seeks to sow controversy regarding the 1983
24 study by denigrating Dr. Kushner’s analysis. For example, in his report, Dr. Charles Benbrook—
25 an *economist*—sensationally refers to the tumor identified by Dr. Kushner as a “magic” tumor, as
26 if Monsanto had somehow conjured it from thin air. *See* Edwards Decl. ¶ 14, Ex. 13 (Expert
27 Report of Charles Benbrook at ¶ 90 (Dec. 21, 2017)) (“In 1991, EPA changed its interpretation of
28 the 1983 mouse oncogenicity study, on account of one seemingly ‘magic’ tumor found by a

1 Monsanto-commissioned pathologist, who had been asked to reread the kidney slides in the study.
2 This one magic tumor in the male mouse control group turned the seemingly positive
3 Bio/dynamics mouse study into a negative one.”). In fact, Dr. Benbrook admitted to having
4 concocted this phrase himself. *See* Edwards Decl. at ¶ 42, Ex. 41 (Dep. of Charles Benbrook at
5 274:6-16 (Feb. 8, 2018)).¹ And he repeatedly used such sensational terminology when describing
6 the tumor during his deposition. *See id.* at 247:14-25. Monsanto anticipates that Plaintiff will try
7 to make similar insinuations to create a distraction about this supposed “magic tumor” conjuring.

8 **III. ARGUMENT**

9 The Court should exclude any reference to a “magic” tumor. *See* Cal. Evid. Code § 350.
10 Such evidence is irrelevant to whether glyphosate-based herbicides caused Plaintiff to develop
11 mycosis fungoides. None of the Plaintiff’s technical experts claims that Dr. Kushner’s review of
12 the pathology slides was flawed, or that the tumor in the control group was not real.

13 The only “expert” who has purportedly opined on the pathology slide is Dr. Benbrook—an
14 economist with no expertise in any scientific discipline, much less pathology. *See* 05/17/2018
15 Order on *Sargon* and Summary Judgment at 30. The Court has already precluded Dr. Benbrook
16 from interpreting emails or Monsanto communications. *Id.* The Court should likewise preclude
17 Dr. Benbrook from commenting on the results of the 1983 study, or the re-review of the pathology
18 slides, or expressing any opinions about that regulatory review process, or the communications
19 between Monsanto and EPA about it. Likewise, the Court should preclude any argument or
20 characterization of a “magic” tumor by Dr. Benbrook and/or Plaintiff’s counsel. Using such
21 language when describing this tumor serves only to distract or inflame the jury, has no non-
22 prejudicial purpose, and should be excluded under Cal. Evid. Code § 352.

23

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1 “Q. You used the term “magic tumor,” not only in your testimony today, but in a number of
25 places in your report. Is that a term that EPA has used to describe the control group tumor?

26 A. No.

27 Q. Is that a term that is used in the scientific evaluation of pathology slides, “magic
28 tumor”?

A. I haven't encountered it.

Q. So you came up with that phrase?

A. Yeah. I came up with it.”

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should exclude any reference to a “magic tumor”
3 pertaining to the 1983 Bio/dynamics mouse oncogenicity study.

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Dated: May 24, 2018

Respectfully submitted.

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY