Michael J. Miller (appearance *pro hac vice*)
Timothy Litzenburg (appearance *pro hac vice*)
Curtis G. Hoke (State Bar No. 282465)
THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
Phone: (540) 672-4224
Fax: (540) 672-3055
mmiller@millerfirmllc.com
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

Attorneys for Plaintiff
DEWAYNE JOHNSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY

Defendants.

Case No. CGC-16-550128

NOTICE OF MOTION AND PLAINTIFF'S MOTION *IN LIMINE* NO. 7 TO EXCLUDE ANY ARGUMENT AND TESTIMONY REGARDING WHAT THE EPA WOULD HAVE DONE HAD MONSANTO ATTEMPTED TO ADD A WARNING OF NON-HODGKIN'S LYMPHOMA TO ITS LABELING

Trial Judge: TBD

Hearing Date: TBD
Time: TBD
Department: TBD

Trial Date: June 18, 2018

[Filed concurrently with Declaration of Curtis Hoke and [Proposed] Order]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at a date and time set by the trial judge assigned to this matter of the above-entitled Court located at 400 McAllister St. San Francisco, CA 94102-4515, Plaintiff Dewayne Johnson will and hereby does move *in limine* to exclude any speculative argument and testimony regarding what the EPA would have done had Monsanto attempted to add a warning of Non-Hodgkin's lymphoma to the labeling of Glyphosate-based herbicides.

This motion *in limine* has been brought pursuant to Evid. Code §§ 210, 350, and 352 and is based on the grounds that any testimony regarding what the EPA would have done had Monsanto attempted to add a warning to its labeling is completely irrelevant and would be pure speculation and conjecture.

This Motion *in Limine* is based on this Notice of Motion, the Motion and accompanying Memorandum of Points and Authorities, the concurrently-filed Declaration of Curtis Hoke, the concurrently-filed Proposed Order, all pleadings and papers on file in this matter, and such further oral and documentary evidence and papers as the Court may consider at the time of the hearing.

Respectfully Submitted,

Dated: May 24, 2018

THE MILLER FIRM, LLC

By: */s/ Curtis G. Hoke*

Michael J. Miller (appearance *pro hac vice*)
Timothy Litzenburg (appearance *pro hac vice*)
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choke@millerfirmllc.com
Attorneys for Plaintiff
DEWAYNE JOHNSON

MEMORANUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff Dewayne Johnson ("Plaintiff" or Mr. Johnson") respectfully requests that the Court exclude the introduction at trial of any evidence, argument, or opinion as to whether the EPA would have accepted or rejected an attempt by Monsanto Company ("Monsanto") to add a warning of Non-Hodgkin's lymphoma to the labels of Glyphosate-based herbicides (GBHs). This speculative evidence is not relevant to the issue of whether Monsanto failed to adequately warn of risks: (1) that were known or knowable (in strict liability); or (2) risks that a reasonably prudent manufacturer would have known or warned about (in negligence). Further, the introduction of such evidence would distract and confuse the jury focusing on irrelevant and prejudicial evidence, and result in an undue consumption of time. Accordingly, this evidence should be excluded.

II. ARGUMENT

Monsanto admits that it has never warned consumers, including Mr. Johnson, of an association between GHB's and Non-Hodgkin's lymphoma. See Exhibit A; Def's Responses to P's First Req. for Admissions at 7. There is also no evidence that Monsanto ever submitted a request to the EPA requesting a labeling change to warn about the risk of Non-Hodgkin's lymphoma. Exhibit B; Deposition Transcript of John R. Fowle, III, Ph.D. (Fowle Dep.) at 315-316. Nonetheless, Monsanto has continually argued to this Court that the EPA would have rejected any attempt by Monsanto to include such warnings statements in the labeling of GHB's.

Plaintiff anticipates that Monsanto will seek to argue or introduce testimony from its witnesses that the EPA would not have allowed Monsanto to warn consumers of the risk of Non-Hodgkin's lymphoma. By way of example, Monsanto's regulatory expert, Dr. John Fowle, has offered the following testimony:

> Q. Are you aware of anything in the record documenting Monsanto requesting permission from the EPA to ad a cancer warning to any of its glyphosate-containing products?
>
> A. No, I'm not, but I doubt that they would – I've never heard of a company, you know, doing that, because EPA has label requirements in place. . . EPA has concluded since

1991 that it's not carcinogenic. So they would not be put on the label. A cancer warning would not be put on the label.

Q. Dr. Fowle, who did you tell me a minute ago drafts and submits draft labels? Is it the registrant or the EPA?

A. Yes, it's the –

MR. COPLE: Objection, asked and answered.

A. Yes, it's the registrant, but EPA reviews and approves those labels based on its guidance, and it does it and consistent with its risk assessments, the evaluations, it's done, et cetera.

And based on my experience at EPA, EPA would not allow such a - - such a warning or label statement, that a chemical causes cancer if it – if the EPA has determined it doesn't cause cancer.

Id. at 312:1-313:11.

Any testimony and argument regarding what the EPA would have done in a hypothetical situation is irrelevant and purely speculative. As the testimony has no bearing on any "disputed fact that is of consequence to the determination of the action" it must be excluded.

A. Whether the EPA Would Have Approved or Rejected a Labeling Change is Irrelevant.

Under California law, only relevant evidence is admissible. *See* Evid. Code § 350, 210. Relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." California Evidence Code § 210. Whether the EPA would have hypothetically approved or rejected unknown warning language is of no consequence to the determination of this case and, therefore, must be excluded.

In denying Monsanto's motion for summary judgment on federal preemption, this Court held that a pesticide manufacturer can be found liable under failure to warn claims even if the EPA considered and rejected concerns about the alleged safety risk. This is true because EPA's approval of pesticide labeling is "*not* a defense for the commission of any offense under FIFRA." See Court Order (5/17/18) at 42 (emphasis in original). "[T]he mere fact that the EPA has approved a product label does not prevent a jury from finding that that same label violates FIFRA." *Hardeman v. Monsanto Company,* 216 F. Supp. 3d 1037, 1038 (N.D. Cal. 2016).

The labeling of GHB's has never included any warning or information regarding the risk of Non-Hodgkin's lymphoma and Monsanto has never taken any action to include such a warning. Whether the EPA would have hypothetically rejected a proposed cancer warning has no effect on the jury's determination as to whether Monsanto is liable under California law. The introduction of such evidence would only confuse the jury as to the appropriate standard to apply in analyzing Plaintiff's failure to warn claims. The introduction of such testimony and argument would improperly shift the jury's attention away from whether Monsanto failed to adequately warn Plaintiff to the question of whether the EPA would have approved a warning. As the EPA's decision as to this question is irrelevant under California law, this evidence must be excluded.

B. Evidence or Argument that the EPA Would Have Rejected a Labeling Change is Entirely Speculative.

Testimony and argument regarding what the EPA would have done had Monsanto hypothetically requested a cancer warning is not only irrelevant, it is pure speculation and conjecture. Dr. Fowle admits that his opinions regarding whether the EPA would have rejected a request by Monsanto to include a cancer warning to its labeling amounts to nothing more than speculation. *Id.* at 313:24-314:8 ("I don't know, because I don't know what's in the thinking of EPA, and I was not engaged with the glyphosate. . ."); *see also* 296:15-17 ("Yes, again I can't, you know, I don't know what EPA would do. I don't work at EPA. You'd have to ask them."). Any suggestion that Dr. Fowle's opinion is based on his "experience" with the FDA is rebutted by the fact that Dr. Fowle cannot cite to a single instance where the EPA denied a request from a pesticide manufacturer to add enhanced safety warnings to its label. *Id.* at 315:3-15. As such, Monsanto has nothing to back up its arguments and suggestions that the EPA would have rejected an enhanced warning.

Evidence that is based on mere speculation is inadmissible. *See Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 (holding that opinion testimony which is conjectural or speculative "cannot rise to the dignity of substantial evidence."). For this reason, courts have routinely excluded evidence as to what regulatory agencies "would have done" in hypothetical situations. *In re Gadolinium Prod. Liab. Litig.*, 2013 WL 593993 at *1 (N.D. Ohio Feb. 15, 2013)(granting plaintiff's

motion in *limine* to exclude witnesses from speculating as to FDA's knowledge or state of mind); *In re Trasylol Prod. Liab. Litig.*, 763 F. Supp. 2d 1312, 1331 (S.D. Fla. 2010)(excluding evidence of what the FDA would have done in hypothetical circumstances); *Rheinfrank v. Abbot Labs.*, 119 F. Supp. 3d 749, 768 (S.D. Ohio 2015)(testimony about what the FDA would have done in response to a labeling change is speculative)

There is no legitimate reason for the introduction of speculative testimony about whether the EPA would have accepted or rejected hypothetical warning language. Such arguments or testimony have no bearing on the material issues in this case and would confuse the issues in this case and mislead the jury.

III. CONCLUSION

Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an Order granting this motion *in limine* and excluding any argument or testimony regarding what the EPA would have done had Monsanto attempted to add a warning of Non-Hodgkin's lymphoma to its labeling.

Respectfully submitted,

Dated: May 24, 2018

THE MILLER FIRM, LLC

By: */s/ Curtis G. Hoke*

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(540) 672-4224 phone; (540) 672-3055 fax
mmiller@millerfirmllc.com
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

Attorneys for Plaintiff
DEWAYNE JOHNSON