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12 *Attorneys for Plaintiff*
13 *DEWAYNE JOHNSON*

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF SAN FRANCISCO**

16 DEWAYNE JOHNSON,
17 Plaintiff,
18 v.
19 MONSANTO COMPANY
20 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]

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**PLAINTIFF'S MOTION *IN LIMINE* NO. 7 TO EXCLUDE ARGUMENT OR TESTIMONY REGARDING
WHAT THE EPA WOULD HAVE DONE HAD MONSANTO ATTEMPTED TO ADD A WARNING**

**ELECTRONICALLY
FILED**
*Superior Court of California,
County of San Francisco*
05/24/2018
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

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

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

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

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16 Respectfully Submitted,

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18 Dated: May 24, 2018

THE MILLER FIRM, LLC

19
20 By: /s/ Curtis G. Hoke

Michael J. Miller (appearance *pro hac vice*)
Timothy Litzenburg (appearance *pro hac vice*)

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DEWAYNE JOHNSON

1 **MEMORANUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

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

12 **II. ARGUMENT**

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

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

- 24 Q. Are you aware of anything in the record documenting Monsanto requesting permission
25 from the EPA to ad a cancer warning to any of its glyphosate-containing products?
- 26 A. No, I’m not, but I doubt that they would – I’ve never heard of a company, you know,
27 doing that, because EPA has label requirements in place. . . EPA has concluded since
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1 1991 that it's not carcinogenic. So they would not be put on the label. A cancer warning
2 would not be put on the label.

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

5 A. Yes, it's the –

6 MR. COPLE: Objection, asked and answered.

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

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

13 *Id.* at 312:1-313:11.

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

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

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

23 In denying Monsanto's motion for summary judgment on federal preemption, this Court held
24 that a pesticide manufacturer can be found liable under failure to warn claims even if the EPA
25 considered and rejected concerns about the alleged safety risk. This is true because EPA's approval of
26 pesticide labeling is “*not* a defense for the commission of any offense under FIFRA.” See Court Order
27 (5/17/18) at 42 (emphasis in original). “[T]he mere fact that the EPA has approved a product label does
28 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).

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

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

12 Testimony and argument regarding what the EPA would have done had Monsanto
13 hypothetically requested a cancer warning is not only irrelevant, it is pure speculation and conjecture.
14 Dr. Fowle admits that his opinions regarding whether the EPA would have rejected a request by
15 Monsanto to include a cancer warning to its labeling amounts to nothing more than speculation. *Id.* at
16 313:24-314:8 ("I don't know, because I don't know what's in the thinking of EPA, and I was not
17 engaged with the glyphosate. . ."); *see also* 296:15-17 ("Yes, again I can't, you know, I don't know
18 what EPA would do. I don't work at EPA. You'd have to ask them."). Any suggestion that Dr. Fowle's
19 opinion is based on his "experience" with the FDA is rebutted by the fact that Dr. Fowle cannot cite to
20 a single instance where the EPA denied a request from a pesticide manufacturer to add enhanced safety
21 warnings to its label. *Id.* at 315:3-15. As such, Monsanto has nothing to back up its arguments and
22 suggestions that the EPA would have rejected an enhanced warning.

23 Evidence that is based on mere speculation is inadmissible. *See Roddenberry v. Roddenberry*
24 (1996) 44 Cal.App.4th 634, 651 (holding that opinion testimony which is conjectural or speculative
25 "cannot rise to the dignity of substantial evidence."). For this reason, courts have routinely excluded
26 evidence as to what regulatory agencies "would have done" in hypothetical situations. *In re*
27 *Gadolinium Prod. Liab. Litig.*, 2013 WL 593993 at *1 (N.D. Ohio Feb. 15, 2013)(granting plaintiff's
28

1 motion in *limine* to exclude witnesses from speculating as to FDA’s knowledge or state of mind); *In re*
2 *Trasylol Prod. Liab. Litig.*, 763 F. Supp. 2d 1312, 1331 (S.D. Fla. 2010)(excluding evidence of what
3 the FDA would have done in hypothetical circumstances); *Rheinfrank v. Abbot Labs.*, 119 F. Supp. 3d
4 749, 768 (S.D. Ohio 2015)(testimony about what the FDA would have done in response to a labeling
5 change is speculative)

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

10 **III. CONCLUSION**

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

14
15 Respectfully submitted,

16
17 Dated: May 24, 2018

THE MILLER FIRM, LLC

18
19 By: /s/ Curtis G. Hoke

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