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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
REPLY IN SUPPORT OF 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*
06/12/2018
Clerk of the Court
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Deputy Clerk

1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson (“Plaintiff”) agrees that Dr. Charles Benbrook will not use the
3 phrase “magic tumor” to describe the results of the 1983 Bio/dynamics mouse study. *See* Pl.’s
4 Opp’n to MIL No. 24 at 1.¹ But this does not resolve the problem if Dr. Benbrook is permitted to
5 opine that Defendant Monsanto Company (“Monsanto”) “pa[id] experts to come up with pre-
6 ordained opinions on carcinogenicity.” Pl.’s Opp’n to MIL No. 24 at 5. Whether he calls the
7 tumor “magic” or “pre-ordained,” the result is the same. Such testimony is unfounded, prejudicial,
8 and inflammatory and should be excluded.

9 **II. ARGUMENT**

10 Monsanto does not seek to exclude *the fact* that, at the EPA’s suggestion, it engaged an
11 outside pathologist to re-examine the original mouse slides prepared by Bio/dynamics. Nor does
12 Monsanto seek to exclude *the fact* that the slides and Dr. Kushner’s analysis sparked discussion.
13 But Plaintiff and Dr. Benbrook do not seek to simply recount these “interactions with the EPA and
14 the regulation decision making process with respect to the mouse study.” *See* Pl.’s Opp’n to MIL
15 No. 24 at 6. They want to argue that Monsanto’s conduct was “unethical,” that it “manipulat[ed]
16 . . . study data for purposes of profit,” and “pai[d] experts to come up with pre-ordained opinions
17 on carcinogenicity.” Pl.’s Opp’n to MIL No. 24 at 5. For example, Dr. Benbrook repeatedly
18 attempts to divine Monsanto’s intentions by claiming that “[k]eeping regulators in the dark,” and
19 “failing to share new information it gained from its internal research” were “common tactic[s]
20 Monsanto relied on to delay or block stricter worker-safety label requirements.” *See* Declaration
21 of Sandra A. Edwards ¶ 4, Ex. 3 (Expert Report of Charles Benbrook) at ¶ 573. Yet none of
22 Plaintiff’s technical experts have expressed *any* disagreement with Dr. Kushner’s pathology
23 review, despite the fact Plaintiff has had access to those slides.

24 The entire 1983 “magic tumor” sideshow has nothing to do with whether Roundup®
25 caused Plaintiff’s cancer. Plaintiff exemplifies the wildly unfounded allegations he seeks to
26 introduce by speculating that, “[i]f Monsanto had not paid an expert to make this tumor
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28 ¹ Though not explicitly conceded, Plaintiff’s counsel and other witnesses should similarly be precluded from using the “magic tumor” phrase.

1 finding,”—a scandalous assertion for which it has no evidence—“*then* there would be a warning
2 on the Ranger PRO® label that glyphosate is carcinogenic. Mr. Johnson *then* would not have used
3 Ranger PRO® and it would not be sprayed near children.” Pl.’s Opp’n to MIL No. 24 at 6
4 (emphasis added). Plaintiff’s reference to children in particular only highlights the inflammatory
5 and prejudicial nature of the testimony and argument he plans to present to the jury. This Court
6 has already precluded Dr. Benbrook from testifying that Monsanto misled the EPA or opining on
7 Monsanto’s legal obligations or from arguing that inferences of knowledge or intent can be
8 derived from documents such as emails. 5/17/2018 Order on *Sargon* and Summary Judgment
9 Motions at 30-31. Dr. Benbrook should likewise be precluded from testifying about the results of
10 the 1983 study or the re-review of the pathology slides, and from expressing any opinions about
11 that regulatory review process, or the communications between Monsanto and EPA regarding the
12 1983 study.

13 **III. CONCLUSION**

14 For the reasons discussed above, the Court should exclude any reference to a magic tumor
15 pertaining to the 1983 mouse study, as well as any opinions by Dr. Benbrook as to the results,
16 regulatory review process, and communications between EPA and Monsanto regarding the 1983
17 study.

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19 Dated: June 12, 2018

Respectfully submitted,

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21 By: 

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MONSANTO COMPANY

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