Curtis G. Hoke (State Bar No. 282465) 1 Timothy Litzenburg (appearance pro hac vice) Michael J. Miller (appearance pro hac vice)
THE MILLER FIRM, LLC **ELECTRONICALLY** 2 FILED 108 Railroad Ave. 3 Orange, VA 22960 Superior Court of California, Telephone: (540) 672-4224 County of San Francisco Facsimile: (540) 672-3055 06/07/2018 Clerk of the Court choke@millerfirmllc.com 5 tlitzenburg@millerfirmllc.com BY:VANESSA WU mmiller@millerfirmllc.com Deputy Clerk 6 Attorneys for Plaintiff 7 DEWAYNE JOHNSON 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 COUNTY OF SAN FRANCISCO 10 11 Dwayne Johnson Case No. CGC-16-550128 12 PLAINTIFF'S OPPOSITION TO Plaintiff. **MONSANTO'S MOTION IN LIMINE** 13 NO. 22 TO EXCLUDE EVIDENCE, VS. ARGUMENT, OR REFERENCE TO 14 **ENDOCRINE DISRUPTION, BIRTH** Monsanto Company 15 **DEFECTS, OR EFFECTS ON GUT BACTERIA** Defendant 16 Trial Judge: TBD 17 Trial Date: June 18, 2018 18 Time: 9:30 a.m. 19 Department: TBD 20 21 INTRODUCTION 22 Monsanto moves to "exclude any evidence or argument that glyphosate causes endocrine disruption, causes birth defects, or affects gut bacteria." Monsanto MIL No. 22 at 1, 23 arguing that Plaintiff has not alleged such injuries. However, if Monsanto presents evidence 24 25 regarding the ostensible benefits of Roundup, Plaintiff should be permitted to rebut such 26 evidence with argument pertaining to the diverse range of health problems associated with 27 Roundup. Thus, Plaintiff's presentation of evidence regarding Roundup's effects on gut 28 bacteria, potential to cause birth defects or endocrine disruption is merely tethered to Monsanto

opening the door to such arguments.

In its Motion, Monsanto challenges the weight of any rebuttal evidence that Plaintiff may offer, but Monsanto ignores the fact that questions regarding conflicts of evidence are for the jury to resolve. If Monsanto opens the door to certain issues, Plaintiff ought to be afforded the opportunity to rebut, thereby allowing the jury to decide the weight of the evidence presented by both sides absent any risk of prejudice.

## **ARGUMENT**

Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action..." Cal. Evid. Code § 210 (emphasis added); People v. Nelson (2008) 43 Cal.4th 1242, 1266; Donlen v. Ford Motor Company (2013) 217 Cal.App.4th 138, 148 as modified on denial of reh'g (July 8, 2013). Moreover, section 352 "speaks in terms of undue prejudice. Unless the dangers of undue prejudice, confusion, or time consumption 'substantially outweigh' the probative value of relevant evidence, a section 352 objection should fail." People v. Scott (2011) 52 Cal.4th 452, 490–491 (emphasis in original) (quoting People v. Cudjo (1993) 6 Cal.4th 585, 609); People v. Yu (1983) 143 Cal.App.3d 358, 377 (when applying Section 352, "prejudicial" is not synonymous with "damaging.").

This is a simple matter. If Monsanto does not argue to the jury that Roundup confers benefits on food production, the environment, economy, and people in general, Plaintiff will not raise evidence regarding Roundup's connection with a host of adverse health effects.

Otherwise, Plaintiff should be permitted to offer rebuttal evidence to Monsanto's touting of Roundup's ostensible benefits. *People v. Nunez* (2013) 57 Cal.4th 1, 27 ("Rebuttal evidence is relevant and thus admissible if it 'tend[s] to disprove a fact of consequence on which the defendant has introduced evidence.""). For example, if Monsanto argues that Roundup has a beneficial impact on food production, it is legitimate for Plaintiff to present compelling evidence that the ingestion of Roundup via the food supply has an adverse effect on gut

bacteria, resulting in a host of diseases. See, e.g., Shehata, et al. The Effect of Glyphosate on Potential Pathogens and Beneficial Members of Poultry Microbiota In Vitro, 66 CURR.

MICROBIOL. 350-8 (2013); Aitbali, et al., Glyphosate-Based Herbicide Exposure Affects Gut Microbiota, Anxiety and Depression-Like Behaviors in Mice 67 NEUROTOXICOL. TERATOL. 44-49, 48 ("Consistent with the potential of pesticide-contaminated foods to induce gut microflora dysbiosis in rodent models...we found that the anxiogenic and depressive-like behaviors observed in the present work paralleled by an altered gut microbiota in GBH-treated mice in term of abundance and bacteria species."); Samsel, A..and Seneff, S, Glyphosate's Suppression of Cytochrome P450 Enzymes and Amino Acid Biosynthesis by the Gut microbiome: Pathways to Modern Diseases, 15 Entropy, 1416-1463.

Thus, if Monsanto opens the door to Roundup's benefits to the environment and people, it is unlikely that the presentation of proper rebuttal evidence will pose "an *intolerable 'risk* to the fairness of the proceedings or the reliability of the outcome" *People v. Jones* (2013) 57 Cal.4th 899, 948, *as modified on denial of reh'g* (Oct. 2, 2013) (quoting (*People v. Tran* (2011) 51 Cal.4th 1040, 1047) (discussing the standards for exclusion under Section 352).

Monsanto argues that "No evidence from any witness supports a claim that glyphosate causes any birth defects or causes harm by inhibiting gut microbes," and asserts that Dr. Sawyer's opinions to that effect are "baseless." Monsanto MIL No. 22 at 3, 2. However, Monsanto is conflating weight with admissibility. *People v. Venegas* (1998) 18 Cal.4th 47, 74 (questions of method "simply go to the weight of the evidence, not its admissibility, and hence can be determined by the jury."); *Humane Society of the United States v. Superior Court of Yolo County* (2013) 214 Cal.App.4th 1233, 1257 ("where expert has sufficient knowledge to allow his opinion to go to the jury, question of degree of knowledge goes to weight, not admissibility of evidence."). Monsanto cannot open the door to arguments regarding Roundup's effects on gut bacteria and potential to cause birth defects and then preclude Plaintiff from presenting such evidence by challenging the weight of the evidence *a priori*.

Moreover, Dr. Benbrook's opinion regarding endocrine disruption is limited to Monsanto's responses to the regulatory review of glyphosate's endocrine disruption profile and Monsanto's internal commentary about studies raising potential endocrine disruption problems – as discussed in Dr. Benbrook's report and not excluded by the Court's *Sargon* ruling. *See*, *e.g.*, Ex. A to Hoke Decl., Expert Report of Dr. Charles Benbrook at 61-2. The fact that Monsanto denies endocrine disruption by pointing to the U.S. EPA's conclusions regarding the same only reinforces the point that conflicts about the import of such factual issues, if raised, are proper questions for the jury. *People v. Solomon* (2010) 49 Cal.4th 792, 818 ("[i]t is the jury, not the reviewing court, that resolves conflicts in the evidence."). Monsanto's reason for precluding Plaintiff from proffering *any* evidence regarding endocrine disruption, despite the fact that Dr. Benbrook's opinions are not about causation, is thus a complete red herring.

Having said that, if Monsanto introduces evidence at trial, such as the opinions of Dr. Al-Khatib, to influence the jury's perception regarding Roundup's effects on people and the environment, it is only proper that Plaintiff is able to rebut this on cross examination with contrary evidence regarding Roundup's potential for endocrine disruption and Monsanto's efforts to avoid a comprehensive review of Roundup's endocrine disruption profile. *People v. Hughes* (2002) 27 Cal.4th 825A, 385, *as modified* (Apr. 10, 2002) (evidence "was not admitted as aggravating evidence, but as rebuttal to the defense expert's opinion evidence.") Similarly, evidence of Roundup's potential to cause birth defects would constitute relevant rebuttal evidence should Monsanto argue to the jury that Roundup bestows an array of benefits on society and the environment.

## CONCLUSION

For the foregoing reasons, the Court should deny Monsanto's Motion *in limine* No. 22 and permit Plaintiff to present argument and evidence regarding Roundup's effects on gut bacteria, potential to cause birth defects, and endocrine disruption if Monsanto opens the door to such issues.

DATED: June 7, 2018 Respectfully submitted, By: /s/ Curtis G. Hoke Curtis G. Hoke (SBN 282465) Timothy Litzenburg (appearance pro hac vice) Michael J. Miller (appearance pro hac vice) THE MILLER FIRM, LLC 108 Railroad Ave. Orange, VA 22960 (540) 672-4224 phone (540) 672-3055 fax choke@millerfirmllc.com tlitzenburg@millerfirmllc.com mmiller@millerfirmllc.com Attorneys for Plaintiff