

1 Timothy Litzenburg (appearance *pro hac vice*)
2 Curtis G. Hoke (State Bar No. 282465)
3 **THE MILLER FIRM, LLC**
4 108 Railroad Ave.
5 Orange, VA 22960
6 Telephone: (540) 672-4224
Facsimile: (540) 672-3055
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

7 *Attorneys for Plaintiff*
8 DEWAYNE JOHNSON

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11
12 DEWAYNE JOHNSON,
13 Plaintiff,
14 vs.
15 MONSANTO COMPANY,
16 Defendant.

Case No.: CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MOTION *IN LIMINE*
NO. 10 TO EXCLUDE BENBROOK'S
OPINIONS REGARDING PERSONAL
PROTECTIVE EQUIPMENT**

Trial Judge: TBD

Trial Date: June 18, 2018

Time: 9:00 a.m.

Department: TBD

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/07/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1
2
3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 Monsanto's Motion to Exclude Dr. Benbrook's opinion regarding personal protective
6 equipment is factually incorrect. Dewayne Johnson was constantly exposed to RangerPro
7 through mist hitting his face, neck, and body through the porous Tyvek suit. Dewayne Johnson
8 did wear more protective gear than required on the RangerPro label, but unfortunately far less
9 protective gear than was necessary to keep him safe.
10

11 **II. FACTUAL BACKGROUND**

12 Mr. Johnson was constantly exposed to RangerPro due to his heavy use of the product as
13 an Integrated Pest Manager. As described by Plaintiff's exposure expert Dr. Sawyer:

14 Although he wore a Tyvek jumpsuit, boots, mask and goggles, the suit was not sealed and
15 there was an opening at the arms, legs and neck. "All my face... ears, neck, all that is
16 exposed." (pg. 80)

17 As discussed in detail earlier in this report, Mr. Johnson mixed the Ranger Pro as per the
18 pamphlet using 10 ounces of product to 5 gallons of water. However, he notes that the
19 formulation could be stronger in certain applications. He has also testified spraying
20 reports a higher application frequency for more than 2 years prior to his T-cell lymphoma
21 diagnosis.

22 Mr. Johnson also details high level, severe (upper body soaking) acute exposures. Mr.
23 Johnson testified that he experienced drift exposure "all the time." There was no way to
24 control the drift even by spraying on calm days or changing out nozzles to increase
25 droplet size. During spraying, Mr. Johnson used personal protective equipment including
26 gloves, boots, a "sweatshirt-type hoodie," a permeable Tyvek suit, hat and goggles.
27 (Although Mr. Johnson wore a Tyvek suit, it was apparently the fine cloth type as he
28 explained that drift passed through it leaving him wet).

During Mr. Johnson's first high level, acute exposure, he testified that he was soaked
with glyphosate when a hose broke off the 50 gallon pump unit and he attempted to
access the unit to shut it off. "The hose came [dis-attached] from the back of the truck
and it was just juice everywhere, flying out the back of the truck. So that's when I had to

1 hop in because the switches are in the back. There's no safety switch there ... I reach in
2 the back there and turn it off and that's when I got it on the back of my neck and the back
3 of my head and everywhere and on my face."

4 Sawyer Report, pp.

5 Dr. Benbrook, after reviewing the facts specific to Dewayne Johnson, the documents in
6 this case, and his independent research has reached the opinion that Monsanto knew yet failed to
7 warn handheld spray operators, like Johnson, of the increased risk of exposure. As Dr. Benbrook
8 notes:
9
10

11 Government statistics, and the records in this case, show that over the years, a highly
12 disproportionate share of the glyphosate-related, worker-safety poisoning and illness
13 episodes arise from hand-held, backpack, or other application methods that result in
14 markedly higher exposures and risks than typical, larger-scale applications of Roundup...
15 The sizable differential in routine, expected exposures between ag and many nonag uses
16 of glyphosate arises because of the proximity of people using a hand held or backpack
17 sprayer to the spray solution, their need to walk within and through an area that was
18 sprayed just minutes before, the absence of a barrier or shield to protect them from spray
19 drift, and the absence of an air filtration system (since a respirator is not required on any
20 Roundup labels). Since the 1980s, Monsanto has known that individuals applying a
21 glyphosatebased herbicide through a hand-held or backpack sprayer face markedly higher
22 exposures and risks, especially on windy days. The company has also known that risks
23 are higher for individuals that apply the herbicide for many days a year and/or many
24 hours during a given day,

25 Report at 6-7.

26 Dr. Benbrook identified several ways that Johnson's exposure and thus risk of Cancer
27 could have. Dr. Benbrook noted that meeting minutes from an internal meeting with outside
28 consultants in 2008, acknowledge that "Label recommendations for hand held spraying should
include recommendation for using shields and not walking through the spray or sprayed area."
Id. at p. 111. Johnson did not wear a face shield and did walk through the sprayed area because
Monsanto failed to warn him of these safety precautions. Monsanto knew that exposure is

1 minimized when hand held operators walk perpendicular to the wind, yet failed to advise Mr.
2 Johnson of this simple safety precaution. *Id.* at 113. In the UK, Monsanto had warned hand held
3 operators to wear respirators when using glyphosate based herbicides in situations with heavy
4 face exposure. *Id.* at 106. Mr. Johnson did not receive this warning, although he did start
5 wearing a respirator after developing NHL, which was too late. Monsanto could have prescribed
6 “stricter worker protection measures as a function of how many hours in a work week, or over a
7 year, that a person sprays glyphosate herbicides as part of their job.” P. 7. Mr. Johnson received
8 no such additional warning.
9

10 Mr. Johnson was certainly a conscientious employee and clearly would have followed the
11 extra precautions identified by Dr. Benbrook if
12

13 **IV. CONCLUSION**
14

15 For the foregoing reasons, Plaintiff respectfully requests that this honorable Court DENY
16 Monsanto's Motion *in limine* No. 10.
17

18 DATED: June 7, 2018

Respectfully submitted,

THE MILLER FIRM, LLC

21 By: /s/ Curtis G. Hoke
22 Curtis G. Hoke (SBN 282465)
23 Timothy Litzenburg (appearance *pro hac vice*)
24 **THE MILLER FIRM, LLC**
25 108 Railroad Ave.
26 Orange, VA 22960
27 (540) 672-4224 phone
28 (540) 672-3055 fax
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

Attorneys for Plaintiff