

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

12 *Attorneys for Plaintiff*
13 DEWAYNE JOHNSON

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

16 DEWAYNE JOHNSON,
17 Plaintiff,
18 vs.
19 MONSANTO COMPANY,
20 Defendant.

Case No.: CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MIL NO. 20 TO
EXCLUDE EVIDENCE OF
GHOSTWRITING**

Trial Judge: TBD

Trial Date: June 18, 2018
Time: 9:30 a.m.
Department: TBD

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. INTRODUCTION**

23 Courts have described ghostwriting as "polluting the scientific literature." *Barton v.*
24 *Wyeth Pharm., Inc.*, No. 694 EDA 2010, 2012 WL 112613, at *11 (Pa. Super. Ct. Jan. 3, 2012).
25 The World Association of Medical Editors has put forth the following statement regarding
26
27
28

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Deputy Clerk

1 ghostwriting, “The integrity of the published record of scientific research depends not only on
2 the validity of the science but also on honesty in authorship” [http://www.wame.org/policy-](http://www.wame.org/policy-statements)
3 [statements.](http://www.wame.org/policy-statements)

4 Judge Karnow has already decided that Monsanto’s ghostwriting efforts are relevant to
5 punitive damages and create a triable issue of fact:

6 The internal correspondence noted by Johnson could support a jury finding that
7 Monsanto has long been aware of the risk that its glyphosate-based herbicides are
8 carcinogenic, and more dangerous than glyphosate in isolation, but has continuously
9 sought to influence the scientific literature to prevent its internal concerns from reaching
10 the public sphere and to bolster its defenses in products liability actions

11 4/17/2018, Order Re: Sargon 45-46. Judge Karnow specifically cited the very evidence of
12 ghostwriting Monsanto seeks to now exclude:

13 Ex. 21 (introduced as evidence that Monsanto had a practice of ghostwriting scientific
14 literature about glyphosate in and around 2015), Ex. 22 (introduced as evidence that
15 Monsanto ghost wrote scientific literature about glyphosate as far back as 1999), Ex. 24
16 (introduced as evidence of Monsanto's sponsorship of literature for the purpose of
17 defending products liability claims regarding glyphosate in 2012), Ex. 25 (introduced to
18 show that Monsanto calculated the benefits of securing certain experts to lend credibility
19 to their sponsored studies in 2012).

20 *Id.* at Monsanto’s own scientists admit that they have ghostwritten papers that were “invaluable
21 assets to regulatory reviews” and for purposes of “product defense.” *See infra.* Monsanto’s own
22 attorney have acknowledged that articles were ghostwritten. It is therefore shocking for
23 Monsanto to claim their own admissions and actions are false.

24 In the federal in re: Roundup litigation, Judge Chhabria reviewed the Monsanto
25 documents on ghostwriting and stated:

26 But the internal e-mails reflect that Monsanto has been ghostwriting reports. And those
27 reports have been portrayed as independent. And you -- I mean, your whole presentation
28 thus far has been about how all the independent science supports a conclusion that
glyphosate doesn't cause non-Hodgkin's lymphoma. So, you know, I don't understand
how you could have taken the position that the issue of Monsanto drafting reports for
allegedly independent experts on whether glyphosate causes non-Hodgkin's lymphoma
could be irrelevant to the question of whether there's evidence that glyphosate causes
non-Hodgkin's lymphoma. I just don't understand how you could take that position.

1 Hoke Decl. at Exhibit A, 8/4/2017 In re: Roundup MDL Hearing Tr. 43:4-16. As a result of
2 Judge Chhabria's questioning, Monsanto's own attorneys eventually admitted that Monsanto did
3 ghostwrite articles:
4

5 THE COURT: I haven't been tricked by the plaintiffs. I've apparently been tricked by
6 Monsanto when Monsanto internally referred to what it was doing as "ghostwriting."

7 MR. HOLLINGSWORTH: Well, the ghostwriting memos, Your Honor, don't refer to
8 any original science. Okay? What they refer to is review articles done by groups of --
9 of -- of --

10 THE COURT: Independent scientists?

11 MR. HOLLINGSWORTH: -- professors, and independent people, and oftentimes
12 consultants. That goes on. I'll admit that. Okay?

13 46:15-25.

14 II. FACTUAL BACKGROUND

15 There can be no clearer admission to ghostwriting than the February 19, 2015 email
16 written by Monsanto toxicologist, William Heydens which states:

17 A less expensive/more palatable approach might be to involve experts only for the areas
18 of contention, epidemiology and possibly MOA (depending on what comes out of the
19 IARC meeting), and **we ghost-write the Exposure Tox & Genetox sections**. ..we would
20 be keeping the cost down by **us doing the writing and they would just edit & sign** their
21 names so to speak. Recall **that is how we handled Williams Kroes & Munro, 2000**.

22 Hoke Decl. at Exhibit B, MONGLY00977265. The Williams article, which Monsanto admits to
23 ghostwriting is titled "Safety evaluation and risk assessment of the herbicide Roundup and its
24 active ingredient, glyphosate, for humans" and concludes that "[t]here was no convincing
25 evidence for direct DNA damage;" "Roundup and its components do not pose a risk for the
26 production of heritable/somatic mutations in humans;" and "glyphosate is non carcinogenic;"
27 and "Roundup herbicide does not pose a health risk to humans."¹ In addition to Dr. Heydens

28 ¹ Williams, et al., Safety Evaluation and Risk Assessment of the Herbicide Roundup and Its
Active Ingredient, Glyphosate, for Humans. Regulatory Toxicology and Pharmacology, 31, 117-
165 (2000)

1 admitting that he ghostwrote the article, Monsanto also documented the writing process for the
2 Williams article.

- 3 • WHO: Monsanto Scientists (leads - Heydens, McKee, Wratten) • WHO: • Mammalian Tox: lead - Heydens

4 Hoke Decl. at Exhibit C MONGLY02598454, Glyphosate Publications Recommendations for
5 Process. This was not just some harmless act of scientific fraud. In fact, Williams (2000) has
6 been cited in 679 separate journal articles.²

7 The new registration reviews prompted another round of ghostwritten articles. One
8 example, the Kier and Kirkland study³ was originally written by David Saltmiras of Monsanto.
9 In requesting funding for the manuscript, Saltmiras states that it “will be a valuable resource in
10 future product defense against claims that glyphosate is mutagenic or genotoxic.” Hoke Decl. at
11 Exhibit D, MONGLY02117800, 2/29/2012 manuscript clearance form However, after drafting
12 the manuscript Monsanto felt that “the manuscript turned into such a large mess of studies
13 reporting genotoxic effects, that the story as written stretched the limits of credibility among less
14 sophisticated audiences.” Hoke Decl. at Exhibit E, MONGLY02145918. Therefore, it was
15 decided that a way to “help enhance credibility is to have an additional author on the papers who
16 is a renowned specialist in the area of genotoxicity ... Dr. David Kirkland was identified as the
17 best candidate.” Id. David Saltmiras was therefore taken off of the manuscript as an author and
18 replaced with David Kirkland to give the impression that this study was written by independent
19 experts.

20 Monsanto has even ghostwritten articles for the specific purpose of supporting their
21 position in litigation involving NHL, Prop 65, and to support its position during the EPA’s re-
22 registration. decision for glyphosate. Immediately after IARC deemed glyphosate a carcinogen,
23 Monsanto devised a response plan due to the “[s]evere stigma attached to Group 2A

24 _____
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26 ² Citation Report from Google Scholar.

27 https://scholar.google.com/scholar?cites=965770000498629891&as_sdt=5.47&sciodt=0.47&hl=en

28 ³ Kier & Kirkland, “Review of genotoxicity studies of glyphosate and glyphosate-based formulations” Crit Rev Toxicol. 2013 Apr;43(4):283-315

1 Classification.” Hoke Decl. Ex. F, MONGLY01228577. Part of their plan was to convene an
2 expert panel to “[p]ublish comprehensive evaluation of carcinogenic potential by credible
3 scientists.” *Id.* Monsanto noted that the “Genetox / MOA” section would be important for
4 “future litigation support.” With respect to the expert panel it was noted that from a legal
5 perspective such a panel would be “[a]ppealing; best if use big names; better if sponsored by
6 some group.” *Id.* Monsanto proceeded with arranging the expert panel and worked with
7 Intertek, an industry consultancy firm, to create a false impression that the expert panel was
8 independent.

9 On September 28, 2016, the “independent” expert panel of 12 scientists published its pre-
10 ordained conclusions in the journal *Critical Reviews in Toxicology* in a paper titled “A review of
11 the carcinogenic potential of glyphosate by four independent expert panels and comparison to the
12 IARC assessment.” The journal published a special issue dedicated solely to the work of this
13 expert panel which included an introduction/summary article authored by all of the experts, and
14 four papers authored by various subgroups of the panel. On October 11, 2016 these articles
15 were submitted to the EPA to support the re-registration of Roundup® and the continued
16 exposure of the American public to Roundup®.

17 In the published article submitted to the EPA, the Conflict of Interest statement declares
18 that, “neither any Monsanto company employees nor any attorneys reviewed any of the Expert
19 Panel’s manuscripts prior to submission to the journal.”⁴ These statements are false. Not only did
20 Monsanto regularly contact the authors of the review the manuscripts before they were
21 submitted, they actually wrote parts of the manuscripts. In a January 2016 email to Intertek, for
22 example, William Heydens of Monsanto confirms that he drafted the introduction for the
23 manuscript. Hoke Decl. Ex. G, MONGLY00999487. The independent experts did make edits
24 and contributions to the summary manuscript, however, ultimately it was Heydens who had
25 authority over the content stating “I have gone through the entire document and indicated what I

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27
28 ⁴Williams, et al, A review of the carcinogenic potential of glyphosate by four independent
expert panels and comparison to the IARC assessment, *Crit Rev Toxicol.* 2016 Sep;46(sup1)

1 think should stay, what can go, and in a couple spots I did a little editing.” Hoke Decl. Ex. H,
2 MONGLY01000676.

3 These studies have been replied upon by Monsanto’s experts. Hoke Decl. Exhibit I,
4 Foster Rpt. at 46; Exhibit J, Goodman Rpt. at 32-33. They have been relied upon by the EPA,
5 “The CARC evaluated a total of 54 mutagenicity/genotoxicity studies which included studies
6 submitted to the agency, as well as studies reported in the two review articles (Williams et al.,
7 2000, and Kier and Kirkland, 2013”⁵ In the final SAP report some panel members also relied on
8 the ghostwritten Williams (2016) stating “consideration of the dataset consisting of responses
9 from 8 rat bioassays (Williams et al., 2016) shows there is no relationship between dose and
10 tumor incidence across rat tumor bioassays.”⁶ This section of Williams (2016) was simply an
11 edited version of Monsanto’s position paper. In Europe, several members of Parliament noted
12 that they were “deeply concerned” EFSA relied on the Kier & Kirkland paper and called for an
13 investigation into whether “Monsanto has deliberately falsified studies on the safety of
14 glyphosate.” Hoke Decl. at Exhibit K.

15 **III. Argument**

16 Evidence is relevant if it has a “tendency in reason to prove or disprove any disputed fact
17 of consequence to the determination of the action...” Cal. Evid. Code § 210 (emphasis added);
18 People v. Nelson (2008) 43 Cal.4th 1242, 1266; Donlen v. Ford Motor Company (2013) 217
19 Cal.App.4th 138, 148 as modified on denial of reh'g (July 8, 2013). Moreover, section 352
20 “speaks in terms of undue prejudice. Unless the dangers of undue prejudice, confusion, or time
21 consumption ‘substantially outweigh’ the probative value of relevant evidence, a section 352
22 objection should fail.” People v. Scott (2011) 52 Cal.4th 452, 490–491 (emphasis in original)
23 (quoting People v. Cudjo (1993) 6 Cal.4th 585, 609); People v. Yu (1983) 143 Cal.App.3d 358,
24 377 (when applying Section 352, “prejudicial” is not synonymous with “damaging.”).

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27 ⁵ 10/1/2015 GLYPHOSATE: Report of the Cancer Assessment Review Committee, p. 9,
<file:///D:/Users/jtravers/Downloads/EPA-HQ-OPP-2016-0385-0014.pdf>

28 ⁶ Final Report of SAP Panel, p. 52. https://www.epa.gov/sites/production/files/2017-03/documents/december_13-16_2016_final_report_03162017.pdf

1 **A. Evidence Of Monsanto’s Misconduct Is Relevant And Admissible For**
2 **Purposes Of Impeachment;To Show Conformity With Monsanto’s Business**
3 **Practice and Intent; and is Directly Relevant to Causation.**

4 Defendants, through their corporate employees, have time and again made the claim that
5 Monsanto is an ethical company that makes a patient’s safety its top priority. Evidence of
6 unethical conduct via, *inter alia*, manipulation of publications and other medical literature is
7 relevant and admissible as impeachment evidence to rebut such allegations. Likewise,
8 Monsanto’s misconduct is relevant to show its state of mind with respect to the sacrifice of patient
9 safety through the suppression of safety data, and hence is relevant punitive damages.⁷

10 California Evidence Code Section 1101, states that while evidence of other wrongs or
11 acts is not admissible to prove character or to show action in conformity therewith, it is “relevant
12 to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity,
13 absence of mistake or accident...” As such, evidence of Monsanto’s unethical conduct in the
14 sponsorship of ghostwritten literature is relevant and admissible to rebut any argument by
15 Defendants that they were acting with reasonable care with respect to its sales and marketing of
16 Roundup® and to show Monsanto’s motive and plan regarding its attempts to minimize negative
17 risks and maximize profits. Monsanto’s ghostwriting practices are probative evidence of their
18 failure to warn and that Monsanto’s inadequate representations about the risk and benefits of
19 Roundup® were not mere inadvertence or mistake, but rather the product of conscious malice.
20 Ghostwriting helps establish Monsanto’s state of mind.

21 Pursuant to Evidence Code 1106 “Any otherwise admissible evidence of habit or custom
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23

24 ⁷ The Eighth Circuit itself, in discussion of plaintiff’s evidence showing conduct worthy of
25 punitive damages called it “ghost-written”. *In re Prempro Prods. Liab. Litig. (Scroggin v.*
26 *Wyeth)*, 586 F.3d 547, 557 (8th Cir. 2009), *cert. denied*, 130 S.Ct. 3467 (U.S. 2010). The Nevada
27 Supreme Court, when upholding the jury’s punitive damage award in a hormone therapy case,
28 cited to “Wyeth’s strategy to undermine scientific studies linking an increased risk of breast
 cancer to estrogen-progestin hormone therapy included ghostwriting multiple articles” as one of
 the bases for its ruling. *Wyeth v. Rowatt*, 244 P.3d 765, 784 (Nev. 2010), *cert. denied*, 131 S.Ct.
 3028 (June 20, 2011).

1 is admissible to prove conduct on a specified occasion in conformity with the habit or custom.”
2 The evidence of Monsanto’s unethical conduct in the sponsorship of ghostwritten literature
3 including the manipulation of clinical trials and data reported therein is relevant to show that
4 when Monsanto’s failed to adequately warn Plaintiff and his prescriber about the risks associated
5 with Actos, it was acting in conformity with its routine practices.

6 Finally, the entire purpose of Monsanto’s ghostwriting was to attempt to tip the scale of
7 scientific literature away from conclusions that glyphosate is carcinogenic and to convince
8 regulators that glyphosate is not carcinogenic. References to Monsanto’s ghostwritten articles
9 are rampant throughout the peer-reviewed literature and are cited in articles relied upon by both
10 Plaintiff and Defense experts. Had Monsanto not polluted the scientific literature with unethical
11 behavior, then there would be a greater scientific consensus that glyphosate is carcinogenic and
12 that consensus would have occurred earlier. Earlier knowledge of the carcinogenic properties of
13 glyphosate would also have prevented Mr. Johnson from using RangerPro®.

14
15 **B. The Court Should Reject Monsanto’s Arguments Regarding Relevance, As**
16 **Other Courts Have Routinely Done When Facing The Same Issue.**

17 In *In Re Seroquel Products Liability Litigation*, No. 6:06-md-1769-Orl-22DAB2009 WL
18 223140 (M.D. Fla. Jan 30, 2009), The court held that the plaintiffs should be permitted to explain
19 to the jury the implications of the drug manufacturer’s misrepresentations in the creation and/or
20 sponsorship of ghostwritten publications and other literature related to the safety and efficacy of
21 the drug. As such, the evidence was ruled admissible. *Id.* at *3. In *Proctor v. Davis*, 682
22 N.E.2d 1203 (Ill. App. Ct. 1997), an Illinois appellate court found ghostwriting evidence to be a
23 basis for affirming a punitive damage award. In *Proctor*, the drug company paid doctors to write
24 case reports for publication, ordered thousands of copies of these articles to be distributed to the
25 medical community, undertook the task of ‘scattering about’ information to doctors promoting
26 its drug for unapproved off-label use, and routinely forwarded copies of articles discussing
27 unapproved uses to physicians. *Id.* at 270. The court was particularly offended because,
28 “although it is assumed that physicians will keep abreast of current medical literature, here, part

1 of the flawed literature was generated by [the drug manufacturer].” *Id.* at 284. The court strongly
2 condemned ghostwriting as a practice that should not be countenanced. *Id.*⁸

3 Similarly, in *In re Yasmin & Yaz (Drospirenone) Mktg.*, 2011 U.S. Dist. LEXIS 147935,
4 at *25 (S.D. Ill. Dec. 22, 2011), the court noted “In the context of this case and *the issue of*
5 *adequate warning, in particular*, [evidence of ghostwriting] is *particularly relevant* for the fact
6 finder to consider with all the other evidence in the case.” (emphasis added). In denying the
7 defendant’s motion *in limine* to exclude evidence of ghostwriting, another court has noted:

8 Such evidence is probative of (i) defendant’s failure to warn the medical
9 community of the risks of taking Prempro; (ii) defendant’s disregard for such risks,
10 as that disregard may bear on the appropriateness of punitive damages; and (iii) the
11 information relied upon by plaintiff’s doctors when prescribing Prempro.

12 *Torkie-Tork v. Wyeth*, 2010 U.S. Dist. LEXIS 121804 at *4 (E.D. Va. Nov. 15, 2010). *See*
13 *also Kammerer v. Wyeth*, 2012 U.S. Dist. LEXIS 10905, at *4 (D. Neb. Jan 31, 2012) (“the
14 court finds there is no basis to exclude evidence of Wyeth-supported, ghostwritten
15 literature...”).

16 **C.. Evidence of Monsanto’s Ghostwriting Is Not Overly Prejudicial.**

17 California Evidence Code Section 352 “speaks in terms of undue prejudice. Unless
18 the dangers of undue prejudice, confusion, or time consumption ‘substantially outweigh’
19 the probative value of relevant evidence, a section 352 objection should fail.” *People v.*

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21 ⁸ Many other court have admitted and considered evidence of ghostwriting. *See, e.g., Giles v.*
22 *Wyeth*, 500 F. Supp. 2d 1063, 1064 (S.D. Ill. 2007) (motion for summary judgment on failure to
23 warn claim denied in part because of evidence that Wyeth had “utilized material
24 misrepresentations to promote and market is drug via the practice of ‘ghost writing’ scientific
25 articles for publication under the names of prominent academic ‘authors.’”); *Tucker v.*
26 *SmithKline Beecham Corp.*, 701 F. Supp. 2d 1040, 1048 (S.D. Ind. 2010)(Indiana district judge
27 in Paxil litigation denied challenges to plaintiff’s expert, in part, because expert, in forming his
28 opinion on the drug company’s negligence, appropriately relied upon the “practice of
ghostwriting scientific articles, which [the expert] said has led to exaggeration of the benefits of
drugs and concealment of their risks.”); *Strom ex rel United States of America v. Scios, Inc.* 676
F. Supp. 2d 884, 888-889 (N.D. Cal. 2009) (motion to dismiss False Claims Act cause of action
denied; court discussed evidence that defendant used a third party to ghostwrite articles about its
drug and arranged to submit them for publication under the names of doctors selected by the
defendant).

1 Scott (2011) 52 Cal.4th 452, 490–491 (emphasis in original) (quoting People v. Cudjo
2 (1993) 6 Cal.4th 585, 609); People v. Yu (1983) 143 Cal.App.3d 358, 377 (when applying
3 Section 352, “prejudicial” is not synonymous with “damaging.”).

4 Monsanto claims that ghostwriting evidence is prejudicial because the allegations
5 of ghostwriting are baseless. However, as demonstrated above, the allegations of
6 ghostwriting are true and are based on Monsanto’s own scientists admissions. While the
7 evidence is certainly damaging to Monsanto, there is no indication a jury can’t look at the
8 evidence objectively. Monsanto is free to argue that when its employees say they
9 ghostwrite articles that they didn’t really mean it. Indeed, most of this evidence will come
10 in through Plaintiff’s questioning of Monsanto corporate witnesses in videotaped
11 depositions that have already occurred. The Monsanto witnesses had a chance to explain
12 why their actions at the deposition. Dr. Benbrook will also talk about ghostwritten articles,
13 and Monsanto can cross examine him. This evidence goes straight to the core of
14 Monsanto’s actions in covering up the risk of Roundup®.

15 **IV. CONCLUSION**

16 For the above stated reasons, Plaintiff respectfully requests that this honorable Court
17 DENY Monsanto's Motion *in limine* No. 20 to Exclude Evidence of Ghostwriting.

18 Respectfully submitted,

19 **THE MILLER FIRM, LLC**

20 DATED: June 7, 2018

21 By: /s/ Curtis G. Hoke

22 Curtis G. Hoke (SBN 282465)

23 Timothy Litzenburg (appearance *pro hac vice*)

24 Michael J. Miller (appearance *pro hac vice*)

25 **THE MILLER FIRM, LLC**

26 108 Railroad Ave.

27 Orange, VA 22960

28 (540) 672-4224 phone

(540) 672-3055 fax

tlitzenburg@millerfirmllc.com

choke@millerfirmllc.com

mmiller@millerfirmllc.com

Attorneys for Plaintiff,