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

16 DEWAYNE JOHNSON,
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18 Plaintiff,
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20 vs.
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22 MONSANTO COMPANY,
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24 Defendant.

Case No.: CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MOTION IN LIMINE
NO. 21 TO EXCLUDE DR. SAWYER
FROM INTERPRETING MONSANTO'S
INTERNAL DOCUMENTS, ASCRIBING
MOTIVATIONS, OR CLAIMING
MONSANTO MISLEAD EPA**

Trial Judge: TBD

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

PLAINTIFF'S OPPOSITION TO MONSANTO'S MOTION IN LIMINE NO. 21

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/07/2018
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1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson (hereinafter, “Mr. Johnson” or “Plaintiff”) hereby opposes
3 Defendant Monsanto Company’s (hereinafter, “Monsanto” or “Defendant”) Motion *in limine* No.
4 21 to Exclude Dr. Sawyer From Interpreting Monsanto’s Internal Documents, Ascribing
5 Motivations, or Claiming Monsanto Mislead EPA. The vast majority of Monsanto’s
6 unsubstantiated two-page motion constitutes an improper attempt to reargue aspects of its omnibus
7 motion to exclude plaintiff’s expert witnesses. As the Court rejected viewed aspects of the motion
8 previously as unsupported, the Court should promptly deny the instant motion. Ultimately,
9 defendant’s motion also fails as it seeks to give preclusive effect to the Court’s May 17 Order
10 without discussing, let alone meeting, its applicable burden of proof. For the reasons stated below,
11 the plaintiff requests that the Court deny Monsanto’s Motion *in Limine* No. 21 in full.
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13 **II. STATEMENT OF FACTS**

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15 Monsanto’s instant *in limine* motion paints an inaccurate image of basic facts. *See*
16 “Defendant Monsanto Company’s Motion *in Limine* No. 21 to Exclude Dr. Sawyer from
17 Interpreting Monsanto’s Internal Documents, Ascribing Motivations, or Claiming Monsanto
18 Misled the EPA, dated May 24, 2018 (“MIL 21”). Monsanto hints that Dr. Sawyer “selectively
19 quote[d] various snippets of internal communications,” *id.* at 2 (citing pages 68-73), but Monsanto
20 fails to provide this Court with communications to permit the Court to assess this characterization.
21 That section of the report actually focuses on a single e-mail communication chain, predominately
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1 between six individuals on a single issue in November 2008.¹ *See*, Decl of Curtis Hoke, **Exhibit**
2 **A.** In addressing this single e-mail chain, Dr. Sawyer’s report examines the representations that
3 Monsanto’s employees were making concerning toxicological studies and, within his scope of
4 expertise, detailing the errors in those representations. *See, generally*, Decl. of Sandra A. Edwards,
5 dated May 24, 2018 (“Edwards Dec.”), Exhibit 29. Rather parsing through snippets, Dr. Sawyer
6 quoted full paragraphs or otherwise retained the context, identified significant facts and
7 misrepresentations within those sections and applied his knowledge to explain the significance.
8 *See id.* The only actual parsing occurs in defendant’s quoting of four words from a 166-page report.
9 *See* MIL#21 at 2.

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12 Monsanto had a full opportunity to challenge the expert opinion of Dr. Sawyer in advance
13 of trial. Plaintiff provided Monsanto with Dr. Sawyer’s expert report on December 21, 2017. *See*
14 *generally* Edwards Dec., Exhibit 29. Defendant then deposed Dr. Sawyer on February 26, 2018,
15 with the deposition beginning at 8:12 a.m. and continuing to 5:04 p.m. *Id.*, Exhibit 30. Defendant,
16 accordingly, possessed Dr. Sawyer’s opinion in advance of the deadline for filing a *Sargon* motion
17 to challenge any aspect of an expert’s opinion or report. With the report and deposition testimony,
18 defendant did move to preclude Dr. Sawyer from testifying and the Court addressed that motion.
19 *See* “Order on (1) Monsanto’s Omnibus *Sargon* Motion; (2) Monsanto’s Motion for Summary
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25 ¹ Christophe Gustin wrote four of the ten e-mails and is on every e-mail in the chain. Donna Farmer, and
26 David Saltmiras authored three of the other e-mails and, likewise, received every e-mail. Joel Kronenberg received
27 eight of the ten, Richard Garnett and Jaime Costa received seven of the ten e-mails in the chain and each individual
28 authored one of the e-mails. Each individual was a Monsanto employee and plaintiff expects the document to
squarely fall within the business records exception.

1 Judgment; (3) Plaintiff's Omnibus *Sargon* Motion; (4) Plaintiff's Motion for Summary Judgment,"
2 dated May 17, 2018 (Order).

3 **III. ARGUMENT**

4 **A. Monsanto's Unsubstantiated Motion Exceeds The Limits Of An *In Limine* Challenge.**

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6 The Court should reject the instant *in limine* motion as unsupported, unsubstantiated and
7 well beyond the scope of such motions. "The usual purpose of motions *in limine* is to preclude
8 the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical
9 order *in limine* excludes the challenged evidence and directs counsel, parties, and witnesses not to
10 refer to the excluded matters during trial." *Amtower v. Photon Dynamics, Inc.*, 158 Cal.App.4th
11 1582, 1593 (Cal.Ct.App. 2008) (authority omitted). Such motions "permit more careful
12 consideration of evidentiary issues than would take place in the heat of battle during trial. They
13 minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of
14 evidence." *R & B Auto Ctr., Inc. v. Farmer Grp., Inc.*, 140 Cal. App.4th 327, 371-72 (Cal.Ct.App.
15 2006)(authority omitted).
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18 The Court should deny the instant motion as it fails to address the fundamental nature of
19 an *in limine* motion. Nothing within defendant's twenty-first *in limine* challenge permits a "more
20 careful consideration" of evidentiary issues or even a ruling on a piece of evidence. While seeking
21 to impose various restraints on Dr. Sawyer's expert testimony, defendant has not identified and
22 placed before the Court any aspect of Dr. Sawyer's deposition testimony or any element of his
23 report for the Court to weigh and assess. *See generally* MIL#21. Indeed, beyond quoting four
24 words from the report and making a collective reference to six other pages out of a 166-page report,
25 *id.* at 2, defendant makes no direct reference to Dr. Sawyer at all. Without identifying what specific
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1 evidence it seeks to preclude and without providing any context for the unidentified evidence it
2 seeks to preclude, the instant motion seeks a series of dispositive opinions without presenting the
3 Court with any evidence to assess the motion. Neither the plaintiff nor the Court can participate
4 in a “more careful consideration” of anticipated trial evidence when defendant has failed to identify
5 what it might be. Accordingly, the motion is fatally flawed and the Court should deny it.
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7 An example from the Sawyer report illustrates the basic error of defendant’s sweeping
8 application. Defendant closes with the statement that it seeks a declaration from the Court that it
9 is “improper for Dr. Sawyer to testify that Monsanto misled the EPA or other foreign regulatory
10 bodies.” *Id.* Aspects of such testimony, however, fall squarely within Dr. Sawyer’s expertise and
11 the jury will require expert opinion in order to understand the issue. In explaining data provided
12 to the Spanish government, a Monsanto employee noted:
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14 The IV data gives in vivo disposition of a systematic available dose. This dose
15 could be the result of aggregate systematic exposure (meaning a systemic dose after
16 combined oral, dermal, inhalation exposure). The total accountability of this
17 experiment is high >96% - ~100% and we know exactly the amount that was
18 systemically available. The recovery factor for urine is therefore relevant and
19 reliable.

20 *See, Edwards Dec., Exh. 29 at 68.* As Dr. Sawyer, however, explains:

21 Unfortunately, the dose was not an “*aggregate systemic exposure*” as stated, but
22 the result of an “IV push” injection. **This is clearly stated in the study.** One
23 cannot conclude that the recovery factor from IV dosing is “*relevant and reliable*”
24 to dermal dosing. It is critical to note that IV administration presents a
25 **tremendously high acute dose** to the liver. Saturation of the liver as an
26 elimination pathway to the feces would result in spill over to the urinary excretion
27 pathway. Giving the same (IV) dose quantity over a slow drip period of 24 hours
28 would not expose the liver to potential saturation.

29 *Id.*, Exh. 29 at 68 (emphasis in original). If defendant was making inaccurate representations to
30 any government agency on issues that fall within Dr. Sawyer’s area of expertise and if the opinion
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1 of an expert will assist the finder of fact, as would be the case in the example above, then it is both
2 proper and necessary for Dr. Sawyer to provide such information to the jury. *See also id.*, Exh. 29
3 at 68-69 (discussing information that defendant’s employee failed to consider); *id.* at 69-70 (noting
4 that “it is not acceptable in toxicology to replace real *in vivo* data with a “model” [as defendant’s
5 employee suggest] unless the actual dermal dosing data is faulty”); *id.* at 71 (noting defendant’s
6 apparent admission that primate dermal absorption studies contradict assumptions that defendant
7 is making). With respect to this technical information, Dr. Sawyer’s testimony as to both the
8 available scientific information defendant possessed and what information defendant presented to
9 an agency, coupled with the identification of any discrepancy, contradiction or error between the
10 two, falls squarely within permissible expert testimony.
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13 **B. Monsanto’s Motion *In Limine* No. 21 Seeks To Reargue A Failed Position.**

14 Monsanto errs in seeking to obtain the preclusion of testimony through an *in limine* motion
15 after the Court denied, in relevant part, their prior omnibus motion for summary judgment.
16 Remarkably, Monsanto’s 21st motion *in limine* omits any reminder to the Court that it has already
17 addressed the raised issues specific to Dr. Sawyer’s report. Notably, defendant failed to note that
18 the Court denied certain efforts to preclude testimony because defendant failed to support and
19 substantiate their motion.
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21 Defendant has already sought unsuccessfully to preclude certain testimony in its dispositive
22 motion. Defendant’s omnibus motion, in part, challenged Dr. Sawyer’s and Dr. Benbrook’s
23 opinion regarding corporate conduct. *See* “Defendant Monsanto Company’s Omnibus Motion to
24 Exclude Testimony of Plaintiff’s Experts,” dated Mar. 15, 2018 (“Omni Motion”) at 28-41.
25 Specifically, defendant sought to preclude Dr. Sawyer’s opinion on “corporate intent, conduct, or
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1 ethics” and “EPA regulation and enforcement.” *Id.* at 41. Defendant also pursued a more global
2 challenge to Dr. Sawyer’s report. *See id.* at 24-28 (asserting that Dr. Sawyer had not applied a
3 reliable methodology in his specific causation opinion”). *See also* “Defendant Monsanto
4 Company’s Reply in Support of its Omnibus Motion to Exclude Testimony of Plaintiff’s Experts,”
5 dated Apr. 18, 2018 (“Omni Reply”) at 16 (seeking to exclude testimony on ethical behavior). The
6 parties fully briefed these issues and argued these points before this Court on May 10, 2018.
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8 This honorable Court already addressed these issues and rendered its decision. *See*, May
9 17, 2018 Order at 26-28, 31. Generally, the Court denied defendant’s motion to preclude Dr.
10 Sawyer’s opinion as to specific causation, *id.* at 28 (although qualifying testimony reliant on the
11 cancer slope opinion), while excluding testimony on his last-minute permeability experiment. *Id.*
12 at 28-29. The Court separately considered what testimony that Dr. Sawyer might give concerning
13 the EPA and excluded any opinion as to whether the EPA departed from its regulation. *Id.* at 31.
14

15 This honorable Court rejected defendant’s effort to preclude Dr. Sawyer from offering
16 testimony on a toxicologist’s ethical obligations. The Court determined that “Monsanto has not
17 demonstrated that Dr. Sawyer disclaimed any such opinions. ... Nor has Monsanto supplied a
18 record sufficient to identify the opinions it challenges.” *Id.* (reserving the issue of relevancy for
19 the trial judge). As the defendant limited its effort to preclude various areas of testimony from Dr.
20 Sawyer to a single paragraph, *see* Omni Motion at 40-41, the Court’s conclusion was
21 understandable. The instant motion repeats the same basic challenge without offering any
22 evidence sufficient for supporting its motion. Accordingly, the Court should deny the motion. If
23 anything, defendant has supplied less in the instant motion.
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1 A motion *in limine* does not provide defendant a second opportunity – on less evidence –
2 to obtain the previously-denied bar of expert testimony. Further, to the extent that Monsanto has
3 recrafted its motion and attempts to preclude differently defined testimony, that application is late
4 and the Court should reject the attempt. The Court set an express deadline of March 15, 2018 to
5 file a dispositive motion challenge any aspect of the opposing party’s expert testimony: “March
6 15, 2018: filing of motion(s) for summary judgment/adjudication and *Sargon* motions re experts
7 (together ‘Key Motions’).” *See*, August 29, 2017 Case Management Order No. 6. In making its
8 previous motion, defendant did not challenge Dr. Sawyer’s ability to address issues such as
9 corporate stewardship, interpretation of Monsanto’s representations to government agencies or
10 whether the EPA would have approved a new label for Roundup. *Compare* Omni Motion at 24-
11 28, 40-41 *with* MIL#21 at 2 (seeking these preclusions). Having failed to adhere to the Court’s
12 scheduling order and raised these challenges in a timely fashion, Monsanto may not now
13 circumvent the Court’s schedule and raise these issues for the first time as to Dr. Sawyer.
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16 **IV. CONCLUSION**

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18 For the foregoing reasons, Plaintiff respectfully requests that this honorable Court **DENY**
19 Monsanto’s Motion *in Limine* No. 21 to Exclude Dr. Sawyer From Interpreting Monsanto’s
20 Internal Documents, Ascribing Motivations, or Claiming Monsanto Mislead EPA.
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22 DATED: June 7, 2018

Respectfully submitted,

23 **THE MILLER FIRM, LLC**

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