

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

12 *Attorneys for Plaintiff*
13 DEWAYNE JOHNSON

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
06/07/2018
Clerk of the Court
BY: LINDA ALLSTON
Deputy Clerk

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

16 Dwayne Johnson)

17 Plaintiff,)

18 vs.)

19 Monsanto Company)

20 Defendant)

Case No. CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MOTION *IN LIMINE*
NO. 14 TO EXCLUDE EVIDENCE,
ARGUMENT, REFERENCE OR
COMPARISON TO THE TOBACCO
INDUSTRY**

Trial Judge: TBD

Trial Date: June 18, 2018

Time: 9:30 a.m.

Department: TBD

21 **INTRODUCTION**

22 Monsanto seeks to exclude "any evidence, argument, or reference comparing Monsanto
23 to the tobacco industry." However, Plaintiff does not intend to compare Monsanto to the
24 tobacco industry. To the contrary, any references to the tobacco industry at trial will occur in
25 the context of discussing the pertinent scientific issues presented to the trier of fact. As
26 explained below, the jury will be able to better assess the weight to be given to pieces of
27 relevant evidence if it is presented with examples that will help elucidate complex scientific
28 issues and their import for resolving disputes at trial.

1 **ARGUMENT**

2 Evidence is relevant if it has a “*tendency in reason* to prove or disprove any disputed
3 fact of consequence to the determination of the action...” Cal. Evid. Code § 210 (emphasis
4 added); *People v. Nelson* (2008) 43 Cal.4th 1242, 1266; *Donlen v. Ford Motor*
5 *Company* (2013) 217 Cal.App.4th 138, 148 *as modified on denial of reh'g* (July 8, 2013).
6 Moreover, section 352 “speaks in terms of *undue* prejudice. Unless the dangers of undue
7 prejudice, confusion, or time consumption ‘substantially outweigh’ the probative value of
8 relevant evidence, a section 352 objection should fail.” *People v. Scott* (2011) 52 Cal.4th 452,
9 490–491 (emphasis in original) (quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 609); *People v.*
10 *Yu* (1983) 143 Cal.App.3d 358, 377 (when applying Section 352, “prejudicial” is not
11 synonymous with “damaging.”).

12 Plaintiff does not seek to compare Monsanto to the tobacco industry. Instead, any
13 references to tobacco companies arise in disputing the complex scientific issues of this case.
14 For example, throughout the pre-trial stage, Monsanto contended that the epidemiological
15 studies reporting associations between Roundup exposure and NHL are unreliable due to the
16 mere possibility of confounding as a result of exposures to multiple pesticides. *See, e.g.,* Ex. 1
17 to Hoke Decl., Monsanto Omnibus Sargon Motion at 2, 8-9. Ultimately, under *Sargon*,
18 Monsanto was unable to demonstrate that any *potential* confounding in the studies resulted in
19 *actual* confounding. Indeed, Monsanto’s attempt to explain away associations with reference
20 to confounding has been noted by the Reference Manual on Scientific Evidence:
21

22
23 Often the mere possibility of uncontrolled confounding is used to
24 call into question the results of a study. *This was certainly the*
25 *strategy of some seeking, or unwittingly helping, to undermine*
26 *the implications of the studies persuasively linking cigarette*
27 *smoking to lung cancer.* The critical question is whether it is
28 plausible that the findings of a given study could indeed be due to
unrecognized confounders.

Federal Judicial Center, *Reference Manual on Scientific Evidence* (3rd ed. 2011) 593

1 (“Reference Manual”) (emphasis added). Monsanto will undoubtedly raise the shield of
2 confounding during trial. Plaintiff should be able to challenge Monsanto’s flawed scientific
3 theories with reference to the fact that such arguments have been unsuccessfully attempted
4 before. Any references to the tobacco industry in this context occur in relation to the central
5 scientific disputes of the case, and do not constitute undue prejudicial aspersions at Monsanto.
6 *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 674 (the trial court cannot
7 “exclude evidence which is *directly relevant to the primary issues of the litigation* [merely]
8 because the evidence is prejudicial to the opponent.”) (emphasis added).

9
10 Another pertinent scientific issue that will be contested at trial is whether studies that
11 Monsanto relies upon for its causation argument should be afforded less weight due to the
12 authors’ undisclosed conflicts of interest and Monsanto’s involvement with ghostwriting the
13 science on Roundup safety. Indeed, the MDL court noted that the issue of scientific
14 manipulation goes to the heart of causation:

15 [T]he internal e-mails reflect that Monsanto has been ghostwriting
16 reports. And those reports have been portrayed as independent....
17 [Monsanto’s] whole presentation thus far has been about how all
18 the independent science supports a conclusion that glyphosate
19 doesn't cause non-Hodgkin's lymphoma...I don't understand how
20 [Monsanto] could have taken the position that the issue of
21 Monsanto drafting reports for allegedly independent experts on
22 whether glyphosate causes non-Hodgkin's lymphoma could be
23 irrelevant to the question of whether there's evidence that
24 glyphosate causes non-Hodgkin's lymphoma. I just don't
25 understand how [Monsanto] could take that position.

26 Ex. 2 to Hoke Decl., MDL 08/24/2017 Hearing Trns. at 43:4-16. The important scientific
27 implications of conflicts of interest and undisclosed industry contributions to studies have also
28 been recognized by the Reference Manual: “Some biases go beyond errors in individual studies
and affect the overall body of available evidence in a way that skews what appears to be the
universe of evidence... *[[]financial conflicts of interest by researchers and the source of
funding of studies have been shown to have an effect on the outcomes of such studies.*” at

1 590 (emphasis added). The Reference Manual’s citation for this conclusion states:

2 *The major determinant of whether reviews of passive smoking*
3 *concluded it was harmful was whether the authors had financial*
4 *ties with tobacco manufacturers. In the disputed topic of whether*
5 *third-generation contraceptive pills cause an increase in*
6 *thromboembolic disease, studies funded by the pharmaceutical*
industry find that they don’t and studies funded by public money
find that they do.

7 *Id.* (quoting Richard Smith, *Making Progress with Competing Interests*, 325 BRIT. MED. J.
8 1375, 1376 (2002)). Again, any references to other industries, such as Big Tobacco, would
9 occur in the context of testimony and argument which is concerned with determining the
10 weight that the jury should afford pieces of scientific evidence. *Scott* 52 Cal.4th at 490
11 (“Evidence is not prejudicial, as that term is used in a section 352 context, merely because it
12 undermines the opponent's position or shores up that of the proponent”).

13 Plaintiff is thus not comparing Monsanto to the tobacco industry in discussing pertinent
14 scientific issues such as confounding and undisclosed conflicts of interest (which have also
15 been raised in tobacco litigation), but is contesting Monsanto’s defense with reference to
16 established principles of science and the real-world examples from which such principles are
17 drawn. “*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095 (evidence can only be excluded if it
18 has “little to do with the legal issues raised at trial.”). The trier of fact will only be able to
19 logically evaluate the facts if it is provided with relevant real-world examples directed at the
20 underlying scientific issues, which is a far cry from volleying gratuitous comparisons between
21 Monsanto and the tobacco industry. *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763
22 (recognizing that the introduction of evidence which may have confused the jury before trial is
23 not prejudicial when the jury is able to place the evidence in context during trial).

24
25 **CONCLUSION**

26 For the foregoing reasons, the Court should deny Monsanto’s Motion *in limine* No. 14
27 and permit Plaintiff to discuss the underlying scientific and legal issues at trial with relevant
28 references to the tobacco industry that will assist the trier of fact in grasping the complex facts

1 of this action.

2
3 DATED: June 7, 2018

Respectfully submitted,

4
5 By: /s/ Curtis G. Hoke
6 Curtis G. Hoke (SBN 282465)
7 Timothy Litzenburg (appearance *pro hac vice*)
8 Michael J. Miller (appearance *pro hac vice*)
9 **THE MILLER FIRM, LLC**
10 108 Railroad Ave.
11 Orange, VA 22960
12 (540) 672-4224 phone
13 (540) 672-3055 fax
14 choke@millerfirmllc.com
15 tlitzenburg@millerfirmllc.com
16 mmiller@millerfirmllc.com

Attorneys for Plaintiff

17
18
19
20
21
22
23
24
25
26
27
28