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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SAN FRANCISCO**

15 DEWAYNE JOHNSON,
16 Plaintiff,
17 v.
18 MONSANTO COMPANY
19 Defendants.

20 Case No. CGC-16-550128

21 **PLAINTIFF DEWAYNE JOHNSON'S**
22 **OPPOSITION TO DEFENDANT'S MOTION**
23 **IN LIMINE NO. 15 TO EXCLUDE**
24 **REFERENCES TO ROUNDUP READY**
25 **CROPS AND OTHER BIOTECHNOLOGY**

26 Trial Judge: TBD

27 Trial Date: June 18, 2018

28 Time: 9:30 a.m.

Department: TBD

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

1 **I. INTRODUCTION**

2 Defendant Monsanto Company’s (“Monsanto”) seeks to exclude all evidence, argument, or
3 reference to the risks and dangers of genetically modified organisms (“GMO”) and biotechnology on
4 the basis that the testimony would somehow be “derogatory.”¹ Monsanto does not identify any specific
5 testimony that it seeks to exclude but, rather, seeks a sweeping order that would exclude all evidence
6 or testimony that is, in any way, critical of GMO biotechnology. Such a broad motion, devoid of any
7 factual support, should not be ruled upon “in a vacuum.” *Kelly v. New West Federal Savings*, 49
8 Cal.App.4th 659, 670 (1996). Nevertheless, Monsanto’s motion should be denied as evidence of the
9 harmful effects of GMO’s are relevant to punitive damages and to rebut Monsanto’s claims regarding
10 the benefits of glyphosate-based herbicides (“GBHs”).

11 **II. ARGUMENT**

12 **A. Evidence of Risks Associated with Genetically Modified Organisms and Biotechnology**
13 **Is Admissible To Rebut Monsanto’s Evidence That These Products are Safe and**
14 **Effective**

15 Plaintiff previously moved to exclude all evidence regarding the benefits and efficacy of GBHs,
16 including the testimony of Monsanto’s expert witness Dr. Kassim Al-Khatib (“Dr. Al-Khatib”), on the
17 basis that such evidence was irrelevant to the issues in this case. Monsanto vehemently opposed
18 Plaintiff’s motion arguing that Dr. Al-Khatib’s testimony and opinions regarding “the remarkable
19 benefits that glyphosate has had for agriculture and human society generally” are relevant and
20 admissible. *See* Def’s Opp. to P’s MIL No. 1 at 3. Dr. Al-Khatib’s opinions, however, extend beyond
21 glyphosate. Monsanto intends to have Dr. Al-Khatib offer testimony regarding the use and benefits of
22 genetically modified, glyphosate-resistant crops. Exhibit 1; Expert Report of Dr. Kassim Al-Khatib
23 (“Al-Khatib Rep.”) at 28-29. By way of example, Dr. Al-Khatib is expected to testify to the following:

- 24 • “Crops carrying the resistance genes can be treated with glyphosate during the growing season,
25 allowing farmers greater flexibility in the timing of herbicide application.”

26 ¹ Monsanto’s titles this motion in *limine* as one seeking to exclude “derogatory references” to Roundup
27 Ready crops and biotechnology. The scope of the motion is far broader. Monsanto seeks to exclude
28 any evidence or reference of the harmful effects of GMO biotechnology to people or the environment.
It is readily apparent that Monsanto equates any testimony that does not conform to their claims

- 1 • “[U]se of this herbicide in glyphosate-resistant crop systems has given farmers cost-effective
2 broad-spectrum weed control options with the ability to control weeds that developed resistance
3 to other herbicides’ mode of action...”
- 4 • “The outcomes of this unprecedented adoption of glyphosate-resistant crops have been many,
5 but perhaps most dramatic is the simplification of weed control tactics. Growers can now apply
6 glyphosate at higher rates and at multiple times without concern about crop damage or
7 environmental impacts.”
- 8 • “This historically significant technological advance set the stage for unprecedented and rapid
9 growth in the area planted to glyphosate-resistant crops.”
- 10 • “Several studies have shown that potential effects of glyphosate on water, air, and soil
11 contamination are minimal, compared to those caused by the herbicides that were replaced when
12 glyphosate-resistant crops were adopted.”

13 Id. at 28-29.

14 Monsanto cannot have it both ways. The fact that Monsanto will introduce testimony regarding
15 the *benefits* of GMO’s to people and the environment completely undercuts their arguments that
16 plaintiff’s competing evidence should be excluded. Monsanto’s motion must be denied as Plaintiff is
17 clearly entitled to rebut Monsanto’s evidence regarding GMO’s.

18 **B. Evidence That GMO Products Increases An Individual’s Exposure to Glyphosate**
19 **Through Dietary Consumption Is Relevant and Admissible**

20 Evidence of GMO’s is necessary, relevant, and admissible on the issue of dietary exposure and
21 the presence of glyphosate in food. This Court has already ruled that evidence relating to dietary
22 exposure to glyphosate should not be excluded. *See* Court’s Order Motions in *Limine*, April 3, 2018 at
23 6-7. Mr. Johnson’s cancer risk is dependent on both his occupational exposure and dietary exposure
24 to GBHs. Plaintiff’s expert, Dr. William Sawyer calculated the cancer risk from dietary glyphosate to
25 the general U.S. population. Exhibit 2; Expert Report of Dr. William Sawyer (“Sawyer Rep.”) at 145.
26 As Dr. Sawyer testified, “genetically modified crops contain far more glyphosate residue than
27 conventional crops.” *Id.* at 35. Thus, the amount of dietary consumption of GMO food is relevant to
28

1 overall exposure in determining one’s cancer risk. The fact that Monsanto may disagree with this fact
2 does not render the opinion inadmissible or prejudicial.

3 Furthermore, Plaintiff anticipates that Monsanto will seek to cross-examine Dr. Sawyer
4 regarding his personal use of GBHs.² Dr. Sawyer testified that he takes numerous precautions to
5 minimize his exposure to glyphosate. Once such precaution is that, because he is aware of GBHs
6 carcinogenic potential, his family never buys GMO food. Exhibit 3; Sawyer Dep. at 526-527. If
7 Defendant cross-examines Dr. Sawyer regarding the fact that he has personally used GBHs in the past,
8 Dr. Sawyer must be able to explain what types of precautions he takes to minimize exposure as well as
9 his reasoning for taking those precautions. This testimony would necessarily include an explanation of
10 the risks associated with dietary consumption of GMO food.

11
12 **C. The Harmful Effect of GMO Products and Biotechnology Is Admissible to Prove**
13 **Monsanto Acted With a Willful and Knowing Disregard of the Rights or Safety of**
14 **Others**

15 Plaintiff’s evidence could support a finding that “Monsanto has long been aware of the risk that
16 its glyphosate-based herbicides are carcinogenic, and more dangerous than glyphosate in isolation, but
17 has continuously sought to influence the scientific literature to prevent its internal concerns from
18 reaching the public sphere and to bolster its defenses in products liability actions.” Order Denying Def’s
19 Mot. for Summ. Judg. (May 17, 2018) at 45. Plaintiff is entitled to introduce evidence that Monsanto
20 aggressively marketed and sold glyphosate-resistant crops in order to establish his right to punitive
21 damages.

22 Glyphosate “in conjunction with genetically engineered herbicide-tolerant crops accounts for
23 about 56% of global glyphosate use.” Exhibit 1; Al-Khatib Rep. at 28. Evidence that Monsanto,
24 without warning growers and farmers of the cancer risk associated with GBHs, expended its resources
25 on the development and marketing of crops that would increase ones exposure to the defective, cancer-
26 causing product is directly relevant to assessing Monsanto’s reprehensibility. *Bullock v. Philip Morris*
27 *USA, Inc.*, 159 Cal.App.4th 655, 691 (2008)(“By placing the defendant’s conduct on one occasion into
28 the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct

² Plaintiff has filed a motion in *limine* seeking to exclude evidence or argument regarding an expert’s use of GHB’s.

1 toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated
2 conduct of the same nature.”); *Boeken v. Philip Morris, Inc.*, 127 Cal.App.4th 1640, 1690
3 (2005)(intentionally marketing a product knowing that it might cause injury and death is highly
4 reprehensible). A defendant that has repeatedly engaged in profitable but wrongful conduct “tends to
5 show that ‘strong medicine is required’ to deter the conduct’s further repetition.” *Johnson v. Ford*
6 *Motor Co.*, 35 Cal.4th 1191, 1207 (2005). Monsanto’s efforts to increase global use of glyphosate,
7 including through the marketing of GMO’s crops, is clearly relevant to punitive damages. Accordingly,
8 Monsanto’s motion must be denied.

9 **III. CONCLUSION**

10 For the foregoing reasons, Plaintiff respectfully requests that this Court **DENY** Defendant’s
11 Motion *in Limine* No. 15 to Exclude References to Roundup Ready Crops and Other Biotechnology.

12
13 Respectfully submitted,

14 **THE MILLER FIRM, LLC**

15
16 DATED: June 7, 2018

17 By: /s/ Curtis G. Hoke

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