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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF SAN FRANCISCO**

19 DEWAYNE JOHNSON,

20 Plaintiff,

21 vs.

22 MONSANTO COMPANY,

23 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
TRIAL BRIEF REGARDING OPINIONS
DR. BENBROOK MAY NOT OFFER**

Hon. Judge Suzanne R. Bolanos

Department: 504
Trial Date: June 18, 2018

ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

07/23/2018

Clerk of the Court

BY: KALENE APOLONIO

Deputy Clerk

1 In his *Sargon* ruling, Judge Karnow all but excluded Dr. Benbrook from this case,
2 accepting only a single facet of his proposed testimony. Judge Karnow ruled that Dr. Benbrook
3 could testify about the general framework of the EPA regulatory decision-making process: “I’m
4 sure he can provide some sort of general overview as to how that works. I’m not sure where it gets
5 you in the case, but he may have the background to be able to do that.” *See* Tr. of Proceedings
6 60:24-61:5 (May 10, 2018)¹; Order on (1) Monsanto’s Omnibus *Sargon* Mot.; (2) Monsanto’s
7 Mot. for Summ. J.; (3) Pl.’s Omnibus *Sargon* Mot.; (4) Pl.’s Mot. for Summ. Adjudication at 30
8 (May 17, 2018) (“5/17/18 *Sargon* Order”) (“He does have some experience tracking the rise of
9 glyphosate-based herbicides and some experience with the regulatory regime applicable to
10 herbicides. Based on this experience, Dr. Benbrook may testify as to the general framework of the
11 EPA regulatory decision making process.”). Monsanto files this trial brief well in advance of Dr.
12 Benbrook’s testimony to ensure that the parameters Judge Karnow set are clear and to limit the
13 necessity to object during his testimony.

14 **I. Dr. Benbrook May Not Offer An Opinion About Six Things**

15 Judge Karnow specifically *excluded* Dr. Benbrook’s testimony as to six broad categories
16 which encompass the vast majority of his proposed testimony:

- 17 1) “Dr. Benbrook may not offer any opinions as to the proper interpretation of
18 documents, such as emails, or to argue that inferences of knowledge or intent can
19 be derived from those documents.” 5/17/18 *Sargon* Order at 30.
- 20 2) “Dr. Benbrook may not opine on Monsanto’s legal obligations.” *Id.*
- 21 3) “Dr. Benbrook may not relate case-specific facts asserted in hearsay statements
22 unless they are independently proven by competent evidence or are covered by a
23 hearsay exception.” *Id.*
- 24 4) “Dr. Benbrook may not offer an opinion as to whether the EPA would have
25 approved an amendment to the Roundup label.” *Id.*

26
27 ¹ *See* Decl. of Sandra A. Edwards In Support of Defendant Monsanto Co.’s Trial Brief Regarding
28 Opinions Dr. Benbrook May Not Offer (“Edwards Decl.”) at ¶ 3, Ex. 1 (“5/10/18 Hearing Tr.”).

1 5) “[W]hile Dr. Benbrook might have experience regarding industry standards and
2 stewardship obligations, at argument Johnson agreed these were irrelevant.”
3 5/17/18 *Sargon* Order at 30.

4 6) Dr. Benbrook may not testify Monsanto misled the EPA.” *Id.* at 31.

5 **II. Explanation Regarding the Six Things Judge Karnow Ruled That Dr. Benbrook**
6 **Could Not Testify About.**

7 Dr. Benbrook’s expert report is filled with many examples of the six things that Judge
8 Karnow ruled were impermissible for Dr. Benbrook to offer opinions about. Examples of the types
9 of opinions and statements from Dr. Benbrook’s report that are excluded under the *Sargon* order
10 are illustrated below.

11 **A. Proper interpretation of documents, such as emails or knowledge and intent**
12 **based on review of emails / documents. 5/17/18 *Sargon* Order at 30.**

13 *First*, Dr. Benbrook cannot testify about the proper interpretation of documents, such as
14 emails, or argue that inferences of knowledge or intent can be derived from such documents. At
15 the *Sargon* hearing, Plaintiff’s counsel said he wanted to have a “witness sort of walk through the
16 story.” Judge Karnow responded, “[t]hat’s the problem.” *See* 5/10/2018 Hearing Tr. at 60:11-21.
17 Judge Karnow also stated with respect to Dr. Benbrook and his “interpretation” of emails “[h]ow
18 would he possibly have a basis to know that, and what expertise would he bring to the
19 question... You give the jury the documentation. You don’t have an expert. Is he an expert in
20 email reading? Surely not.” *Id.* at 59:5-18. Much of Dr. Benbrook’s expert report was about his
21 interpretation of Monsanto company documents, such as emails, a fact which he admitted at
22 deposition. *See* Edwards Decl. at ¶ 2, Ex. 2 (Dep. of Charles Benbrook at 451:15-25 (Feb. 9,
23 2018)) (“Much of my report – there’s something over 1,000 paragraphs – I would say 400 of them
24 simply restate what Monsanto employees or scientists say to each other . . .”).

25 Dr. Benbrook’s expert report is replete with examples of interpretation of Monsanto and
26 EPA documents. Some of these are:

- 27 • “*In my opinion, Monsanto did not want to test their formulated glyphosate-based*
28 *herbicides because they expected such studies to produce positive evidence of*

1 genotoxicity.” Edwards Decl. ¶ 3, Ex. 3 (Report of Charles Benbrook at ¶ 121
2 (Dec. 21, 2017)) (“Benbrook Rpt.”).

- 3 • “Monsanto had displayed to the OPP that it would always be willing and able to
4 take whatever next step was necessary to raise new scientific issues in need of
5 exploration.” *Id.* at ¶ 87.
- 6 • “Monsanto’s abuse of science is so systematic and consistent that it seems to track
7 some, perhaps unstated, internal company policy.” *Id.* at ¶ 149.
- 8 • “Clearly, in this final paragraph, Parry was delivering to Monsanto a ‘good news-
9 bad news’ message. The ‘bad news’ is glyphosate is likely genotoxic via induction
10 of oxidation damage in cells, and likely other modes of action. The ‘good news’ is
11 that Monsanto might be able to convince regulators that one or more of these
12 mechanisms might be subject to threshold effects, leading to the possibility that
13 Monsanto could show that the effects are not likely under real-world exposure
14 scenarios.” *Id.* at ¶ 684.
- 15 • “Monsanto continued to resist EPA’s call for a new mouse oncogenicity study, and
16 indeed still has not redone that study as requested by EPA. The primary reason is
17 clear – legitimate concern in the company that the results of such a study would
18 affirm the key finding in the original Bio/dynamics study mouse oncogenicity
19 study, and result in EPA classifying glyphosate as a ‘possible human carcinogen.’”
20 *Id.* at ¶¶ 506-07.
- 21 • “This Houseneger email to Jenkins reads like a status report from a junior staff
22 person to his/her manager. It reflects a desire to be helpful to Monsanto that is
23 fundamentally at odds with Houseneger’s role as the senior manager of the EPA’s
24 Office of Pesticide Programs.” *Id.* at ¶ 627.
- 25 • “The implication is clear. The number one goal driving Monsanto’s assessment of
26 evolving EPA science policies and regulatory procedures is minimizing the impact
27 on FTO and sale of Monsanto products.” Benbrook Rpt. at ¶ 992.

28

1 The time for Plaintiff to assemble the emails and documents in the case into a “story” and
2 present it to the jury as such is closing. Dr. Benbrook reviewed many Monsanto and EPA emails
3 and other documents because counsel wanted to have a “witness sort of walk through the story”
4 during their case in chief, a trial role that Judge Karnow has rejected. *See* 5/10/18 Hearing Tr. at
5 60:11-21. Dr. Benbrook may *not* offer opinions and interpretations about what emails and other
6 documents mean, *see* 5/17/18 *Sargon* Order at 30. Because there is then no other purpose in Dr.
7 Benbrook *identifying and reading* internal emails and documents before the jury, he should not be
8 permitted to do that either.

9 **B. Monsanto’s legal obligations. 5/17/18 *Sargon* Order at 30.**

10 Dr. Benbrook also cannot testify about Monsanto’s legal obligations. *Summers v. A.L.*
11 *Gilbert Co.*, 69 Cal. App. 4th 1155, 1178 (1999) (“There are limits to expert testimony, not the
12 least of which is the prohibition against admission of an expert’s opinion on a question of law.”).
13 Thus, for example, Dr. Benbrook may not opine on the following:

- 14 • Whether Monsanto violated FIFRA 6(a)(2) by not reporting the results of the TNO
15 rat skin dermal penetration study, 5/17/18 *Sargon* Order at 30 (citing Benbrook
16 Rpt. at ¶ 1084);
- 17 • Whether Monsanto violated FIFRA 6(a)(2) by not providing Dr. Parry’s report to
18 the EPA, Benbrook Rpt. at ¶ 706;
- 19 • That Monsanto was responsible for four things: (1) assuring that specific herbicides
20 products sold to the school district for which Mr. Johnson worked were as safe as
21 they could be, given existing knowledge and technology; (2) the content, scope,
22 and effectiveness of the label directions for use, use restrictions, warnings about
23 high-risk scenarios, and worker-safety requirements on the RangerPro and
24 Roundup ProConcentrate labels; (3) drawing on its extensive field testing and
25 scientific resources to improve the utility and safety of its products through safer
26 formulations and label directions and worker-safety provisions; and (4) to work
27 cooperatively and openly with the EPA to assure that both the company’s internal
28 assessments of risk are as accurate as possible, *id.* at ¶¶ 17-22;

- 1 • Whether the hypothetical classification of glyphosate as a potential oncogene
2 would have required “the establishment of dozens of Section 409 food-additive
3 tolerances to cover the residues that would be present in certain fractions of grains
4 and oilseed crops,” *id.* at ¶ 106;
- 5 • That the hypothetical submission of genotoxic studies would have “almost certainly
6 led to new, EPA-mandated restrictions on where and how Roundup herbicides
7 could be used,” *id.* at ¶ 122; and
- 8 • Whether “[p]esticide companies bear an obligation vested in various laws and
9 regulations, and common corporate decency, to assure that the products they bring
10 to market are safe and will reliably produce the benefits for which they are
11 registered,” *id.* at ¶ 971.

12 The above examples are all statements from Dr. Benbrook’s expert report regarding some
13 purportedly legal obligation he claims Monsanto had to consumers. Such opinions are not
14 permissible bases for Dr. Benbrook’s expert testimony.

15 **C. Discussion of case-specific facts in hearsay statements. 5/17/18 Sargon Order**
16 **at 30.**

17 Further, Dr. Benbrook may not relate as true, case-specific facts related to Mr. Johnson
18 asserted in hearsay statements unless those facts are independently proven by competent evidence
19 or are covered by a hearsay exception. In *People v. Sanchez*, 63 Cal. 4th 665, 686 (2016), the
20 California Supreme Court adopted the following rule: “when any expert relates to the jury case-
21 specific out-of-court statements, and treats the contents of those statements as true and accurate to
22 support the expert’s opinion, the statements are hearsay.”

23 **D. Whether EPA would have approved an amendment to the Roundup label.**
24 **5/17/18 Sargon Order at 30.**

25 Dr. Benbrook also may not offer an opinion regarding whether EPA would have approved
26 an amendment to the Roundup label. 5/17/18 Sargon Order at 30. Judge Karnow explained “Dr.
27 Benbrook has no specific expertise pertaining to the EPA’s approval of amended labels” citing to
28 paragraph 61 of Dr. Benbrook’s report. Benbrook Rpt. at ¶ 61 (“Had Monsanto amended the label

1 to include a risk of NHL in 2002, the EPA would have approved that amendment.”); *see also id.* at
2 ¶ 37 (“EPA almost always approves such requests for label amendments, and in most cases,
3 quickly.”).

4 **E. Industry standards. 5/17/18 Sargon Order at 30.**

5 Plaintiff’s counsel agreed at the May 10, 2018 *Sargon* hearing that testimony regarding
6 industry standards and product stewardship were irrelevant. *See* 5/10/18 Hearing Tr. at 62:5-24.
7 Accordingly, statements such as those below, are also irrelevant: “The actions of Monsanto ‘are
8 inconsistent with applicable industry standards and do not comport with how a reasonable
9 company would act with respect to tapping outside scientific expertise in the hope of elucidating
10 and preventing human health risks.” Benbrook Rpt. at ¶ 102.

- 11 • The term ‘product stewardship’ is used within the industry and regulatory agencies
12 to describe and encompass the actions pesticide manufacturers should take on an
13 ongoing basis in the interest of product stewardship, before and after a new use of a
14 pesticide is approved.” *Id.* at ¶ 972.
- 15 • “A company selling a pesticide to the public is responsible for the testing of its
16 product to ensure it can be used safely.” *Id.* at ¶ 30.
- 17 • “After receiving Dr. Parry’s expert report, a reasonable and prudent pesticide
18 manufacturer would have added a genotoxicity warning to Roundup labels.”
19 Benbrook Rpt. at ¶ 58.
- 20 • “A reasonable and prudent manufacturer that repeatedly pledges allegiance to
21 sound science would not engage in a campaign to ‘orchestrate outcry,’ ‘invalidate
22 the relevance,’ and cut the funding of IARC.” *Id.* at ¶ 64.

23 **F. Whether Monsanto misled EPA. 5/17/18 Sargon Order at 31.**

24 Dr. Benbrook may not testify that Monsanto misled the EPA. *See, e.g.,* Benbrook Rpt. at
25 pg. 185 (“Protecting ‘Freedom to Operate’ and Scientific Deceit Characterize Monsanto’s
26 Assessments of and Response to Glyphosate-Related Risks”). According to Judge Karnow, Dr.
27 Benbrook brings “no relevant expertise to the table on that issue.” 5/17/18 *Sargon* Order at 31.
28

1 **III. Many Statements in Dr. Benbrook’s Report Also Violate Motions *In Limine* Already**
2 **Ruled Upon.**

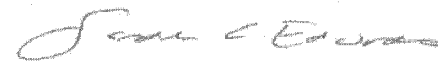
3 In addition to the six things that Dr. Benbrook may not offer an opinion on, many
4 statements in his expert report also violate motions *in limine* that have already been ruled upon.
5 Dr. Benbrook should not and cannot offer such statements and should be instructed by his counsel
6 not to violate any motions *in limine*. For example, many of the paragraphs in Dr. Benbrook’s
7 report go to post-use corporate conduct, Benbrook Rpt. at ¶¶ 959-60 (“In a March 10, 2016 email,
8 Dan Goldstein, Monsanto’s “Lead, Medical Sciences and Outreach,” contacts a colleague, Allister
9 Vale, a consulting clinical pharmacologist and director of the National Poisons Information
10 System (Birmingham Unit), in the U.K. Dr. Vale is active in several organizations that convene
11 meetings of medical toxicologists, a group that Monsanto is striving to engage in the ongoing
12 reaction to IARC and debate over glyphosate safety”), the “magic tumor” Dr. Benbrook claims
13 was found in the 1983 mouse study, *id.* at ¶¶ 90-91, IBT, *id.* at ¶ 109 (“The first round of
14 mutagenicity and genotoxicity studies on glyphosate were commissioned by Monsanto in the
15 1970s, conducted by IBT, and were found to be invalid and/or fraudulent”); ¶¶ 263-273
16 (discussing IBT); and Seralini, *id.* at ¶ 807 (“The Seralini study was the first, independent two-
17 year rat feeding study designed to sort out the individual and combined impacts of long-term
18 exposure to a GE corn (NK603) and formulated Roundup herbicide”).

19
20 Dated: July 23, 2018

Respectfully submitted,

21 FARELLA BRAUN + MARTEL LLP

22
23 By:



24 Sandra A. Edwards

25 Attorneys for Defendant
26 MONSANTO COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2018, I electronically filed the foregoing

- **DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF
REGARDING OPINIONS DR. BENBROOK MAY NOT OFFER**
- **DECLARATION OF SANDRA A. EDWARDS IN SUPPORT OF
DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF
REGARDING OPINIONS DR. BENBROOK MAY NOT OFFER**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Susan C. Hunt