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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SAN FRANCISCO**

14 Dewayne Johnson)

15 Plaintiff,)

16 vs.)

17 Monsanto Company)

18 Defendant)

Case No. CGC-16-550128

**PLAINTIFF'S TRIAL BRIEF
REGARDING ADMISSIBILITY
OF EXHIBIT 308 AND DR.
SAWYER'S OPINION
REGARDING DIETARY
EXPOSURE**

Hon. Suzanne R. Bolanos

Department: 504

REDACTED

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23 **ARGUMENT**

24
25 **A. Plaintiff's Exhibit 308 is Relevant to Punitive Damages and Should be Admitted**

- 26 • Dr. Goldstein admitted at deposition that the term "[REDACTED]" was used
27 specifically for problems arising with Roundup and not just GMOs. Hoke Decl. at Exh.
28 A, Goldstein Dep. at 72:18-73:3 ("Q. [REDACTED]")

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[REDACTED]
[REDACTED]
[REDACTED]) (emphasis added).

- Dr. Donna Farmer, the individual from [REDACTED] with whom Dr. Goldstein admitted to playing “[REDACTED]” [REDACTED]. Hoke Decl. at Exh. B, MONGLY01249878; Exh.C, Donna Farmer CV at 2, 3 (“[REDACTED]”); Hoke Decl. at Exh. D, Farmer depo. at 18:22-19:8, 373:8-374:13. Thus, Dr. Goldstein’s statement regarding [REDACTED] by playing “[REDACTED] in collaboration with Dr. Farmer is referring to Roundup, since Dr. Farmer only worked on Roundup up to 2008.

- Dr. Goldstein’s statement in the document is relevant to punitive damages, specifically whether Monsanto has engaged in a pattern or practice of willfully ignoring evidence of Roundup’s carcinogenicity and failing to conduct adequate tests on the formulated product. *See* Judicial Council of California Civil Jury Instruction 3945(a)(4); *see also Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 592, *review denied* (July 27, 2016) (“By placing the defendant’s wrongful conduct into the *context of a continuing pattern and practice*, ‘an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.’) (quoting *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1206, fn. 6) (emphasis added).

- Dr. Goldstein’s statement is also highly relevant to “whether [Monsanto] disregarded the health or safety of others.” Judicial Council of California Civil Jury Instruction

1 3945(a)(2). The fact that Monsanto is more concerned with rebutting any and all
2 suggestions that Roundup may pose a risk to human health than properly investigating
3 the effects of its flagship product shows a disregard not only to the health and safety of
4 Mr. Johnson, but millions of others that are exposed to Roundup. As acknowledged by
5 Monsanto's own Medical Sciences Lead, Dr. Daniel Goldstein, Monsanto has been
6 [REDACTED] endangering the life of those that
7 Monsanto assured of the safety of Roundup. The jury should be presented with such
8 evidence when evaluating Monsanto's overall conduct for the purpose of punitive
9 damages.

10
11 **B. Dr. Sawyer Will Testify that Mr. Johnson's Dietary Exposure to Roundup through
12 GMO Foods Increased His Exposure and His Risk of Cancer**

- 13
- 14 • Dr. Sawyer will testify that Mr. Johnson's food intake contributes to his glyphosate
15 exposure and his risk of cancer. Dr. Sawyer relies on animal studies showing a risk of
16 lymphoma via the dietary exposure route. Hoke Decl. at Exh. E, Sawyer Rep., p. 166
17 ("Glyphosate has been demonstrated to induce (but may not be limited to)
18 lymphopoietic malignancies as supported by multiple, independent chronic dietary
19 animal studies.").
 - 20 • Dr. Sawyer opines that the risk of lymphoma increases with increased exposure. Hoke
21 Decl. at Exh. E, Sawyer Rep., at 124, 161. Dr. Sawyer testified at his deposition that
22 Mr. Johnson's food intake of glyphosate was "certainly additive to his occupational
23 exposure." Hoke Decl. at Exh. F, Sawyer Dep. at 525:13-526:10. Dr. Sawyer further
24 analyzed the cancer risk of dietary exposure: "You did analyze the cancer or cancer risk
25 of the general population to dietary exposure of glyphosate, correct, in your report? A. I
26 did. I used the US EPA data, which used the higher end of the risk." *Id.* at 522:20-24.
 - 27 • Dr. Sawyer made it clear that he considered the additional impact of dietary exposure
28 on Mr. Johnson's risk in addition to the risk from occupational exposure alone. Dr.

1 Sawyer states that “[t]he occupational cancer risk level derived from the Agricultural
2 Health Study is displayed separately from the **combined dietary and occupational**
3 **exposure dose.**” Hoke Decl. at Exh. G, ¶ 16.

- 4
- 5 • In his report, Dr. Sawyer calculates the additive cancer risk for the average dietary
6 exposure of glyphosate for an adult, concluding that it adds to the risk of cancer already
7 present through dermal exposure. Hoke Decl. at Exh. E at 145-146, (“Cancer Risk to
8 the U.S. General Population via Dietary Exposure”); 154, Table 31; (“Cancer Risk
9 Levels for Spray Operator Exposures (Hydraulic Nozzles)...Including a Dietary Risk
10 Level of 1.5×10^{-4} ”).¹
 - 11
 - 12 • Monsanto acknowledges that Dr. Sawyer testifies that dietary intake increases the
13 cancer risk of glyphosate in humans and pursued that line of questioning at deposition:

14
15 Q. Now, you claim the average dietary risk for glyphosate is 1.5
times 10 to the minus 4, right, based on the DEEM model?

16 A. At the high-end of the DEEM model, yes.

17 Q. Isn't that based on the average in the DEEM model?

18 A. No. It's based on the upper limit at .223.

19 Q. If you look at page 146 of your expert report.

20 A. Okay.

21
22 Q. Do you see there where you have noted 1.5 times 10 to the
23 minus 4 is for the average exposure based on the DEEM model?

24
25 ¹ Judge Karnow did exclude the specific calculations of the Cancer Slope Factor based on a
26 relevancy argument with respect to specific causation, but allowed that Dr. Sawyer could
27 testify as to the Cancer Slope Factor if Defendant opens the door. 5/17/2018 Order re: Sargon,
28 p. 28. Defendant could open the door, for example, by trying to argue that the doses used in
animal studies are not relevant to humans or by arguing that Mr. Johnson's glyphosate
exposure did not exceed regulatory risk levels. Dr. Sawyer would then be able to use the
Cancer Slope Factor to explain why both of these arguments by Defendant are faulty.

1 A. Yes, but it's still upper limit exposure, assuming a glyphosate
2 diet with residues at the tolerance limit.

3 ...

4 Q. And that dietary risk would exceed the recorded background
5 risk of NHL in the SEER data you discussed yesterday, right, the
6 risk of 1.95 times 10 to the minus 4?

7 A. I don't recall where the 1.95 times 10 to the minus 4 comes
8 from. The background of his particular malignancy at his age is
9 about 5.6 per million which is 5.6 times 10 to the minus 6.

10 Hoke Decl. Ex. F, Sawyer Dep. at 525:13-526:10.

- 11 • Therefore, Dr. Sawyer will testify that Mr. Johnson's dietary exposure to glyphosate
12 does increase Mr. Johnson's risk of developing cancer. Dr. Sawyer will be careful to
13 avoid the calculated cancer risk increase derived through the Cancer Slope Factor unless
14 Defendant opens the door. Dr. Sawyer will testify that increased dose of glyphosate
15 from the diet further increased Mr. Johnson's risk due to the fact that the epidemiology
16 and animal studies show an elevated risk with increased exposure to glyphosate.

17 **C. Evidence Regarding GMOs is Relevant when Discussing the Epidemiological**
18 **Literature for Roundup Carcinogenicity**

- 19 • Evidence regarding GMOs is relevant for Plaintiff's experts to offer testimony related to
20 the Agricultural Health Study ("AHS"), Monsanto's primary defense to the
21 epidemiological evidence for Roundup carcinogenicity. Andreotti et al, *Glyphosate Use*
22 *and Cancer Incidence in the Agricultural Health Study* 1110 JNCINATL CANCER INST
23 1-8 (2018).
- 24 • The explosion of Roundup use toward the latter end of the 1990s due to the introduction
25 of Roundup-Ready Crops (a type of GMO crop) materially affected how the exposure
26 assessment in the AHS was conducted. In a nutshell, people who were classified as low
27 Roundup users prior to the introduction of GMO crops became higher users following
28 the introduction of GMO crops at the end of the 1990s. Plaintiff's experts will testify

1 that such a substantial increase in the use of Roundup had a drastic impact on the
2 study's ability to properly compare participants' exposure to Roundup, leading to
3 spurious results.

- 4 • Importantly, the epidemiological studies relied upon by Plaintiff's experts, which show
5 a consistent elevated risk of NHL associated with Roundup exposure, predate GMO
6 crops. Plaintiff's experts should be permitted to draw upon evidence regarding GMO
7 crops in distinguishing the flaws of the AHS from the numerous earlier epidemiological
8 studies which are not affected by the introduction of GMO crops.

9
10 **D. Evidence Regarding GMOs May be Relevant as Rebuttal to Monsanto's Expert
11 Testimony**

- 12 • Lastly, evidence regarding GMOs will be relevant for rebutting the testimony of
13 Monsanto's expert, Dr. Al-Khatib. In so far as Dr. Al-Khatib testifies that Roundup has
14 benefited the health of people, the environment, and economy, it is only proper that
15 Plaintiff is able to rebut this on cross examination with contrary evidence regarding the
16 adverse health effects of GMOs due to the increased use of Roundup following the
17 introduction of GMO crops. *People v. Hughes* (2002) 27 Cal.4th 825A, 385, *as*
18 *modified* (Apr. 10, 2002) (evidence "was not admitted as aggravating evidence, but
19 as rebuttal to the defense expert's opinion evidence.").

20 **CONCLUSION**

21 Plaintiff's Exhibit 308 and related testimony is not limited to Monsanto's GMO food
22 products, but rather refers to issues arising with Roundup generally and goes to the heart of
23 punitive damages. Moreover, Dr. Sawyer will testify that Mr. Johnson's dietary exposure to
24 glyphosate through GMOs will increase his risk of NHL. Exhibit 308 and evidence regarding
25 GMO foods should accordingly be admitted.

26 Notwithstanding, evidence regarding GMOs is pertinent for Plaintiff's experts to
27 critique Monsanto's epidemiological defense in so far as it is based on the Agricultural Health
28 Study. And, if Monsanto proffers the opinion of Dr. Al-Khatib touting the benefits of

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Roundup, evidence regarding GMOs is admissible for purposes of rebuttal.

Dated: July 6, 2018

Respectfully submitted,

THE MILLER FIRM, LLC

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