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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY ET AL.,

Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO COMPANY'S REQUEST FOR
JUDICIAL NOTICE OF FOREIGN
REGULATORY DOCUMENTS**

Trial Judge: Hon. Suzanne R. Bolanos

Trial Date: June 18, 2018

Time: 9:30 a.m.

Department: 504

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/25/2018
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

1 Plaintiff Dewayne Johnson (hereinafter, “Plaintiff” or “Mr. Johnson” hereby opposes defendant
2 Monsanto Company’s (hereinafter, “Defendant” or “Monsanto”) Request for Judicial Notice of Foreign
3 Regulatory Documents (Exhibits 1001 through 1021). However, Foreign Regulatory documents are
4 simply not subject to judicial notice under California Evidence Code Section 452 or any other California
5 law. These documents are reviews by foreign political agencies subject to lobbying by Monsanto, many
6 of which simply repeat the same flawed arguments made by the European Food Safety Agency (EFSA),
7 or are extremely outdated. The EFSA review of glyphosate has been widely criticized. A group of ninety-
8 four eminent scientists published a peer-reviewed article explaining that there were “serious flaws in the
9 scientific evaluation in the RAR, and that the IARC conclusion was correct.” *See*, Portier, et al.,
10 Differences in the carcinogenic evaluation of glyphosate between the International Research on Cancer
11 (IARC) and the European Food Safety Authority, Vol. 70, No. 8J Epidemiol. Community Health 741
12 (2016). SOF 14:4-11. An analysis of the carcinogenicity review relied upon by EFSA actually
13 demonstrated that the report was essentially copy and pasted from a document written by Monsanto and
14 other chemical companies.¹ This makes sense because nearly half of all scientists at EFSA have financial
15 conflicts of interest.²

16 Defendants go on to cite a report of the New Zealand EPA on glyphosate. This review was
17 likewise subject to criticism by independent scientists because, “the NZEPA report quotes heavily from
18 the European Food Safety Authority (EFSA) report, which is itself markedly flawed, and like the NZEPA
19 report, relies heavily on industry-funded and industry-manipulated reviews.” These scientists, “conclude
20 that the NZEPA process for evaluating the carcinogenicity of glyphosate was flawed and the post hoc
21 justification invalid.” Douwes JI, “Carcinogenicity of glyphosate: why is New Zealand's EPA lost in the
22 weeds?” N Z Med J. 2018 Mar 23;131(1472):82-89.

23 Unlike IARC, which is free of any conflict-of-interests and protected against lobbying, these
24 political agency reviews for which Monsanto seeks judicial notice are heavily flawed; and do not contain
25 independent analyses of glyphosate. This is evidenced by the fact that Italy, France and Germany, among
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27 ¹ <https://www.global2000.at/sites/global/files/Expert%20Opinion%20Glyphosat%20Plagiarism%20English.pdf>

28 ² <https://corporateeurope.org/pressreleases/2017/06/nearly-half-experts-european-food-safety-authority-have-financial-conflicts>

1 other countries, will all will be banning or severely restricting glyphosate due to IARC’s findings.³
2 Furthermore, POEA the other major ingredient in RangerPro has recently been banned in the EU, yet is
3 still sold in the United States.⁴

4 **I. ARGUMENT**

5 **A. Monsanto Cannot Seek Judicial Notice For The Truth Of The Matter Asserted – I.E.,**
6 **That The Conclusions Of Foreign Regulatory Documents Be Taken As Truth, Or**
7 **That Such Conclusions Shield It From Liability.**

8 Monsanto cannot request judicial notice for the truth of the matter asserted – i.e. that the
9 conclusions and opinions contained in Exhibits 1001-1021 be taken as truth, or that such conclusions
10 and/or opinions contained therein shield it from liability. Indeed, California law is clear that “Taking
11 judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular
12 interpretation of its meaning.” *See, Herrera v. Deutsche Bank Nat. Tr. Co.*, 196 Cal. App. 4th 1366, 1374–
13 75 (2011), as modified (June 28, 2011) [citing *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369,
14 374, 228 Cal.Rptr. 878]. “While courts take judicial notice of public records, they do not take notice of
15 the truth of matters stated therein.” *Id.* [citing *Love v. Wolf* (1964) 226 Cal.App.2d 378, 403, 38 Cal.Rptr.
16 183]. Yet, Plaintiff anticipates that Monsanto will improperly attempt to introduce these documents to
17 the jury in hopes that the jury will accept the conclusions contained in these records as true without giving
18 Plaintiff any opportunity to conduct cross examination relating to these documents. Indeed, even if
19 Monsanto’s stated intent is merely to that certain political agencies “conducted the reviews described in
20 the official government documents and reached the conclusions the documents set forth” (RJN at 1), it is
21 highly likely that the jury will nonetheless improperly take the conclusions and opinions in Monsanto’s
22 Exhibits 1001 – 1021 as true without affording Plaintiff sufficient ability to conduct cross examination
23 relating to these documents. To the extent these documents are being offered for the truth of any scientific
24 findings, they should be offered through experts so that Plaintiff has an opportunity cross examine the
25 experts as to the reliability of the documents.

26 ³ <https://www.reuters.com/article/us-germany-politics-glyphosate/germany-moving-ahead-with-plans-to-restrict-weed-killer-glyphosate-idUSKBN1HO2IM>

27 <https://www.politico.eu/article/french-and-italians-sense-golden-opportunity-in-glyphosate-ban/>

28 ⁴ <https://www.euractiv.com/section/agriculture-food/news/eu-agrees-ban-on-glyphosate-co-formulant/>

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2 **B. This Court Should Not Take Judicial Notice Of Monsanto’s Exhibits 1001 - 1021**
3 **Because They Are Unduly Prejudicial And Likely To Confuse The Jury.**

4 This Court should not take judicial notice of Monsanto’s Exhibits 1001-1021 because they are
5 unduly prejudicial and likely to confuse the jury into erroneously taking as true the conclusions and
6 opinions contained therein. California law is clear that “[b]ecause judicially noticed matters are a
7 “substitute for proof,” the trial court retains its usual discretion not to take judicial notice of matters that
8 are irrelevant or, under Evidence Code section 352, have a probative value that is substantially outweighed
9 by the probability that their admission will create a substantial danger of undue prejudice, confusing the
10 issues, or misleading the jury.” *See, Licudine v. Cedars-Sinai Med. Ctr.*, 3 Cal. App. 5th 881, 901–02
11 (Cal. Ct. App. 2016) (rejecting that plaintiff’s argument that the court *must* take judicial notice as a matter
12 of law of the Bureau's report indicating that the median salary for lawyers in 2012 was \$113,530, and that
13 the trial court has no discretion to exclude that evidence) [citing *Mangini v. R.J. Reynolds Tobacco Co.*
14 (1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73 (*Mangini*), overruled on other grounds in
15 *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, 63 Cal.Rptr.3d 418, 163 P.3d 106]. Here, Exhibits
16 1001-1021 should be offered through experts so that Plaintiff has an opportunity cross examine the experts
17 as to the reliability of the documents. This Court has similarly observed that the decisions and actions of
18 foreign governmental agencies are admissible only as a “basis for expert opinion” (*see*, Decl. of Curtis
19 Hoke, **Exhibit A**, Order Denying Monsanto’s Motion for Continuance of Trial Date and Re: Motions *in*
20 *Limine* at 3), but there is no basis for Monsanto to present Exhibits 1001-1021 to the jury in a vacuum
21 without a properly-disclosed expert subject to rigorous cross-examination.
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24 Granting this request for judicial notice would open the floodgates. Plaintiff could simply just take
25 judicial notice of the hundreds of studies conducted by independent scientists that conclude glyphosate is
26 genotoxic or carcinogenic, and read those to the jury
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1 **C. The Conclusions And Opinions Set Forth In Exhibits 1001 – 1021 Are Not Properly Subject**
2 **To Judicial Notice Because They Are Reasonably Subject To Dispute And Should Be Offered**
3 **Through Experts So That Plaintiff Has An Opportunity To Cross Examine Such Experts As**
4 **To The Scientific Reliability Of Exhibits 1001 – 1021.**

5 The conclusions and opinions set forth in Exhibits 1001- 1021 are not properly subject to judicial
6 notice because they are reasonably subject to dispute; moreover, Exhibits 1001-1021 should be offered
7 through disclosed experts so that Plaintiff has an opportunity cross examine the experts as to the reliability
8 of the documents. Here, Monsanto has requested judicial notice based on California Evidence Code
9 Section 452(h), which “provides that judicial notice may be taken of “[f]acts and propositions that are not
10 reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources
11 of reasonably indisputable accuracy.” *Scott v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 753
12 (2013), as modified on denial of reh'g (Apr. 16, 2013); Cal. Evid. Code § 452(h). Courts cannot take
13 judicial notice of the truth or conclusions within a government report regarding the health effects of a
14 particular product. *See, Scott*, 214 Cal. App. 4th at 754 [citing *Mangini v. R.J. Reynolds Tobacco Co.*
15 (1994) 7 Cal.4th 1057, 1063–1065, 31 Cal.Rptr.2d 358, 875 P.2d 73] (noting that a “court could not take
16 judicial notice of the truth of conclusions within a report from the United States Surgeon General regarding
17 the health effects of smoking or the truth of matters reported in a newspaper article”). Indeed, California
18 law is clear that “[a] matter ordinarily is subject to judicial notice only if the matter is reasonably beyond
19 dispute. Although the existence of a document may be judicially noticeable, **the truth of statements**
20 **contained in the document and its proper interpretation are not subject to judicial notice if those**
21 **matters are reasonably disputable.”** *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97,
22 113 (2007) (internal citations omitted) (emphasis added). Similarly, the truth of the statements contained
23 in Exhibits 1001-1021 and the proper interpretation of conclusions an opinions therein are not properly
24 subject to judicial notice here.
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1 **D. The Conclusions And Opinion Set Forth In Exhibits 1001-1021, Untethered From Serving**
2 **As The Basis Of A Disclosed Expert’s Opinion(s), Are Beyond The Ken Of Lay Jurors And**
3 **Would Open The Jury To A Flood Of Unreliable Scientific Opinions And Conclusions While**
4 **Depriving Plaintiff From Adequate Cross-Examination.**

5 The scientific conclusions and opinions set forth in Exhibits 1001-1021, untethered from serving
6 as the basis of a disclosed expert’s opinion(s), are beyond the ken of lay jurors and would open the jury to
7 a flood of unreliable scientific opinions and conclusions while depriving Plaintiff of adequate cross-
8 examination to assess the reliability of those opinions. As a practical matter, it is inconceivable that the
9 jury will be able to interpret and critically analyze the hundreds of pages highly complex scientific
10 conclusions, opinions, and scientific analysis set forth in Exhibits 1001-1021 without the assistance of a
11 properly disclosed expert opinion. Indeed, if this Court were to take judicial notice of Exhibits 1001-
12 1021, Monsanto would essentially be permitted to flood the jury with unreliable scientific opinions and
13 conclusions not subject to cross examination. Plaintiff would then likewise seek judicial notice of the
14 hundreds of studies by independent scientists that conclude glyphosate is genotoxic or carcinogenic. This
15 would only serve to prejudice Plaintiff and confuse the jury, and Monsanto’s Request for Judicial Notice
16 should be denied. *See, e.g., Licudine*, 3 Cal. App. 5th at 901–02 (“[b]ecause judicially noticed matters are
17 a “substitute for proof,” the trial court retains its usual discretion not to take judicial notice of matters that
18 are irrelevant or, under Evidence Code section 352, have a probative value that is substantially outweighed
19 by the probability that their admission will create a substantial danger of undue prejudice, confusing the
20 issues, or misleading the jury.”)

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22 **IV. CONCLUSION**

23 Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that this Court DENY
24 Defendant Monsanto Company’s Request for Judicial Notice of Foreign Regulatory Documents.
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1 DATED: June 25, 2018

Respectfully submitted,

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3 **THE MILLER FIRM, LLC**

4 By: /s/ Curtis G. Hoke

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