Kelly A. Evans (*pro hac vice*)
(kevans@efstriallaw.com)
Jay J. Schuttert (*pro hac vice*)
(jschuttert@efstriallaw.com)
EVANS FEARS & SCHUTTERT LLP
2300 West Sahara Avenue, Suite 900
Las Vegas, NV 89102
Tel: (702) 805-0290
Fax: (702) 805-0291

Tarek Ismail (*pro hac vice*)
(tismail@goldmanismail.com)
Joe Tomaselli (*pro hac vice*)
(jtomaselli@goldmanismail.com)
GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP
564 West Randolph Street, Suite 400
Chicago, IL 60661
Tel: (312) 881-5970
Fax: (312) 881-5191

Attorneys for Defendant MONSANTO COMPANY
*Additional counsel listed on signature block

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

COORDINATION PROCEEDING SPECIAL TITLE (Rule 3.550) ROUNDUP PRODUCTS CASES THIS DOCUMENT RELATES TO: *Pilliod, et al. v. Monsanto Co., et al.* Case No. RG17862702	JCCP NO. 4953 ASSIGNED FOR ALL PURPOSES TO JUDGE WINIFRED SMITH DEPARTMENT 21 **DEFENDANT'S NOTICE OF MOTION AND MOTION TO EXCLUDE TESTIMONY OF DR. CHARLES BENBROOK ON *SARGON* GROUNDS** BY FAX Hearing Date: March 7, 2019 Time: 10:00 a.m. Department: 21 Reservation No.: R-2048305

TO EACH PARTY AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on March 7, 2019, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Department 21 of the above-entitled court, located at 1221 Oak Street, Oakland, California, Defendant Monsanto Company ("Monsanto") will present its *Sargon* Motion to Exclude the Testimony of Dr. Charles Benbrook. Monsanto seeks an order excluding Benbrook under *Sargon Enterprises, Inc. v. Univ. of Southern California*, 55 Cal. 4th 747, 772 (2012) and Cal. Evid. Code §§ 720 and 801.

This Motion is based upon this Notice, the Memorandum of Points and Authorities, the accompanying Declaration of Eugene Brown, the federal MDL court's *Daubert* record (which has been jointly submitted to this Court by Plaintiffs and Defendants), and supporting exhibits and evidence (filed and served herewith), as well as all pleadings and papers on file in this action and upon such other matters as may be presented by Defendant in further briefing and at the time of the hearing.

Dated: February 12, 2019

/s/ Kirby Griffis
Kirby Griffis (*pro hac vice*)
(kgriffis@hollingsworthllp.com)
Martin C. Calhoun (*pro hac vice*)
(mcalhoun@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Tel: (202) 898-5800
Fax: (202) 682-1639

Kelly A. Evans (*pro hac vice*)
(kevans@efstriallaw.com)
Jay J. Schuttert (*pro hac vice*)
(jschuttert@efstriallaw.com)
EVANS FEARS & SCHUTTERT LLP
2300 West Sahara Avenue, Suite 900
Las Vegas, NV 89102
Tel: (702) 805-0290
Fax: (702) 805-0291

Tarek Ismail (*pro hac vice*)
(tismail@goldmanismail.com)
Joe Tomaselli (*pro hac vice*)

(jtomaselli@goldmanismail.com)
GOLDMAN ISMAIL TOMASELLI
BRENNAN & BAUM LLP
564 West Randolph Street, Suite 400
Chicago, IL 60661
Tel: (312) 881-5970
Fax: (312) 881-5191

Eugene Brown
(ebrown@hinshawlaw.com)
Amee Mikacich
(amikacich@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, CA 94111
Tel: (415) 362-6000
Fax: (415) 834-9070

Attorneys for Defendant
MONSANTO COMPANY

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INTRODUCTION

Plaintiffs designated Dr. Charles Benbrook, an agricultural economist, to testify on a topic that is not the proper subject of expert testimony—whether "Monsanto's conduct as a pesticide manufacturer and registrant, comport with its obligations and stewardship responsibilities." Brown Decl. Ex. 1, Expert Report of Charles Benbrook at ¶ 3 (Nov. 10, 2018) ("Benbrook Rpt."). Dr. Benbrook's testimony was largely excluded from testifying in *Johnson v. Monsanto Co.*, No. CGC-16-550128 (Cal. Super. Ct. S.F. Cnty.). There is no basis for a different outcome here.

Indeed, Dr. Benbrook again seeks to offer the same opinions that were excluded in *Johnson*.[1] He purports to review company documents and opine on the intent, state of mind, and motives of Monsanto employees, EPA, and others. He also seeks to offer opinions about Monsanto's moral, ethical, legal, and regulatory obligations. For multiple reasons, Dr. Benbrook's opinions do not meet the threshold standards for admissibility and should be excluded.

First, Dr. Benbrook does not have the requisite expertise to testify on any of those topics. He of course has no particular expertise in reading other people's emails in order to determine intent or motives—that is a quintessential jury function. He is not a legal expert, nor does he have any particular or relevant regulatory expertise. ***Second***, qualifications aside, it is well-established that an expert may not act as a storyteller for a plaintiff to narrate a defendant's documents or speculate about a defendant's state of mind, intent, or knowledge. To allow a witness to testify as to his personal opinion about a party's intent or state of mind—under the guise of "expert" opinions—would invade the jury's function. ***Third***, it is the role of the judge, not a purported "expert," to instruct the jury about the law and the company's obligations under the law. Dr. Benbrook's opinions amount to nothing more than improper speculation based on his own subjective beliefs. He should not be allowed to present them to the jury.

[1] Dr. Benbrook did not prepare and submit a separate expert report in this case. Rather, Plaintiff's expert disclosures refer to Dr. Benbrook's expert report served in the *In re Roundup* MDL, 15-MD-2741-VC, as well as all other reports and testimony in Roundup cases. *See* Brown Decl. Ex. 2, Pls.' Amended Expert Disclosures.

BACKGROUND

Dr. Benbrook sought to offer these same opinions in *Johnson*, and Judge Karnow held that the vast majority of Dr. Benbrook's purported "expert" opinions were inadmissible.[2] After a hearing, Judge Karnow severely limited Dr. Benbrook's proposed testimony, allowing him to testify only "as to the general framework of the EPA regulatory decision making process," but *prohibiting* him from testifying about the following subjects—all of which Plaintiffs seek to have Dr. Benbrook offer in this case:

1. Dr. Benbrook may not opine about the "proper interpretation of documents, such as emails, or to argue that inferences of knowledge or intent can be derived from those documents[,]" as his "opinions about the knowledge and intent of Monsanto and other actors invade the province of the jury and are often speculative."

2. Dr. Benbrook "may not opine on Monsanto's legal obligations."

3. Dr. Benbrook "may not relate case-specific facts asserted in hearsay statements unless they are independently proven by competent evidence or are covered by a hearsay exception."

4. Dr. Benbrook "may not offer an opinion as to whether the EPA would have approved an amendment to the Roundup label[,]" as he "has no specific expertise pertaining to the EPA's approval of amended label[s]."

5. Dr. Benbrook "may not testify Monsanto misled the EPA," as he "brings no relevant expertise to the table on that issue."

Brown Decl. Ex. 3, *Johnson* Order at 30. For the reasons set forth in Judge Karnow's *Johnson* Order, as well as those set forth below, Dr. Benbrook's opinions offered in this case should likewise be excluded under *Sargon*.

LEGAL STANDARD

Under California law, expert testimony is only admissible when it is offered by a qualified expert in a way that would assist the jury. *See* Evid. Code §§ 720, 801. An expert is only qualified if he "has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth." *Lattimore v. Dickey*, 239 Cal. App. 4th 959, 969 (2015) (quotation omitted). An expert who lacks "special knowledge, skill, experience training, or education" on a subject should be precluded from testifying on that subject. Evid. Code § 720(a). It is "well settled that an expert's qualifications must be established with respect to the subject matter of his testimony. The fact that he

[2] *See* Brown Decl. Ex. 3, Order on Monsanto's Omnibus *Sargon* Mot., *Johnson v. Monsanto Co.*, No. CGC-16-550128 (Cal. Super. Ct. S.F. Cnty. May 17, 2018) ("*Johnson* Order").

purported expert may be qualified in one field vaguely related to another does not mean that he is qualified in that other field" *Cal. Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66.

Apart from qualifications, California Evidence Code § 801 also requires the expert's opinion to be "based on matter . . . that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." Even a qualified expert does not possess "a carte blanche to express any opinion within the area of expertise" and that opinions "based on assumptions of fact without evidentiary support, or on speculative or conjectural factors, ha[ve] no evidentiary value and may be excluded from evidence." *Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal. App. 4th 1108, 1117 (2003); *see also Pacific Gas & Elec. Co. v. Zuckerman*, 189 Cal. App. 3d 1113, 1135 (1987) ("where an expert bases his conclusion on assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value"). When an opinion is "purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because 'an expert opinion is worth no more than the reasons upon which it rests.' " *Id.* (quoting *Kelley v. Trunk*, 66 Cal. App. 4th 519, 523-525 (1988)); *see also Sears, Roebuck & Co. v. Walls*, 178 Cal. App. 2d 284, 289 (1960) ("[a]n expert's opinion is no better than the reasons given for it.").

California courts ultimately must "act[] as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." *Sargon Enterprises, Inc. v. Univ. of Southern California*, 55 Cal. 4th 747, 772 (Cal. 2012) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152(1999)).

ARGUMENT

I. Dr. Benbrook Is Not Qualified to Offer Expert Testimony in this Case.

Dr. Benbrook lacks the qualifications of an expert in the areas for which he is proffered to testify. As a threshold matter, Dr. Benbrook brings very little relevant expertise to this matter. He has no education or degree in any physical science. *See* Brown Decl. Ex. 4, Dep. of Charles Benbrook at

19:3-6, Feb. 8, 2018, *Johnson v. Monsanto Co.*, No. CGC-16-550128 (Cal. Super. Ct. S.F. Cnty.) ("Benbrook *Johnson* Dep."). He is not trained in any field of medicine. *Id*. at 18:13-19. He has no training or degree in toxicology and has never designed or conducted a toxicology study. *Id*. at 18:23-5; 119:17-120:1; Brown Decl. Ex. 5, Dep. of Charles Benbrook at 35:23-36:3, 36:18-21, 112:7-11, Dec. 28, 2018, *Hardeman v. Monsanto Co.*, No. 3:15-c-0525-VC (N.D. Cal.) ("Benbrook *Hardeman* Dep."). He has never investigated the toxicity of pesticides through scientific experiment. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 72:25-73:2. And he has no education or training in epidemiology, nor has he ever designed or conducted an epidemiology study. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 18:20-22, 69:2-7.

This lack of expertise is especially evident when considering the decidedly non-expert topics he has been offered to present. First, Dr. Benbrook seeks to testify about Monsanto's ethical, legal and regulatory duties, but he has never worked at EPA or any regulatory body, and he has never been employed by a pesticide, chemical or agricultural company subject to EPA regulations. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 32:7-15; Ex. 1, Expert Rpt. Appendix A- Resume. Dr. Benbrook has never conducted a pesticide label review with or for EPA. *Id*. at 102:18-23. He has no training or experience regarding preparing herbicide labels for EPA review. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 367:5-13, 365:3-9. He has never published anything in peer-reviewed literature on the labeling requirements for herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Id*. at 367:15-19. Dr. Benbrook also has never participated in a registration review of a pesticide for EPA. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 42:10-12. He has never been involved with a submission to EPA for registration of an herbicide. *Id.* at 86:20-88:2. Moreover, Dr. Benbrook is not trained in the law or legal interpretation or enforcement of federal regulations. *Id.* at 35:13-19. He has never been involved in advising the EPA in its enforcement of FIFRA § 6(a)(2)'s "adverse effects" reporting, nor in assessing whether adverse effects reporting requirements have been met. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 42:13-17, 131:7-9; Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 155:10-15. He has never worked at the EPA on any FIFRA § 6(a)(2) adverse effects reporting issues. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at

429:10-16. He has never participated in an EPA enforcement review for violations of any regulations under FIFRA. *See* Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 42:10-17. Dr. Benbrook recently admitted: "I really don't know the details of the regs [regulations] well enough to say whether [Monsanto] would be obligated to submit" a final version of a certain study report to the EPA. Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 163:2-11. Although he once held a legislative position with a House Subcommittee in the early 1980s, he admits he had no direct responsibility for regulating pesticides in that decades-old position. Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 85:9-11

Second, Dr. Benbrook lacks any qualifications to testify about the proper interpretation of Monsanto documents and whatever inferences about Monsanto's state of mind, motives, and intent that should be drawn from those documents. Even if there were such a thing as an expert qualified to offer opinions on a company's alleged intent (there is not—*see infra* Section II.B.), Dr. Benbrook is not it. He has never been employed by an herbicide or chemical company. *Id.* at 41:21-42:4. He is not an expert in reading or interpreting other people's emails. *See* Brown Decl. Ex. 6, 5/10/2018 *Johnson* Hearing Tr. at 59:5-18 (recognizing that Dr. Benbrook is "[s]urely not" an "expert in email reading"). Nor is he an expert in whether a company acted ethically. He does not have a degree in corporate ethics. Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 41:14-19. Rather, his supposed expertise is "self-taught." *Id*. at 41:21-42:4. He bases his opinions about what a reasonable pesticide company would do on his review of internal documents and his claimed "expert[ise] in honesty" based on his "long personal experience" providing "as solid a foundation to judge the honesty of actions of a pesticide company, a regulator, or a non-governmental organization as anyone currently active in the field." Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 431:5-432:5. Such subjective beliefs and opinions do not qualify him as an expert and invade the province of the jury to judge Monsanto's conduct.

Judge Karnow found that "Dr. Benbrook's background does not demonstrate much familiarity with the EPA or Monsanto's internal knowledge or regulatory compliance" and thus excluded and limited his proposed opinions accordingly. Brown Decl. Ex. 3, *Johnson* Order at 30. Here, too, Dr. Benbrook lacks the qualifications and expertise necessary to offer his proffered opinions.

II. Dr. Benbrook's Summaries and Narration of Corporate and EPA Documents Do Not Constitute Admissible Expert Testimony, and He Should Not Be Permitted To Offer Opinions About Monsanto's Intent, Motives, or State of Mind.

Dr. Benbrook generated the majority of his opinions using a supposed "methodology" of reading internal Monsanto corporate documents and EPA communications, and then speculating as to the intent of their authors and recipients. An expert may not offer opinions that are no more than (1) storytelling or advocacy on behalf of a party, (2) speculation about a party's intent, state of mind, or motives, or (3) personal opinions about a company's ethics. Dr. Benbrook's proposed testimony violates all three of these principles.

A. Dr. Benbrook Should Not Be Permitted to Narrate Company Documents.

It is well-settled that an expert witness may not serve as an advocate or storyteller for a party without bringing relevant expertise to bear on facts actually at issue in the case. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004). In other words, an expert who merely reads or summarizes documents for the jury is not providing helpful testimony because the jury is capable of reading and reaching conclusions on its own. *See id.* Yet, Dr. Benbrook repeatedly provides his opinion about what corporate documents written by or to Monsanto employees mean to *him* based on his personal opinion:

> Q: So you reviewed these corporate documents with the MONGLY Bates- numbering in order to inform yourself what they say and then to tell us in your expert report **what they mean to you,** correct?
>
> A: Yes, sir.
>
> Q: And when you do that, you also, in your report in many places, characterize what **you believe in your personal opinion** is the conduct of Monsanto or its employees or its consultants and whether **you in your personal opinion** believe the conduct is acceptable is some way, correct?
>
> A: Sure. Correct.

Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 37:4-16 (emphasis added). Even a cursory review of Dr. Benbrook's report demonstrates that it consists largely of wholesale recitation of select company documents, pieced together to paint a narrative that Plaintiffs' counsel would like to present to the jury. *See, e.g.*, Brown Decl. Ex. 1, Benbrook Rpt. at ¶¶ 254-268, 281-342, 444-475, 480-496, 524-537.

Reading and interpreting e-mails and memoranda does not require any specialized knowledge or skill outside the ken of the layman. As such, Dr. Benbrook brings to the jury no relevant expertise. "Having an expert witness simply summarize a document (which is just as easily summarized by a jury) with a tilt favoring a litigant, without more, does not amount to expert testimony." *In re Prempro Prods. Liab. Litig.*, 554 F. Supp. 2d 871, 886-87 (E.D. Ark. 2008).

It also invades the jury's core function to review the evidence and make factual determinations. *See, e.g., Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal. App. 4th 1108, 1117-78 (2004) ("An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by *declaring* what occurred."); *City of New York v. FedEx Ground Package Sys., Inc.*, No. 13 Civ. 9173 (ER), 2018 WL 2941455, at *4 (S.D. N.Y. Oct. 10, 2018) (excluding expert opinion where expert "relied on the same types of evidence that a jury traditionally relies upon to answer the sort of questions that a jury traditionally answers."); *Mitchell v. United Nat'l Ins. Co.*, 127 Cal. App. 4th 457, 477-78 (2005) (holding that expert's conclusions as to the defendant company's intent and what the defendant should have known or done differently was mere speculation and must be disregarded).

For this reason, courts regularly exclude experts that offer an advocacy-based recitation of documents. *See, e.g., In re Prempro*, 554 F.Supp.2d at 887 ("If an expert does nothing more than read exhibits, is there really any point in her testifying as an expert?"); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004) (barring "narrative reciting selected regulatory events" because "[s]uch material, to the extent it is admissible, is properly presented through percipient witnesses and documentary evidence.").[3]

[3] *See also Sanchez v. Boston Sci. Corp.*, No. 2:12-CV-05762, 2014 WL 4851989, at *32 (S.D. W. Va. Sept. 29, 2014) ("The majority of this section of Dr. Slack's report is simply a narrative review of corporate documents, which is not helpful to the jury."); *Pritchett v. I-Flow Corp.*, No. 09-cv-02433-WJM-KLM, 2012 WL 1059948, at *7 (D. Colo. Mar. 28, 2012) ("The Court must recognize the inherent power of expert testimony in determining whether to allow an expert to summarize documents that the jury could just as easily summarize itself. Allowing an expert witness to do so may imprint the documents with 'a tilt favoring a litigant,' which hinders impartial adjudication of the merits instead of promoting it." (citing *In re Prempro*, 554 F. Supp. 2d at 887)); *Scentsational Techs., LLC v. Pepsi, Inc.*, No. 13-cv-8645 (KBF), 2018 WL 1889763, at *4 (S.D.N.Y. Apr. 18, 2018), *appeal docketed*, No. 18-2091 (Fed. Cir. June 19, 2018).

(Footnote continued)

Moreover, an expert cannot merely relay hearsay to the jury as independent proof of an ultimate fact. *See Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1524-25 (1992). The California Supreme Court's ruling in *Sanchez* made this expert witness hearsay exclusion abundantly clear.

> In sum, we adopt the following rule: when any expert relates to the jury case-specific out-of-court statements, and treats the contents of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot be logically maintained that the statements are not being admitted for their truth.

People v. Sanchez, 63 Cal. 4th 665, 686 (2016).

Dr. Benbrook's testimony reflects nothing more than improper narration of documents under the guise of expertise and should be excluded.

B. <u>Dr. Benbrook Should Not Be Permitted To Speculate About Monsanto's Motive, Intent, or State of Mind, or To Offer His Personal "Interpretation" of Documents Based on Such Speculation.</u>

Even a qualified expert may not opine as to the intent, motive, or state of mind of a corporation or its employees. *See, e.g., See Kotla v. Regents of Univ. of Cal.*, 115 Cal.App.4th 283, 293 (2004) ("Absent unusual facts, it must be presumed that jurors are capable of deciding a party's motive for themselves without being told by an expert which finding on that issue the evidence supports."); *People v. Vang*, 52 Cal. 4th 1038, 1048-49 (2011) (excluding expert opinion that effectively directed jurors how to resolve the issue of defendant's motive); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-cv-01393-JST, 2018 WL 6511146, at *3 (N.D. Cal. Dec. 11, 2018) ("Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind" because such testimony "would be merely substituting the expert's judgment for the jury's."); *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2018 WL 4212409, at *3 (S.D. W.Va. Sept. 4, 2018) (defendant's "knowledge, state of mind, or other matters related to corporate conduct are not appropriate subjects of expert testimony"); *Deutsch v. Novartis Pharm. Corp.*, 768 F. Supp. 2d 420, 467 (E.D.N.Y. 2011)

(holding that expert cannot opine on a party's state of mind or narrate documents; it is "inappropriate for experts to act as a vehicle to present a factual narrative of interesting or useful documents for a case, in effect simply accumulating and putting together one party's 'story'"); *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2009 WL 3806436, at *4 (M.D. Fla. July 20, 2009) ("Plaintiffs' counsel may not simply use these expert witnesses to provide a narrative history of [the defendant's] marketing and labeling practices ....").

("'[O]pinions of [expert] witnesses on the intent, motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise.'") (quoting *In re Rezulin Prods.*, 309 F. Supp. 2d at 546). As these authorities recognize, an expert who purports to divine the thoughts of a company or its employees is speculating, and such testimony would not be helpful to the jury.

Dr. Benbrook himself recognizes that it is not possible to glean a person's intent or motive merely from reading an email:

> Q: So it's not possible to review the e-mail and understand exactly what was said or what people's intent or motivation was; correct?
>
> A: Correct.

Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 340:23-341:2 (objection omitted). Nonetheless, his expert report and deposition testimony are replete with his personal opinions as to the motives and state of mind of Monsanto and third parties based on his personal interpretation of company and EPA documents that he did not author or receive. For example:

- "The record (including text message exchanges) shows a close, deferential, and supportive relationship in communications from Housenger to Monsanto." Brown Decl. Ex. 1, Benbrook Rpt. at ¶ 469.[4]
- "In this circumstance, it would have been entirely routine for Healy to write back to the Editor and ask for permission to conduct the review with assistance from two Monsanto colleagues who have deep expertise on the subject matter of the paper. The Editor would have almost certainly approved Healy's request, and thanked him in advance for taking on the assignment." Brown Decl. Ex. 1, Benbrook Rpt. at ¶ 576.
- "Then, Chassy alleges that 'The paper in question has not been peer reviewed,' a claim he no doubt knew was false." *Id.* at ¶ 601.

[4] *See also* Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 233:18-21 ("The record shows some unusually close an inappropriate communications between Jess Rowland and Monsanto on the general topic of OPP's evaluation of glyphosate oncogenicity."); *id.* at 234:16-235:17 (testifying that he found an e-mail "very curious and suggestive" which "tipped [him] off" to "perhaps an undue influence" by Monsanto on members of a committee).

Dr. Benbrook's commentary about Monsanto's interactions with the EPA should also be excluded under the *Noerr Pennington* doctrine. That constitutional doctrine, derived from the First Amendment, forbids the imposition of civil liability for advocacy or lobbying efforts conducted before governmental bodies. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Thus, Dr. Benbrook's criticism of the appropriateness of Monsanto's interactions with the EPA is also irrelevant and should be excluded on that basis as well.

- "Q:How do you know that TNO would have deleted the findings?

  A: **How do I know? Well, I guess I don't**. I'm not part of their organization. I don't know what their policies are…" Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 172:10-20 (emphasis added; objection omitted).

- "It is also my opinion that if the Editor of the *CRT* and Taylor and Francis ever come to understand the full degree to which Monsanto controlled the production of these five papers, as documented in this report, they will retract all the papers and issue an apology to its readers." Brown Decl. Ex. 1, Benbrook Rpt. at ¶ 707.[5]

- "EPA could have initiated a cancellation action for Monsanto's failure to comply with a requirement in the 1986 registration standard.... [T]hey did not do it because they felt that it was not a significant enough of a concern to entail the administrative and political cost of trying to cancel a widely-used herbicide." Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 182:23- 183:6.

- "My review of the discovery record leads me to conclude unequivocally that the actions and activities of Monsanto's Third Party Network of scientists were not focused on deepening scientific understanding of Roundup risks, nor on finding the best ways to avoid possibly high-risk applications. The Network was managed and deployed to reinforce Monsanto talking points and science judgments . . . ." BrownDecl. Ex. 1, Benbrook Rpt. at ¶ 99.

Dr. Benbrook has been admonished before for precisely this sort of impugning of a company's motives based on a tale spun from internal documents:

> Dr. Benbrook has never worked inside DuPont nor done any consulting work for the company. He claims he has become an expert on DuPont by reading documents produced in this litigation. But that is akin to studying the Grand Canyon by looking at its depiction in an old-fashioned peeping-type Easter egg. **The view is sharp only because it is so narrow.** It is not enough to make Dr. Benbrook an expert on DuPont.

Adams v. United States, No. 03-0049-E-BLW, 2009 WL 1324231, at *1 (D. Idaho May 8, 2009) (emphasis added) (holding that "Dr. Benbrook cannot testify about DuPont's corporate intent"). Likewise, Dr. Benbrook's speculation about what Monsanto or its employees knew, thought, or intended is not admissible expert testimony in this case.

C. Dr. Benbrook Should Not Be Permitted To Testify About His Opinions as to Monsanto's Ethics or Compliance With Ethical Obligations.

Dr. Benbrook also should not be permitted to offer his opinions about Monsanto's corporate ethics or compliance with ethical obligations. *See, e.g.*, Brown Decl. Ex. 1, Benbrook Rpt. at ¶ 16. For

[5] Monsanto notes that, contrary to Dr. Benbrook's speculative prediction (guised as an expert "opinion"), the referenced papers have not been retracted.

example, Dr. Benbrook admits that Monsanto had no legal obligation under EPA regulations to place an oncogenicity warning on its Roundup labels, yet he nonetheless opines that Monsanto had a "moral and ethical obligation" to do so. *See* Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 239:1-24. *See also id.* at 241:10-242:4. *See also id.* at 279:20-22 ("Monsanto has not done as much as it should have to discourage overstatements of the safety of glyphosate-based herbicides."); *id.* at 237:3-11 (testifying as to his opinion about what a "prudent company" would have done). Remarkably, Dr. Benbrook has claimed that he should be allowed to so opine because he is a self-professed "expert in honesty":

> Q: You've also commented a number of times both in your report and now again today at least once, about whether a particular individual or company, whether it be Monsanto or anybody else at the agency, is honest. Are you claiming you're an expert in honesty?
>
> A: Yes. Yes. I'm an expert in honesty.

Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 430:25-431:7. Dr. Benbrook is no more an "expert in honesty" than the jurors who will decide this case, and his testimony that the EPA or Monsanto acted unethically or otherwise inappropriately could carry undue weight and thus prejudice Monsanto. *See, e.g.*, *Kotla v. Regents of the University of California*, 115 Cal. App. 4th 283, 291 (2004) ("Expert opinions should be excluded when the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." (internal quotations omitted)); *Westbrooks v. State of California*, 173 Cal. App. 3d 1203, 1209–10 (1985) ("If the jurors would be able to draw a conclusion from the facts testified to as easily and as intelligently as the expert, the opinion testimony of the expert is not admissible."); *In re Bard IVC Filters Prods. Liab. Litig.*, No. MDL 15-02641-PHX DGC, 2018 WL 495187, at *3 (D. Ariz. Jan. 22, 2018) ("Personal views on proper corporate behavior are not appropriate expert opinions."); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d at 542-43 ("The opinions of plaintiffs' witnesses, however distinguished these individuals may be as physicians and scientists, concerning the ethical obligations of pharmaceutical companies and whether the defendants' conduct was ethical are inadmissible ….").

Dr. Benbrook's opinions about Monsanto's moral obligations also are not based on a reliable or scientific methodology. For example, he claims that Monsanto has different (and greater) obligations than other pesticide manufacturers simply because it has greater market share. Brown Decl. Ex. 5,

Benbrook *Hardeman* Dep. at 257:5-19. He also admits that his personal opinions regarding ethical guidelines for authorship credit in peer-reviewed literature differ from the guidelines set forth by the International Committee of Medical Journal Editors (ICMJE). *Id.* at 262:2-265:6. Dr. Benbrook's personal views about Monsanto's "moral and ethical obligations" have no bearing to the relevant *legal* questions in this case, and they certainly should have no impact on the *factual* questions the jury will ultimately decide.

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Plaintiff is not entitled to have a partisan "expert" with the Court's imprimatur narrate company documents and place his own spin on them. Judge Karnow rightfully excluded Dr. Benbrook's attempt to opine on "proper interpretation of documents, such as emails, or to argue that inferences of knowledge or intent can be derived from those documents[,]" as his "opinions about the knowledge and intent of Monsanto and other actors invade the province of the jury and are often speculative." Brown Decl. Ex. 3, *Johnson* Order at 30. The same result is warranted here.

III. Dr. Benbrook's Opinions on Legal or Regulatory Duties Should Be Excluded

Dr. Benbrook also seeks to offer his opinion that Monsanto failed to comply with its legal or regulatory obligations. In addition to Dr. Benbrook's lack of relevant qualifications (*see* Section I, *supra*), these opinions should be excluded because they lack the necessary foundation and invade the province of this Court to instruct on the law, and of the jury to decide Monsanto's compliance with that law. *See* Brown Decl. Ex. 3, *Johnson* Order at 30.

A. Dr. Benbrook's Opinions Regarding Monsanto's Compliance With Legal Duties and EPA Regulations Are Improper.

Dr. Benbrook seeks to opine that Monsanto violated federal law and EPA regulations, including FIFRA § 6(a)(2)'s "adverse effects" reporting regulations, and that Monsanto "failed to meet [its] obligation by failing to warn about the risks of oncogenicity, genotoxicity, and most recently, carcinogenicity." Brown Decl. Ex. 1, Benbrook Rpt. at ¶¶ 13, 17, 736. *See also* Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 141-143 (opining as to Monsanto's legal reporting obligations and

Monsanto's alleged failure to meet them).[6] These are legal conclusions that are not appropriate for expert testimony. *See, e.g., Communications Satellite Corp. v. Franchise Tax Bd.*, 156 Cal. App. 3d 726, 747 (1984) ("An expert witness may not properly testify on questions of law or the interpretation of a statute."); *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1185 (reversing superior court that permitted expert to opine on issues of law that are for the jury to determine); *Lukov v. Schindler Elevator Corp.*, No. 5:11-cv-00201 EJD, 2012 WL 2428251, at *2 (N.D. Cal. June 26, 2012) (excluding expert testimony on legal issue).

Dr. Benbrook has no real expertise on FIFRA § 6(a)(2), his opinions are derived from a selective review of corporate emails, and his opinions as to Monsanto's compliance with regulations and federal law are not the proper subject of expert testimony. Judge Karnow thus held that Dr. Benbrook "may not opine on Monsanto's legal obligations." Brown Decl. Ex. 2, *Johnson* Order at 30. The same result should follow here.

B. <u>Dr. Benbrook Improperly Speculates About What Monsanto Should Have Done Differently and About the Customs and Practice of EPA, Including What Warnings or Labeling Might Have Been Accepted by EPA.</u>

Dr. Benbrook also should not be permitted to testify as to what he thinks Monsanto should have done differently—such as conducting different or additional testing or providing different warnings—or whether EPA would have accepted such warnings.[7] His report and past deposition testimony is rife with speculation about what warnings should have been included and the EPA's warnings practices and/or customs, often dating back decades:

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[6] *See also, e.g.*, Brown Decl. Ex. 1, Benbrook Rpt. at ¶ 16 ("Monsanto's zeal in protecting glyphosate's FTO directly conflicts with health-protection obligations imposed by federal law …."); *Id.* at ¶ 17 ("Monsanto failed to meet obligations imposed on it by federal law and EPA regulations."); Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 170:24-171:2, 177:4-22.

[7] Although Dr. Benbrook purported to offer an opinion on general causation in an earlier case, *see* Brown Decl. Ex. 7, Dep. of Dr. Charles Benbrook, May 23, 2018 and Aug. 14, 2018, *Hall v. Monsanto Co.*, No. 1622-CC01071 ("Benbrook Hall Dep."), at 603:24-604:8, in a more recent case Plaintiff's counsel recently represented that "Dr. Benbrook is not being offered on causation." *See* Brown Decl. Ex. 1, Benbrook Rpt.; Brown Decl. Ex. 5, Benbrook *Hardeman* Dep. at 238:7-8. To the extent Dr. Benbrook does attempt to offer a general causation opinion, such opinion must be excluded because (1) Dr. Benbrook does not have the qualifications to opine regarding these scientific issues; and (2) Dr. Benbrook's general causation opinion falls well outside the scope of his expert report in this case. *See* Brown Decl. Ex. 1, Benbrook Rpt.

- "Monsanto could have peripherally put a statement on its label that there's some evidence of potential to cause oncogenic risk from one of the studies submitted, and in an abundance of caution, we've added additional PPE. And I am quite certain that OPP would not object to the addition of such language on a label." Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 473:15-24.

- "In my opinion, by or about 1986, Monsanto could have and should have added a warning to Roundup labels alerting applicators that heavy and/or sustained exposures to Roundup might contribute to the risk of certain cancers." Brown Decl. Ex. 1, Benbrook Rpt. at ¶ 11.

Dr. Benbrook lacks the qualifications necessary to opine about what warnings should have been included under EPA regulations or what warnings EPA may or may not have accepted. As Judge Karnow noted, "Dr. Benbrook's background does not demonstrate much familiarity with EPA or…regulatory compliance." Brown Decl. Ex. 3, *Johnson* Order at 30.

Moreover, Dr. Benbrook's labeling and warning opinions are contrary to the repeated EPA determinations that glyphosate is not carcinogenic to humans, and contrary to his own testimony that label directions and precautions are intended to translate risk assessments of the EPA's Office of Pesticide Programs. Brown Decl. Ex. 4, Benbrook *Johnson* Dep. at 400:18-401:4. For example, Dr. Benbrook agreed that the EPA, as recently as December 2017, determined that glyphosate-based herbicides are not genotoxic, and agreed that EPA could, at any time, demand that Monsanto conduct further genotoxicity testing on its glyphosate-based herbicides, but it has never done so. *See id.* at 466:5-13, 481:4-16. Dr. Benbrook also admitted that Monsanto has satisfied *all* EPA-required toxicology data requirements. *See, e.g., id.* at 128:21-130:2; Brown Decl. Ex. 7, Benbrook *Hall* Dep. at 110:24-111:5, 115:23-116:2.

Dr. Benbrook should not be permitted to present these opinions to the jury, as they suggest that Monsanto had legal or other obligations to act differently, and they invade the role of the Court to instruct the jury on the law. These opinions also amount to speculation and improperly invade the jury's role as the decision-maker on the adequacy of Monsanto's actions under applicable law. *See also* Brown Decl. Ex. 3, *Johnson* Order at 30 (ruling that Dr. Benbrook "may not offer an opinion as to whether the EPA would have approved an amendment to the Roundup label," as he "has no specific expertise pertaining to the EPA's approval of amended labels").

C. Dr. Benbrook's Opinions that Monsanto Defrauded or Misled the EPA are Inadmissible and Preempted by Federal Law.

To the extent Dr. Benbrook seeks to opine that Monsanto defrauded or misled the EPA, such testimony should be excluded because he "brings no relevant expertise to the table on that issue." Brown Decl. Ex. 3, *Johnson* Order at 31; *see also* Section I, *supra.* Moreover, Dr. Benbrook has admitted that he is not aware of the EPA ever finding that Monsanto misrepresented anything regarding the safety of its GBHs. Brown Decl. Ex. 7, Benbrook *Hall* Dep. at 150:11-15. Additionally, any claims that Monsanto defrauded or misled the EPA are preempted by federal law.[8]

CONCLUSION

Dr. Benbrook seeks to offer the same opinions in this case that were excluded in *Johnson*. He attempts to substitute his personal opinions for the opinion of the jury, under the guise of "expertise" that he does not possess. The jury is fully capable of reviewing and interpreting the documents in this case and reaching their own conclusions about those documents and Monsanto's actions in light of the applicable law as instructed by this Court. Dr. Benbrook's proffered expert testimony should be excluded.

[8] *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001) (holding that state-law fraud-on-the-FDA claims were impliedly preempted); *see also Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1205, 1208 (9th Cir. 2002) (finding that the "rationale articulated by the Supreme Court in *Buckman* applies" to EPA "cases involving fraud-on-the-agency labeling allegations"); *Giglio v. Monsanto Co.*, No. 15-cv-2279 BTM(NLS), 2016 WL 1722859, at *3 (S.D. Cal. Apr. 29, 2016) ("Plaintiff's claims based on failure to warn the EPA of dangers of Roundup are preempted.").

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/s/ Kirby Griffis
Kirby Griffis (*pro hac vice*)
(kgriffis@hollingsworthllp.com)
Martin C. Calhoun (*pro hac vice*)
(mcalhoun@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Tel: (202) 898-5800
Fax: (202) 682-1639

Kelly A. Evans (*pro hac vice*)
(kevans@efstriallaw.com)
Jay J. Schuttert (*pro hac vice*)
(jschuttert@efstriallaw.com)
EVANS FEARS & SCHUTTERT LLP
2300 West Sahara Avenue, Suite 900
Las Vegas, NV 89102
Tel: (702) 805-0290
Fax: (702) 805-0291

Tarek Ismail (*pro hac vice*)
(tismail@goldmanismail.com)
Joe Tomaselli (*pro hac vice*)
(jtomaselli@goldmanismail.com)
GOLDMAN ISMAIL TOMASELLI
BRENNAN & BAUM LLP
564 West Randolph Street, Suite 400
Chicago, IL 60661
Tel: (312) 881-5970
Fax: (312) 881-5191

Eugene Brown
(ebrown@hinshawlaw.com)
Amee Mikacich
(amikacich@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, CA 94111
Tel: (415) 362-6000
Fax: (415) 834-9070

Attorneys for Defendant
MONSANTO COMPANY