Michael L. Baum, Esq. (SBN: 119511)
mbaum@baumhedlundlaw.com
R. Brent Wisner, Esq. (SBN: 276023)
rbwisner@baumhedlundlaw.com
Pedram Esfandiary (SBN: 312569)
pesfandiary@baumhedlund.com
BAUM HEDLUND, ARISTEI, & GOLDMAN, P.C.
10940 Wilshire Blvd., 17th Floor
Los Angeles, CA 90024
Telephone: (310) 207-3233
Facsimile: (310) 820-7444

Michael Miller (*pro hac vice*)
mmiller@millerfirmllc.com
Curtis G. Hoke (SBN 282465)
choke@millerfirmllc.com
THE MILLER FIRM, LLC
108 Railroad Ave
Orange, VA 22960
Telephone: (540) 672-4224
Facsimile: (540) 672-3055

Attorneys for Plaintiffs

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 v. Monsanto*, Alameda Sup Ct. Case No.: RG17862702	JCCP NO. 4953 RG17862702 **PLAINTIFFS' OPPOSITION TO MONSANTO'S MOTION TO EXCLUDE THE EXPERT OPINION OF DR. CHARLES BENBROOK** **BY FAX** [Filed concurrently with Declaration of Pedram Esfandiary and Exhibits] Hon. Winifred Smith Hearing Date: March 7, 2019 Time: 10:00 a.m. Department: 21 Reservation No.: R-2048305

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Plaintiffs have proffered the opinions of Dr. Charles Benbrook, an expert highly qualified in the areas of "pesticide regulation and pesticide risk assessment." Exhibit 1, Benbrook *Johnson* Trial Trans. at 3869:16-23. Dr. Benbrook's testimony is directly relevant to the heart of this case, which involves issues such as the U.S. pesticide regulatory scheme, the interplay of various pesticide regulations, pesticide risk assessment, the chronology of the use, registration and labeling of Monsanto GBFs, Monsanto's conduct regarding the evaluation of and publication about the risks associated with use of its GBFs, Monsanto's public statements through labeling, advertising and marketing regarding its GBFs, the differences between the genotoxicity datasets evaluated by EPA and IARC in their respective evaluations of the carcinogenicity of glyphosate, pesticide industry stewardship/ standard of care, including industry codes of conduct, Monsanto's adoption of those codes of conduct, and Monsanto's conduct vis-à-vis those codes of conduct and its GBFs.

Dr. Benbrook brings over 40 years of direct and relevant experience to the above issues, and will walk the jury through the complex regulatory schemes governing the approval and sale of the GBFs at issue in this litigation, and the industry standards which govern the conduct of pesticide manufacturers such as Monsanto. Dr. Benbrook's testimony, although limited in scope by Judge Karnow in the *Johnson* trial, was ultimately admitted, and Dr. Benbrook proceeded to assist the jury in understanding and contextualizing some the relevant regulatory and industry procedures which are implicated in the registration and use of GBFs, matters not directly addressed by Plaintiffs' causation experts. As discussed below, it is well-established that expert testimony is necessary for educating a lay jury on intricate regulatory frameworks and industry standards. California courts, and district courts within the Ninth Circuit, have consistently held that expert testimony regarding industry standards can be used by the trier-of-fact to evaluate the conduct of a defendant in light of such standards, and that such opinions do *not* amount to, as Monsanto contends, "instructing the jury on the law". Indeed, Dr. Benbrook has been permitted to offer substantively similar opinions in a separate matter. *See, e.g., Adams v. U.S.* 2009 WL 1085481 (D. Idaho, Apr. 20, 2009, No. CV-03-49EBLW).

In formulating his opinions, Dr. Benbrook conducted an exhaustive review of the record in this case. And, although Dr. Benbrook will not opine on Monsanto's intent, state of mind, or motives, he

will use his understanding of the record to contextualize pertinent standard of care opinions, a practice regularly employed and admitted in courts across the country, particularly in the setting of product liability cases involving negligence and failure to warn claims. Contrary to Monsanto's contentions, Dr. Benbrook will not be merely reciting the contents of internal company documents, but instead apply his extensive knowledge and experience to the facts and testify regarding Monsanto's practices with respect to GBFs as evidenced in public and internal documents. Throughout its Motion, Monsanto goes through concerning lengths to mischaracterize Dr. Benbrook's extensive deposition testimony, often without directly citing to the record. The Court should not be swayed by such shenanigans, and Dr. Benbrook's opinions should be admitted in full.

LEGAL STANDARD

In assessing the admissibility of expert opinions, a California trial court conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'" *See, Sargon Enterprises, Inc. v. Univ. of S. California*, 55 Cal. 4th 747, 772 (2012) (quoting Edward J. Imwinkelried & David L. Faigman, *Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony* (2009) 42 Loyola L.A. L. Rev. 427, 449).[1] The Court's "gatekeeping" role is limited to excluding only "'clearly invalid and unreliable' expert opinion, and a trial judge "must be exceedingly careful not to set the threshold to the jury room too high." *Sargon*, 55 Cal.4th at 772. As the Fourth District recently explained:

> [t]he gate tended is not a partisan checkpoint. It bars expert opinion only if it fails to meet the minimum qualifications for admission. If the opinion is based on materials on which the expert may reasonably rely in forming the opinion, and flows in a reasoned chain of logic from those materials rather than from speculation or conjecture, the opinion may pass, even though the trial court or other experts disagree with its conclusion or the methods and materials used to reach it.

Davis v. Honeywell Intern. Inc., 245 Cal.App.4th 477, 492 (2016). Importantly, "'the admissibility

[1] "*Sargon* did not announce a new rule, but instead relied on prior statutory and case law authority to evaluate foundational issues with expert testimony. *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1503. *Sargon* did not involve questions germane to the issues in the matter at bar, but rather involved the exclusion of expert testimony on lost profit that were "wildly beyond, by degrees of magnitude anything Sargon had ever experienced in the past." *Sargon* 55 Cal. 4th at 776.

of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard… expert opinion may be admitted ***whenever it would 'assist' the jury***. It will be excluded only when it would add nothing at all to the jury's common fund of information[.]'" *Summers v. A.L. Gilbert Co.*, 69 Cal.App.4th 1155, 1168 (1999) (quoting *People v. McAlpin*, 53 Cal.3d 1289, 1299 (1991)) (emphasis added).

A primary distinction between how California and federal courts evaluate the admissibility of expert testimony resides in the applicable standard of proof utilized by the respective jurisdictions. Whereas, under federal *Daubert* the trial court considers expert opinions using a "preponderance of proof" standard, in California, "[t]he court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." *Sargon*, 55 Cal.4th at 772; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) n.10. Put simply, the threshold for admissibility under California Rules of Evidence is lower than in federal court.

ARGUMENT

I. The Scope of Dr. Benbrook's Testimony is Within the Range of Admissible Expert Opinions Helpful to the Trier of Fact in Understanding Vital Issues of the Case

Dr. Benbrook has spent his 40-year professional life immersed in pesticide risk evaluation and related regulatory issues and pesticide industry standards of care. Dr. Benbrook has testified before Congress on many of these subjects, advised pesticide companies, presented on them in a number of academic and professional settings and published in both peer-reviewed and non-peer-reviewed literature for decades. *See, generally*, Exhibit 2, Benbrook CV. Plaintiffs will not proffer Dr. Benbrook's expert testimony as a means of regurgitating facts or documents that the jury might otherwise consider directly. Dr. Benbrook is not going to testify as to his interpretation of what Monsanto historically said, his interpretation of Monsanto's intent or his interpretation of Monsanto's reasons for taking certain actions or failing to act. Instead, Dr. Benbrook will provide opinions as to Monsanto's corporate conduct regarding GBFs vis-à-vis pesticide industry standards of care based on

what Monsanto scientists and officials have said about their actions, inaction, and plans regarding GBFs, in light of his extensive experience in and knowledge of the field. Indeed, Judge Karnow specifically recognized that Dr. Benbrook has sufficient experience to meaningfully testify on this topic. *See* Exhibit 3, *Johnson Sargon* Order at 30 (acknowledging that Dr. Benbrook has "experience regarding industry standards and stewardship obligations[.]"); *Fidelity Nat. Financial, Inc. v. National Union Fire Ins. Co. of Pittsburg, PA* (S.D. Cal., Mar. 28, 2014, No. 09-CV-140-GPC-KSC) 2014 WL 1286392, at *7 ("experts base their opinions on their knowledge of industry standards.").[2]

As discussed below, Dr. Benbrook's testimony is no different than other "standard of care" experts whose testimony is accepted and presented in the regular course of litigation and will assist the jury's understanding of Monsanto's statements and conduct in the context of the then-existing regulations and pesticide industry standards of care adopted by Monsanto. *See, e.g., Kahn v. East Side Union High School Dist.*, 31 Cal.4th 990, 999 (2003) (expert's testimony regarding industry standards and procedures assisted the trier of fact with comparing the defendant's conduct to the industry standard); *Intercargo Ins. Co. v. Burlington Northern Santa Fe R.R.*, 185 F.Supp.2d 1103, 1114 (C.D. Cal. 2001) ("Experts may testify regarding industry standards where the average lay person has little or no knowledge regarding those industry standards.") (citing *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal.3d 689, 703 (1973)); *King v. GEICO Indemnity Company*, 712 Fed.Appx. 649, 651 (9th Cir. 2017) ("experts may testify about industry standards").

II. Dr. Benbrook is Highly Qualified to Offer His Designated Opinions

Dr. Benbrook earned his B.A. in Economics, *cum laude*, from Harvard University and earned his M. A. and Ph.D. in Agricultural Economics from the University of Wisconsin in 1980. Just prior and then immediately subsequent to graduation, Dr. Benbrook served as an Agricultural Policy Analyst for the Council on Environmental Quality of the Executive Office of the President. Upon President Reagan's election, he served as Staff Director for the U.S. House of Representatives Subcommittee on Department Operations, Research and Foreign Agriculture ("DORFA"). The DORFA Subcommittee had jurisdiction over pesticide regulation and FIFRA. Exh. 1, Benbrook *Johnson* Trial Trans. at 3857-

[2] Plaintiff's counsel's decision in *Johnson* to not proffer Dr. Benbrook on this topic has no bearing on the matter at bar, where Dr. Benbrook will properly testify regarding industry standards of care and stewardship obligations.

3858. Dr. Benbrook organized hearings on pesticide regulation conducted by DORFA. *Id*. at 3859-3860. In his capacity as Staff Director in the early 1980's, Dr. Benbrook was well versed in and devoted a significant portion of his time reviewing and specifically commenting on the science and policy involved in the regulation of carcinogenic pesticides by the EPA. For example, in 1983, Dr. Benbrook contributed to the public discussion and analysis of the interface of the science of pesticide risk assessment and regulatory policy at the EPA in a Letter to the Editor published in the prestigious journal, Science, in the section, "Carcinogen Policy at EPA."[3] Dr. Benbrook's published letter addressed precisely the issues facing EPA, at that time, in its evaluation of glyphosate's oncogenicity. Thus, Monsanto's protestations to the contrary, Dr. Benbrook, in real time, was involved with and had expertise in assessing EPA pesticide regulations and the EPA's Office of Pesticide Program ("OPP") assessment of oncogenicity, carcinogenicity, and genotoxicity. Evid. Code, § 801 (expert's opinion may be "based on matter including…experience[.]"); *People v. Prince*, 40 Cal.4th 1179, 1232 (2007) (expert permitted to draw upon "personal experience upon which to base his opinion.").[4]

[3] *See* Exh. 4, Benbrook, Carcinogen Policy at EPA, Science, Vol. 219 (1983) at 798. Dr. Benbrook wrote 36 years ago: "A congressional staff investigation of the pesticide regulatory program in the [EPA]… analyzed the scientific basis for several recent regulatory actions taken by the EPA in an effort to sort out legitimate scientific refinements in regulatory decision-making from changes in policy. The investigations findings, conclusions, and recommendations are contained in a DORFA Subcommittee report…issued in December 1982…Chapter 6 of the report focuses on regulation of pesticides shown to produce cancer in laboratory animals. ***An in-depth review of several case studies, along with dozens of interviews with staff scientists responsible for analyzing available data on pesticide oncogenicity***, led subcommittee staff to conclude that indeed significant changes had been incorporated in the way the EPA balances and juxtaposes experimental evidence under the aegis of the 'weight-of-evidence' decision-making." (emphasis added).

[4] Throughout its Motion, Monsanto repeatedly misstates Dr. Benbrook's testimony. For example, Monsanto picks out parts of a sentence from Dr. Benbrook's recent deposition for the proposition that Dr. Benbrook is not sufficiently qualified to testify about Monsanto's obligations to submit a dermal absorption study under relevant EPA regulations. *See* Motion at 5 (quoting Exh. 5, Benbrook Hardeman Dep. at 163:2-11). Dr. Benbrook's testimony was in response to Monsanto's counsel's question about whether portions of the final study report, over which there was scientific dispute as to validity, should be submitted to regulators. Dr. Benbrook testified: "I don't think they would be required to submit the final report had they submitted the first draft report, which they surely were require to submit." *Id*. at 162:21-24. When pressed on whether he was "familiar enough with the regulations" to opine on whether the report containing the disputed data should have been submitted, Dr. Benbrook rightfully testified: "a thorough answer to that question would require me to refresh my memory about which aspects of the study they've acknowledged in the body of the report…I will certainly testify that Monsanto had an obligation to submit one of the…reports…all of them have the same core finding with the exception of the revision of the dermal penetration rate for the technical glyphosate concentrate."). *Id*. at 163:16-19, 164:6-10. Monsanto's counsel only showed Dr. Benbrook one section of the report (the conclusion) and Dr. Benbrook

Dr. Benbrook's career assessing EPA pesticide regulations, policy and evaluation of cancer risk continued in his next position as Executive Director (1984-1990) of the Board of Agriculture of the National Research Council ("NRC") of the National Academy of Sciences ("NAS"). These highly prestigious organizations were devoted to providing scientific research and guidance to governmental agencies. On a number of occasions, Dr. Benbrook, in his position with the NRC, testified before and at the request of Congress on issues related to pesticide use, management and risks and the interplay of the regulatory schemes controlling the use of pesticides. *See* Exh. 2, Benbrook CV.

In his September 1988 testimony, Dr. Benbrook provided guidance and presented the findings of an extensive study, conducted by the NRC, at the request of and to advise the EPA, regarding procedures to follow when a pesticide (such as Roundup) had been classified as a "potential oncogene" and was used on crops. *See*, *generally*, Exh. 6, Benbrook Congressional Trans. (Sept. 7, 1988). This book contains sections on and analyses of the oncogenic risk of pesticides, including a chapter and an appendix on the methodology of estimating oncogenic risks, sections and analyses on the legal basis for regulation of pesticides, including analyses, requirements and discussion of FIFRA, the FDCA, the EPA pesticide registration process, the EPA's classification system for carcinogens, the legislative history of various aspects of pesticide regulation and EPA's application of various pesticide regulations. The NRC study repeatedly discusses "Glyphosate (Roundup®)" and, specifically, as one of the "potentially oncogenic pesticides identified by the EPA." *Id.* at 52, Table 3-3, 68, Table 3-9, 76 Table 3-17, 85 Table 3-25. Thus, Dr. Benbrook, more than three decades ago and completely unrelated to litigation, obtained knowledge of glyphosate, its oncogenic potential, its risks, its uses, and the impact of the applicable regulations on its sale and use. *See Daubert* 43 F.3d at 1318 ("Establishing that an expert's proffered testimony grows out of pre-litigation research or that the expert's research has been subjected to peer review are the two principal ways the proponent of expert testimony can show that the evidence satisfies the first prong of Rule 702."). When hearings were held, Dr. Benbrook was the person invited to present the findings and policy recommendations and to summarize the findings of the various experts "in agricultural pest control, pesticide development, agricultural economics, cancer risk assessment,

---

responded that he would need to evaluate the details of the study in the main body of the report to determine whether any problems with the results would affect its validity for regulatory submission. *See id*. at 163:20-64:1.

public health, food science, regulatory decision making, and law" who contributed to the study. Exh. 6, Benbrook Congressional Trans. (Sept. 7, 1988) at v.

Since serving as Executive Director of NRC, Dr. Benbrook has held appointments with organizations such as the Johns Hopkins University, Bloomberg School of Public Health, U.S. Department of Agriculture Agricultural Biotechnology Advisory Committee, and has served as the Chief Scientist of the Organic Center. Exh. 2, Benbrook CV at 1-2. Dr. Benbrook has conducted multiple pesticide label reviews for multiple clients of his private consulting business, and consulted as a contractor for the EPA. Exh. 7, Benbrook *Johnson* Dep. at 102:6-11, 69:11-19. Dr. Benbrook also served as chief scientist for the Organic Center where he was responsible for tracking scientific developments on the safety of food and the impact of pesticides on the environment. Exh. 1, Benbrook *Johnson* Trial Trans. at 3865-3866.

Where Monsanto asserts that Dr. Benbrook is simply a "self-taught" amateur expert, those are the words of Monsanto's attorney and the Motion fails to quote Dr. Benbrook's explanation in response: "Q: Is it all self-taught? A: It is experience that I gained through my research and experience in work, and if that's what you consider self-taught knowledge then, yes, I will agree to that." Exh. XX, Benbrook *Johnson* Dep. at 430:20-24; *id. at* 365:14-20." ("Q. And that's based on your self-taught research; is that right? A: It's based on the fact that over the last 35 years, I've worked in the area of pesticide use, risk assessment, public health and environmental impacts."). Likewise, Monsanto criticizes Dr. Benbrook and asserts that his opinions are inadmissible, because he lacks degrees or official credentials in those areas, credentials that do not exist.[5]

Over the decades, Dr. Benbrook has presented his evaluations of pesticide risk and regulation through the publication of over 40 peer-reviewed articles, many involving issues related to herbicide use, risk and regulation and some, specifically on GBFs. *See* Exh. 2, Benbrook CV at 5-12. In 1996, Dr. Benbrook published a seminal text on pesticide use and regulation in America, titled *Pest*

[5] "Q. Dr. Benbrook, is there a credentialing authority for expertise in corporate or regulatory honesty, to your knowledge? A: Not that I know of.... Q: Is there credentialing or training authority, to your knowledge, for expertise in the reporting requirements of 6(a)(2)(b)?...The witness: No. Exh. 7, Benbrook *Johnson* Dep. at 626:8-627:4.

Management at the Crossroads. Exh. 8, Benbrook Expert Report (11/10/18) at 35. Dr. Benbrook has also written a variety of reports, papers and book chapters on the subject of pesticides and pesticide regulations.[6] Dr. Benbrook continues to contribute to the scientific discussion relating to pesticide risk and regulation, with his most recent publication—specifically addressing GBFs and published on January 14, 2019—providing a thorough, detailed analysis of the differences in the glyphosate genotoxicity datasets reviewed by EPA and IARC in their respective reviews of the glyphosate carcinogenicity literature. *See* Exh. 9, Benbrook, C., *How did the US EPA and IARC reach diametrically opposed conclusions on the genotoxicity of glyphosate-based herbicides?* 31 ENVIRON SCI. EUR. 1-16 (2019). As the Court is aware, IARC and EPA have reached different conclusions regarding glyphosate genotoxicity. Dr. Benbrook's painstaking analysis illustrates the differences in the genotoxicity data reviewed by these two agencies and has been accepted as a valuable contribution to the scientific community, as demonstrated by its use by a critical EU Parliament Committee. *See* Arthur Nelsen, *EU glyphosate approval was based on plagiarized Monsanto text, report finds*, Guardian (January 15, 2019), available at: https://www.theguardian.com/environment/2019/jan/15/eu-glyphosate-approval-was-based-on-plagiarised-monsanto-text-report-finds. A portion of Dr. Benbrook's expert report and anticipated testimony involves the same subject. Jurors hearing about the differences in conclusions by EPA and IARC would certainly be assisted in reconciling these differences and making factual determinations regarding them by hearing the same analysis. Dr. Benbrook's analysis and testimony will greatly assist the jury in evaluating why the conclusions of EPA and IARC regarding the carcinogenicity of glyphosate are different.

III. Dr. Benbrook May Testify About Matters the Jury May Consider in Deciding Monsanto's Intent, Motive, or State of Mind

Dr. Benbrook will *not* opine on Monsanto's motive, intent, or state of mind. He will provide expert testimony regarding factual matters that properly inform *the jury's own determination* of motive,

[6] By way of example, Dr. Benbrook authored a report for the Cal-EPA, Department of Pesticide Regulation, entitled, *Challenge and Change; A Progressive Approach to Pesticide Regulation in California* (1993). For the Consumers Union, he authored a paper, *Pesticide Management at the Crossroads* (1996). For the Organic Center, Dr. Benbrook authored a report *Successes and Lost Opportunities to Reduce Children's Exposure to Pesticides Since the Mid-1990s* (2006). Exh. 2, Benbrook CV at 11, 10.

intent, or state of mind. *See, United States v. Pacific Gas and Electric Company* 2016 WL 1640462 (N.D. Cal., Apr. 26, 2016, No. 14-CR-00175-TEH), at *3 (while an expert witness may not opine as to a corporation's intent, he or she may testify about "corporate practices and policies" that the jury may use to ascertain corporate intent). Accordingly, Dr. Benbrook is being offered to do precisely what the court permitted in *Pacific Gas*: he will apply his own training and experience to the facts and record and testify regarding Monsanto's practices with respect to GBFs as evidenced in public and internal documents.

Monsanto's selective citations to Dr. Benbrook's deposition testimony are extremely misleading. It was defense counsel who used the words "personal opinion" repeatedly at Dr. Benbrook's two-day deposition in the *Johnson* case. In response, Dr. Benbrook clarified that he is not opining as to what Monsanto's documents mean to him, rather, as he testified, the portions in his report summarizing Monsanto's documents *are not his personal opinions* but are merely statements of fact in the record. *See* Exh. 7, Benbrook *Johnson* Dep. at 451-452 ("So all portions of my report that simply restate and observe what Monsanto scientists have said are not a personal opinion. It's a statement of fact of what is in the record."). Instead of "personal opinions" about emails, Dr. Benbrook's report is based on a systematic review of the source materials—at least 10,000 pages of internal Monsanto documents. *Id*. at 586-588.

IV. Dr. Benbrook May Reasonably Base His Testimony in Part on Monsanto's Documents and Employee Testimony, and His opinions that Rely on those Documents and Testimony Will Be Helpful to the Jury

Contrary to Monsanto's assertions, Dr. Benbrook will testify as to how regulatory frameworks and guidelines he references and relies upon inform his opinions regarding Monsanto's conduct as a pesticide manufacturer. There is "nothing particularly unusual, or incorrect, in a procedure of letting a witness relate pertinent information in a narrative form as long as it stays within the bounds of pertinency and materiality." *In re Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation* 2011 WL 6302287 (S.D. Ill., Dec. 16, 2011, No. 3:09-MD-02100-DRH) at *8 (internal citations omitted) (rejecting argument that regulatory experts review of corporate emails "does not require the "specialized knowledge" contemplated by Rule 702, but rather is "mere advocacy on plaintiff's behalf."). Most of the documents referenced by Dr. Benbrook do not "speak for

themselves," but rather involve technical and scientific information and require expertise to understand their context. It is entirely proper to apply one's expertise in a field to provide proper context to corporate emails. *DePaepe v. General Motors Corp*., 141 F.3d 715, 720 (7th Cir.1998) ("[Expert] could give an opinion as an engineer that reducing the padding saved a particular amount of money; he might testify as an engineer that GM's explanation for the decision was not sound (from which the jury might infer that money was the real reason); but he could not testify as an expert that GM had a particular motive."); *see, also, United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA*, 296 F.Supp.3d 1142, 1181 (N.D. Cal. 2017) (expert could opine as to what a reasonable company would have done based on his understanding of the facts and in light of the record evidence he reviewed).[7]

Dr. Benbrook must be permitted to assist the jury in understanding documents involving complicated and technical matters. *Bryant v. Wyeth*, 2012 WL 12844751 (W.D. Wash., Aug. 22, 2012, No. C04-1706 TSZ) at *1 ("The Court concludes that the great majority of documents…are complicated and references those documents may or may not support are the legitimate subject of expert testimony. The Court concludes the proposed testimony is more than just a narrative and may assist the jury at trial. ***Defendants' challenges to these experts are issues for cross examination***") (emphasis added); *Staub v. Breg, Inc.*, 2012 WL 1078335 (D. Ariz., Mar. 30, 2012, No. CV 10-02038-PHX-FJM) at *3 (a court may permit an expert to testify as to documents in "explaining the regulatory context in which they were created, defining any complex or specialized terminology, or drawing inferences that would not be apparent without the benefit of experience or specialized knowledge.").

[7] Monsanto relies heavily on authority that undercuts its own position: *In re: Prempro Liability Litig*. (E.D. Ark. 2008) 554 F. Supp. 2d 871, 887 (Holding as admissible "opinions…based on [expert's] observations over the years and her understanding of the regulations referenced in her expert report, her deposition, and the supplemental briefs."); *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 477-78 (excluding opinion created (seemingly out of thin air and after citing no facts) that an insurance company's underwriter "would have undertaken further investigation."); *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (opinion conclusory "when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion."). *People v. Vang* (2011) 52 Cal.4th 1038, 1048 ("Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact."). Dr. Benbrook's opinions are far more exhaustive, reasoned and relevant than the experts in cases cited by Monsanto.

Furthermore, there is nothing improper in providing a factual description of the long history of the issues with GBFs as detailed in the regulatory record. Indeed, "to the extent [plaintiff's regulatory expert] is summarizing voluminous records and materials, as appears to be the case, this aspect of his testimony is properly admitted under [R.1006] as well as [R.702] in the sense that he is identifying what he, given his background and expertise, considers to be the most salient aspects of those voluminous materials." *In re Testosterone Replacement Therapy Products Liability Litigation Coordinated Pretrial Proceedings*, 2017 WL 1836443 (N.D. Ill., May 8, 2017, No. 14 C 1748) at *15. The record of Monsanto's failure to act as a reasonable pesticide manufacturer spans decades. In providing *the basis for* his opinions, as he was required to do, Dr. Benbrook's report reflects the extent of the record.

Lastly, Monsanto makes a hearsay objection without actually specifying which documents it is referring to. To the extent Monsanto's objection goes to corporate documents which will be in evidence by the time Dr. Benbrook takes the stand, its argument fails for obvious reasons. *People v. Sanchez*, 63 Cal.4th 665 (2016) explicitly held that an expert cannot "relate as true case-specific facts asserted in hearsay statements, ***unless they are independently proven by competent evidence or are covered by a hearsay exception***. *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (emphasis added). Many of the documents that form the basis of Dr. Benbrook's testimony will already been in evidence by the time Dr. Benbrook takes the stand. In any event, Monsanto's evidentiary objections to specific documents can be made at trial when / if a specific document is utilized, and are not a basis for excluding Dr. Benbrook's opinions wholesale.

V. Dr. Benbrook May Properly Testify Regarding Monsanto's Duties as a Pesticide Manufacturer and Has Been Permitted to do so in the Past

Dr. Benbrook will offer opinions concerning complex regulatory frameworks applicable to Monsanto as a pesticide manufacturer, including its interactions with and representations to the EPA. The admission of such expert testimony regarding complicated and highly technical regulatory issues is entirely proper. In *Adams*, the court addressed this issue *in the context of examining Dr. Benbrook's expert testimony* in that case. The *Adams* court found Dr. Benbrook's testimony proper and admissible as to:

(1)...the general roles of the EPA, the registrant, and the state in the registration

> process for pesticides; (2) the general regulatory framework set up by FIFRA; (3) the industry standards and the stewardship duty; (4) the factual circumstances surrounding the 1995 changes to the label and the obtaining of the 24(c) label; and (4) [his] opinions on whether DuPont's conduct satisfied industry standards and any stewardship duty.

Adams, 2009 WL 1085481 at *3; *see, also, Ginena v. Alaska Airlines, Inc.*, 2013 WL 431827 (D. Nev., Feb. 1, 2013, No. 2:04-CV-01304-MMD) at *5 (reasoning that in industries with complex regulatory framework, such as the environmental framework at issue in *Adams*, an expert may be permitted to testify as to industry standards and regulations). Given that the sphere of knowledge pertaining to complex regulatory processes is beyond the everyday experience and understanding of the jury, Dr. Benbrook intends to testify similarly in this case and there is nothing on this record that should dictate a different result. *See*, *Intercargo Ins. Co.*, 185 F.Supp.2d at 1114 ("Experts may testify regarding industry standards where the average lay person has little or no knowledge regarding those industry standards.") (citing *Miller*, 8 Cal.3d at 703).

Moreover, given the knowledge it had at the relevant times, what Monsanto should have done within the context of these regulations is relevant to the determination of whether Monsanto acted as a reasonably prudent manufacturer. This testimony will aid the fact-finder, and comes nowhere near instructing the jury as to legal obligations. It is black-letter California law that "it is erroneous to exclude [expert] testimony insofar as it is limited to custom and practice within the industry and to an opinion as to whether [defendant's conduct] conformed with that custom and practice, as such testimony involves matters beyond the common experience." *Alber v. Owens*, 66 Cal.2d 790, 800 (1967); *Lorange v. University of California Los* Angeles, 2012 WL 13114202 (C.D. Cal., July 24, 2012, No. 2:11-CV-10417-SVW-JC) at *2 ("As a general principle, the Ninth Circuit has found that F.R.E. 702 allows expert testimony comparing conduct of the parties (in this case, Defendant Washburn) to the 'industry standard' (in this case, the POST guidelines), and the F.R.E. allows expert witnesses to express an opinion that embraces an 'ultimate issue' to be decided by the jury.").

An example of how Dr. Benbrook properly applied his expertise to illustrate relevant industry and regulatory standards is demonstrated by Dr. Benbrook's trial testimony in *Johnson* pertaining to a pesticide registrant's conduct of dermal penetration studies. Dr. Benbrook explained to the jury:

> A. the testing guidelines require the registrant to do some field tests under the provisions on the label governing how someone will use it that buys the product. And so they would have to do a study, for example, to estimate dermal absorption or how much would get on an applicator, or how much would be in food….there's a set of studies that go into risk assessment methodologies that the EPA uses, and the EPA will establish some benchmark or exposure threshold over which they don't want to see exposures going above, and they draw on these studies that have been done to make a determination whether their level of concern is exceeded or not.
>
> …
>
> Q. Doctor, so, hypothetically, if a study had been done that showed dermal absorption over, like, much higher than what had been previously reported, would that be something that constitutes new information? A. Yes. Q. And should be disclosed? A. Yes. Q. Okay. And I guess that applies similarly to -- you said new information. Could it also be evaluation of old information with a new conclusion? A. Yes.

Exh. 1, Benbrook *Johnson* Trial Trans. at 3872:21-73:8, 3877:7-17. This is exactly the type of testimony that is necessary in order to walk the jury through the complex matrix of industry standards and Monsanto's related obligations. *See, Howard v. Omni Hotels Management Corp*., 203 Cal.App.4th 403, 426 (2012) ("expert testimony about…industry standards…was relevant to identify triable issues on the ***negligence and design defect theories***.") (emphasis added).

EPA's regulation of pesticides "serves to create a 'floor of safe conduct' but not 'a ceiling on the ability of states to protect their citizens.'" *Burke v. Dow Chemical Co.*, 797 F.Supp. 1128, 1137 (E.D.N.Y. 1992) (quoting *Ferebee v. Chevron Chemical Co.*,736 F.2d 152 (D.C. Cir. 1984)). Claims related to a company's responsibility "to use due care in conducting appropriate testing of their product" are not preempted. *Bates v. Dow Agrosciences* LLC, 544 U.S. 431, 444 (2005). Monsanto's website states "Monsanto's commitment to safety is central to everything we do…We dedicate a team of hundreds of scientists to assess the safety of our products, and share their findings with regulatory authorities and the public."[8] Monsanto does not inform the public that it strives to meet only the bare minimum requirements for testing set forth by the EPA in order to sell its products.[9] And, as Dr.

[8] Available at: https://monsanto.com/company/commitments/.

[9] Monsanto takes issue with Dr. Benbrook's testimony that Monsanto's obligations are, in part, due to the company's market share, yet fails to cite Dr. Benbrook's reasoning for this proposition. *See* Motion at 11-12. Dr. Benbrook explained that "in all pesticide regulation, the company that typically first registers a pesticide active ingredient, a company that has a proprietary position in it, a company that has the most extensive set of labels, it

Benbrook notes

> …as someone who has worked in this field for many years and has worked on the registration activities of many companies on many different products, there are norms and standards in the industry that Monsanto pledges that it adheres to, as do most of the other major companies, as well as statements that Monsanto has made over many years about the safety and properties of Roundup herbicides and their commitment to doing everything possible to assure that they are as effective and as safe as possible. That's the standard to which Monsanto and all pesticide companies ultimately are held in questions and matters such as this one.

Exh. 7, Benbrook *Johnson* Dep. at 40:10-23.[10] Furthermore, it is appropriate for Dr. Benbrook to opine, based on the evidence and applicable regulatory scheme, that Monsanto had a duty to warn consumers of the risk of NHL. The First District has repeatedly "permitted expert testimony as to the adequacy of a warning" in products liability actions. *Jackson v. Deft, Inc.*, 223 Cal.App.3d 1305, 1319 (1990) (holding that such testimony is proper but, unlike here, expert did not explain how he was qualified to offer such an opinion); *Fogo v. Cutter Laboratories, Inc.*, 68 Cal.App.3d 744, 755 (1977) ("…expert was permitted to testify that the warning was inadequate…"). As Dr. Benbrook explains, the registrant "knows far more about the active ingredient, its properties, its toxicology ... So the agency defers to the registrant and the superior and more in-depth knowledge of the registrant whenever a registrant incorporates in a label amendment a change ...that on their face will reduce exposure and risk." Exh. 7, Benbrook *Johnson* Dep. at at 476:17-477:20.[11]

---

is looked to by the rest of the industry as bearing the principal responsibility for assuring that the database is complete and that any questions that regulators have, any questions that the medical community might have, are being dealt with."). Exh. 5, Benbrook *Hardeman* Dep. at 257:20-58:3.

[10] In fact, one Monsanto employee recommended that Monsanto fund an epidemiology study precisely because "companies have a product stewardship obligation to ensure that their products can be used safely." Exh. 8, Benbrook Rep. (10/11/18) at 186. Monsanto decided not to fund the study. *Id.* Monsanto has also never bothered to conduct a rodent carcinogenicity test on its GBHs. *Id*. at 60.

[11] In yet another stunning attempt to mischaracterize the record, Monsanto asserts that Dr. Benbrook opines Monsanto had a "moral and ethical obligation to warn" while at the same time agreeing that Monsanto had no legal obligation to place an oncogenicity warning on the Roundup label. Motion at 11. Dr. Benbrook's actual testimony, based on industry standards and stewardship obligations (which Dr. Benbrook has ample experience and knowledge of, as recognized by Judge Karnow), was: "they had a moral and ethical obligation as a company with a ***professed commitment to product stewardship and safety of its users***...I think it was incumbent on the company, by virtue of its stated commitment to product stewardship and its pledge to promote the safe use of its products, to provide users with that information." Exh. 5, Benbrook Hardeman Dep. at 239:10-240:12 (emphasis

Moreover, Monsanto again misstates the record by suggesting that, contrary to the foundation for Dr. Benbrook's opinion, the EPA has never concluded GBFs to be genotoxic. *See* Motion at 14. Rather than cite the source document—which contradicts its claim—Monsanto cites to Dr. Benbrook's affirmative response to a misleading question during the 11th hour of his deposition. The EPA actually stated, "As described in Section 7.0 of this document, glyphosate formulations are hypothesized to be more toxic than glyphosate alone. The agency is collaborating with NTP to systematically investigate the mechanism(s) of toxicity for glyphosate and glyphosate formulations. However, the focus of this section is the genotoxic potential of glyphosate technical." Exh. 10, EPA Revised Glyphosate Issue Paper at 99.

Finally, Plaintiffs do not plead a fraud-on-the-EPA cause of action. However, evidence of Monsanto's failure to comply with EPA regulations is certainly relevant and admissible. As explained by the court in *In re Yasmin*, 2011 WL 6740391, "*Buckman* is inapposite" to the question of whether evidence of the actions or omissions of a manufacturer in communicating information to the FDA should be admitted. *Id*. at *2. Instead, "*Wyeth v. Levine*…is a far better guidepost for this Court and for this litigation...[i]n a case such as this, the jury must be fully informed of any information withheld from the FDA that could have effected decisions regarding the label. *Id*.; *In re Tylenol (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation*, 181 F.Supp.3d 278, 290 (E.D. Pa. 2016) ("... how the defendants responded to FDA requests for information, what they did to comply with FDA regulations, and what information they presented to the FDA is all relevant to plaintiff's failure-to-warn and design defect claims.")

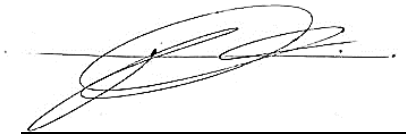
CONCLUSION

For the foregoing reasons, the Court should deny Monsanto's Motion to exclude the testimony of Dr. Benbrook and admit Dr. Benbrook's opinions in full.

added). Moreover, Monsanto attacks Dr. Benbrook for responding to Monsanto's questions about whether Dr. Benbrook is "an expert in honesty" without, again, citing the entirety of the record, specifically Dr. Benbrook contextualizing his answer with reference to his experience and knowledge of stewardship obligations, and Monsanto's own stated goals of adhering to established stewardship principles. *See* Exh. 7, Benbrook *Johnson* Dep. at 431:1-432:5.

Dated: February 21, 2019

BAUM HEDLUND ARISTEI & GOLDMAN, P.C.



Pedram Esfandiary (SBN: 312569)
pesfandiary@baumhedlundlaw.com
Michael L. Baum (SBN: 119511)
R. Brent Wisner (SBN: 276023)
rbwisner@baumhedlundlaw.com
10940 Wilshire Blvd., 17th Floor
Los Angeles, CA 90024
Telephone: (310) 207-3233
Facsimile: (310) 820-7444

THE MILLER FIRM, LLC
Curtis G. Hoke (SBN 282465)
Michael Miller *(pro hac vice)*
mmiller@millerfirmllc.com
choke@millerfirmllc.com
108 Railroad Ave
Orange, VA 22960
Telephone: (540) 672-4224
Facsimile: (540) 672-3055

Attorneys for Plaintiffs