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

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
OBJECTIONS TO EVIDENCE FILED BY
PLAINTIFF IN SUPPORT OF HIS REPLY
BRIEF IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY ADJUDICATION
AND MONSANTO'S OPPOSITION TO
PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF REPLY BRIEF**

Hon. Judge Curtis E.A. Karnow

Hearing Date: May 10, 2018
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Department: 304

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On April 16, 2018, Plaintiff filed his Reply Brief in Support of His Motion for Partial Summary Adjudication (“Plaintiff’s Reply”) and seven exhibits attached to the April 16, 2018 Declaration of Curtis G. Hoke (“4/16 Hoke Declaration”). On April 25, 2018, Plaintiff filed his “Request for Judicial Notice in Support of Plaintiff’s Reply Brief in Support of Motion for Partial Summary Judgment [*sic*]” (“Plaintiff’s 4/25 RJN”) with five exhibits, which are the same as five of the seven exhibits attached to the 4/16 Hoke Declaration.

In light of the substantial overlap between the exhibits attached to the 4/16 Hoke Declaration and the exhibits at issue in Plaintiff’s 4/25 RJN, Monsanto combines in this one filing Monsanto’s responses and objections to both of Plaintiff’s submissions. For the reasons set forth below, the Court should: (1) sustain Monsanto’s objections and decline to consider the evidence filed by Plaintiff in support of Plaintiff’s Reply (*i.e.*, the exhibits attached to the 4/16 Hoke Declaration; and (2) decline to take judicial notice of the exhibits attached to Plaintiff’s 4/25 RJN.

I. MONSANTO’S OBJECTIONS TO PLAINTIFF’S REPLY EXHIBITS

As a threshold matter, Monsanto asserts two related objections that apply to all seven exhibits attached to the 4/16 Hoke Declaration: (a) untimeliness; and (b) failure to present the facts at issue in those exhibits (and addressed in Plaintiff’s Reply) in a separate statement of undisputed material facts filed with Plaintiff’s Motion for Summary Adjudication (Mar. 15, 2018) (“Plaintiff’s Motion”). Filing those seven exhibits on April 16 was untimely because this Court set March 15, 2018 as the deadline for the parties to file motions for summary judgment or summary adjudication. *See* Case Management Order No. 6 (Aug. 29, 2017) (“CMO No. 6”). Thus, any evidence that Plaintiff wanted the Court to consider when deciding Plaintiff’s Motion had to be filed by March 15—not a month later and not after the April 4, 2018 deadline, *see id.*, for Monsanto to file its opposition to Plaintiff’s Motion. By filing additional evidence with his reply, Plaintiff deprived Monsanto of its right to respond to that evidence and the arguments presented in Plaintiff’s Reply. *See San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.*, 102 Cal. App. 4th 308, 316 (2002) (reversing summary judgment ruling for defendant and holding that trial court’s decision to consider evidence filed by defendant with reply in support of summary judgment motion violated plaintiff’s due process rights because plaintiff “was not informed what issues it

was to meet in order to oppose the motion”). Moreover, Plaintiff failed to set forth the facts at issue in the seven exhibits—facts upon which he relied extensively for arguments presented in Plaintiff’s Reply—in a separate statement of undisputed material facts filed with Plaintiff’s Motion, so Plaintiff violated California Code of Civil Procedure § 437c(b)(1), 437c(f)(2) and Rule 3.1350(c) of the California Rules of Court. *See San Diego Watercrafts*, 102 Cal. App. 4th at 313 (“While the code provision [§ 437c] provides for reply papers, it makes no allowance for submitting additional evidence or filing a supplemental separate statement. This is consistent with the requirement [that] supporting papers and the separate statement be served with the original motion [for summary judgment or summary adjudication.]” (citations omitted)).

In these circumstances, the Court should disregard all seven exhibits attached to the 4/16 Hoke Declaration. *See San Diego Watercrafts*, 102 Cal. App. 4th at 316; *see also, e.g., In re Plavix Prod. and Mktg. Cases*, No. CJC13004748, 2017 WL 4792325, at *1 (Cal. Super. Ct. Sept. 11, 2017) (Karnow, J.) (disregarding evidence filed with summary judgment reply (citing *San Diego Watercrafts*, 102 Cal. App. 4th at 316)).

In the alternative, in case the Court declines to sustain the foregoing objections as to some or all of the exhibits attached to the 4/16 Hoke Declaration, Monsanto asserts the following additional objections (“Monsanto’s Objections”) for those exhibits:

Material Objected to	Grounds for Objections	Ruling
1. 4/16 Hoke Declaration, Ex. 1 (information from National Pesticide Information Center website)	Hearsay (Evidence Code § 1200). The disclaimer included on this exhibit—but not highlighted by Plaintiff—shows that the National Pesticide Information Center (“NPIC”) website is not an official United States Environmental Protection Agency (“U.S. EPA”) website: “ The information in this publication does not in any way replace or supersede the restrictions, precautions, directions, or other information on the pesticide label or any other regulatory requirements, nor does it necessarily reflect the position of the U.S. EPA. ” 4/16 Hoke Declaration, Ex. 1, at page 3 (emphasis added). This exhibit presents out-of-court statements offered for the truth of the matters asserted and does not qualify for any exception to the rules precluding the admission of hearsay.	Sustained <input type="checkbox"/> Overruled <input type="checkbox"/>

Material Objected to	Grounds for Objections	Ruling
	Irrelevant to Plaintiff's Motion (Evidence Code §§ 210, 350). In light of the U.S. EPA's disclaimer quoted above, this exhibit is not relevant to Plaintiff's argument— <i>i.e.</i> , that NPIC website information is evidence of the U.S. EPA's position regarding whether glyphosate is a carcinogen. For that reason and the additional reasons set forth below in Monsanto's objections to 4/16 Hoke Declaration, Exhibit 3, 4/16 Hoke Declaration, Exhibit 1 is irrelevant to Plaintiff's Motion.	
2. 4/16 Hoke Declaration, Ex. 2 (information from U.S. EPA website)	Irrelevant to Plaintiff's Motion (Evidence Code §§ 210, 350). In light of the U.S. EPA's disclaimers quoted above in Monsanto's objections to 4/16 Hoke Declaration, Exhibit 1 and quoted below in Monsanto's objections to 4/16 Hoke Declaration, Exhibit 3, this exhibit is not relevant to Plaintiff's argument— <i>i.e.</i> , that NPIC website information is evidence of the U.S. EPA's position regarding whether glyphosate is a carcinogen. For that reason and the additional reasons set forth below in Monsanto's objections to 4/16 Hoke Declaration, Exhibit 3, 4/16 Hoke Declaration, Exhibit 2 is irrelevant to Plaintiff's Motion.	Sustained <input type="checkbox"/> Overruled <input type="checkbox"/>
3. 4/16 Hoke Declaration, Ex. 3 (NPIC website statements regarding glyphosate)	Hearsay (Evidence Code § 1200). The disclaimer included on this exhibit—but not highlighted by Plaintiff—shows that the NPIC website is not an official U.S. EPA website: "The information in this publication does not in any way replace or supersede the restrictions, precautions, directions, or other information on the pesticide label or any other regulatory requirements, nor does it necessarily reflect the position of the U.S. EPA." 4/16 Hoke Declaration, Ex. 3, at 5 (emphasis added). This exhibit presents out-of-court statements offered for the truth of the matters asserted and does not qualify for any exception to the rules precluding the admission of hearsay. Irrelevant to Plaintiff's Motion (Evidence Code §§ 210, 350). In light of the U.S. EPA's disclaimer quoted above, this exhibit is not relevant to Plaintiff's argument— <i>i.e.</i> , that NPIC website information is evidence of the U.S. EPA's position regarding	Sustained <input type="checkbox"/> Overruled <input type="checkbox"/>

Material Objected to	Grounds for Objections	Ruling
	<p>whether glyphosate is a carcinogen. Moreover, to the extent that the NPIC website suggests that glyphosate may be a carcinogen, any such statements are contrary to numerous repeated conclusions by the U.S. EPA that glyphosate is not carcinogenic. <i>See, e.g.</i>, 10/30/1991 EPA Memo [Defendant Monsanto Company's Request for Judicial Notice in Support of Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Adjudication (Apr. 4, 2018) ("4/4 RJN") (Ex. 1)]; EPA, <i>Reregistration Eligibility Decision ("RED") for Glyphosate</i> at 14 (Sept. 1993) ("EPA RED") [Defendant Monsanto Company's Request for Judicial Notice in Support of Motion for Summary Judgment or Summary Adjudication (Mar. 15, 2018) ("3/15 RJN") (Ex. 1)]; Glyphosate; Pesticide Tolerances, 62 Fed. Reg. 17,723, 17,728 (Apr. 11, 1997) [3/15 RJN, Ex. 2]; Glyphosate; Pesticide Tolerances, 67 Fed. Reg. 60,934, 60,943 (Sept. 27, 2002) [3/15 RJN, Ex. 3]; Glyphosate; Pesticide Tolerance, 69 Fed. Reg. 65,081, 65,086 (Nov. 10, 2004) [3/15 RJN, Ex. 4]; Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008) [3/15 RJN, Ex. 5]; Glyphosate; Pesticide Tolerances, 78 Fed. Reg. 25,396, 25,398 (May 1, 2013) [3/15 RJN, Ex. 6]; EPA, Office of Pesticide Programs, <i>Glyphosate Issue Paper: Evaluation of Carcinogenic Potential</i> at 140-41 (Sept. 12, 2016) https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0385-0094 ("2016 EPA OPP Report") [3/15 RJN, Ex. 8]; EPA, Office of Pesticide Programs, <i>Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential</i> at 143-44 (Dec. 12, 2017) https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0385-0528 ("2017 EPA OPP Report") [3/15 RJN, Ex. 9]; 12/12/2017 EPA Memo on Response to the Final Report of FIFRA SAP on the Evaluation of the Human Carcinogenic Potential of Glyphosate at 11 https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0385-0527 ("2017 EPA Response to FIFRA SAP") [4/4 RJN, Ex. 10]; Testimony of Dr. Anna B. Lowit, Science Advisor, Office of Pesticide</p>	

Material Objected to	Grounds for Objections	Ruling
	<p>Programs, U.S. Environmental Protection Agency, Before the House Committee on Science, Space, and Technology at 8-9 (Feb. 6, 2018) (“2018 Lowit Testimony”) [3/15 RJN, Ex. 10]. To the extent that the NPIC website suggests that glyphosate may be a carcinogen, any such statements also are contrary to formal U.S. EPA decisions that repeatedly approved labels for glyphosate-based herbicides that do not provide any cancer warning, including as recently as February 2018. <i>See</i> February 22, 2018 U.S. EPA Approval Letter and Labeling for Roundup QuickPro[®], https://www3.epa.gov/pesticides/chem_search/ppls/093236-00004-20180222.pdf (“February 22, 2018 EPA Approval Letter With Label”) [4/4 RJN, Ex. 8]; October 18, 2016 U.S. EPA Approval Letter and Labeling for Roundup Custom[®] Herbicide, https://www3.epa.gov/pesticides/chem_search/ppls/000524-00343-20161018.pdf (“October 18, 2016 EPA Approval Letter With Label”) [4/4 RJN, Ex. 9]; January 25, 2010 U.S. EPA Approval Letter and Labeling for Ranger PRO[®], https://www3.epa.gov/pesticides/chem_search/ppls/000524-00517-20100125.pdf (“January 25, 2010 EPA Approval Letter With Label”) [3/15 RJN, Ex. 13]; July 1, 2009 U.S. EPA Approval Letter and Labeling for Roundup PROMAX[®], https://www3.epa.gov/pesticides/chem_search/ppls/000524-00579-20090701.pdf (“July 1, 2009 EPA Approval Letter With Label”) [3/15 RJN, Ex. 15]; March 8, 2006 U.S. EPA Approval Letter and Labeling for Roundup PRO[®] Concentrate, https://www3.epa.gov/pesticides/chem_search/ppls/000524-00529-20060308.pdf (“March 8, 2006 EPA Approval Letter With Label”) [3/15 RJN, Ex. 14]; November 20, 2002 U.S. EPA Approval Letter and Labeling for Accord XL Herbicide, https://www3.epa.gov/pesticides/chem_search/ppls/000524-00517-20021120.pdf (“November 20, 2002 EPA Approval Letter With Label”) [3/15 RJN, Ex. 12]; March 10, 1992 U.S. EPA Approval Letter and Labeling for Roundup[®] Quik Stik Grass and Weed Killer, https://www3.epa.gov/pesticides/chem_search/ppls/000524-00452-19920310.pdf (“March 10, 1992 EPA Approval Letter</p>	

Material Objected to	Grounds for Objections	Ruling
	With Label”) [3/15 RJN, Ex. 11]. Thus, 4/16 Hoke Declaration, Exhibit 3 is irrelevant to Plaintiff’s Motion.	
4. 4/16 Hoke Declaration, Ex. 4 (excerpts from EPA Label Review Manual)	Irrelevant to Plaintiff’s Motion (Evidence Code §§ 210, 350). In light of the U.S. EPA’s disclaimers quoted above in Monsanto’s objections to 4/16 Hoke Declaration, Exhibit 1 and Exhibit 3, this exhibit is not relevant to Plaintiff’s argument— <i>i.e.</i> , that NPIC website information is evidence of the U.S. EPA’s position regarding whether glyphosate is a carcinogen. For that reason and the additional reasons set forth above in Monsanto’s objections to 4/16 Hoke Declaration, Exhibit 3, 4/16 Hoke Declaration, Exhibit 4 is irrelevant to Plaintiff’s Motion.	Sustained <input type="checkbox"/> Overruled <input type="checkbox"/>
5. 4/16 Hoke Declaration, Ex. 5 (excerpts from “Recognition and Management of Pesticide Poisonings”)	Hearsay (Evidence Code § 1200). The disclaimer included on this exhibit—but not highlighted by Plaintiff—shows that this book is not an official U.S. EPA publication: “ The information in this publication does not in any way replace or supersede the restrictions, precautions, directions, or other information on the pesticide label or any other regulatory requirements, nor does it necessarily reflect the position of the EPA. ” 4/16 Hoke Declaration, Ex. 5 (second page of exhibit) (emphasis added). This exhibit presents out-of-court statements offered for the truth of the matters asserted and does not qualify for any exception to the rules precluding the admission of hearsay. Incomplete Excerpt. Plaintiff relies on a statement about glyphosate made on page 222 of this publication, which cites to reference 74, but Plaintiff failed to include the cited reference 74 in the excerpts that he filed from this publication. Reference 74 cites a 2002 case-control study from Sweden: “L. Hardell et al., <i>Exposure to Pesticides as Risk Factor for Non-Hodgkin’s Lymphoma and Hairy Cell Leukemia: Pooled Analysis of Two Swedish Case-control Studies</i> , 43 <i>Leukemia and Lymphoma</i> 1043 (2002).” (quoting page 234 of “J. Roberts & J. Reigart, <i>Recognition</i>	Sustained <input type="checkbox"/> Overruled <input type="checkbox"/>

Material Objected to	Grounds for Objections	Ruling
	<p><i>and Management of Pesticide Poisonings</i> 234 (U.S. EPA, 6th ed. 2013)”¹). Monsanto objects to Plaintiff filing an incomplete excerpt of this publication.</p> <p>Irrelevant to Plaintiff’s Motion (Evidence Code §§ 210, 350). In light of the U.S. EPA’s disclaimer quoted above, this exhibit is not relevant to Plaintiff’s argument—<i>i.e.</i>, that this publication is evidence of the U.S. EPA’s position regarding whether glyphosate is a carcinogen. Moreover, this exhibit is not relevant to Plaintiff’s Motion because the statement about glyphosate upon which Plaintiff relies is based on reference 74—the 2002 Hardell Swedish case-control study cited above—but the U.S. EPA repeatedly has addressed the flaws of this Hardell study and has repeatedly concluded (despite this Hardell study) that glyphosate is not likely to be carcinogenic to humans. <i>See</i> 2017 EPA OPP Report at 57-58, 65-67, 143-44 [3/15 RJN, Ex. 9]; 2016 EPA OPP Report at 57, 66-67, 140-41 [3/15 RJN, Ex. 8]; U.S. Cancer Assessment Review Committee, Health Effects Division, Office of Pesticide Programs, <i>Cancer Assessment Document - Evaluation of the Carcinogenic Potential of Glyphosate</i> at 10, 27, 34, 69, 77 (Final Report, Oct. 1, 2015) https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0385-0014 [3/15 RJN, Ex. 7]; Glyphosate; Pesticide Tolerances, 67 Fed. Reg. 60,934, 60,936, 60,943 (Sept. 27, 2002) [3/15 RJN, Ex. 3]. Thus, 4/16 Hoke Declaration, Exhibit 5 is irrelevant to Plaintiff’s Motion.</p>	
6. 4/16 Hoke Declaration, Ex. 6 (purported list of IARC Monograph 112 participants)	<p>Lack of Authentication (Evid. Code §§ 1400, 1401). Monsanto objects to this exhibit on the grounds of lack of authentication because it is missing important caveat language that is included in the authentic list of IARC Monograph 112 participants that is available on the IARC’s website: “Working Group Members and Invited Specialists served in their individual capacities as scientists and not as representatives of their</p>	<p>Sustained <input type="checkbox"/></p> <p>Overruled <input type="checkbox"/></p>

¹ https://www.epa.gov/sites/production/files/2015-01/documents/rmpp_6thed_final_lowresopt.pdf

Material Objected to	Grounds for Objections	Ruling
	<p>government or any organization with which they are affiliated. Affiliations are provided for identification purposes only.” IARC, List of Participants, Vol. 112 (Mar. 3-10, 2015) (emphasis in original).² The Court should not be misled by the exhibit filed by Plaintiff, which conveniently omits the caveat language that directly undermines his argument. The 4/16 Hoke Declaration fails to state where this exhibit came from and fails to provide any other information to satisfy Plaintiff’s burden of establishing the authenticity of this exhibit. In light of the omission of the caveat language quoted above, Plaintiff has not established the authenticity of this exhibit.</p> <p>Hearsay (Evidence Code § 1200). This exhibit presents out-of-court statements offered for the truth of the matters asserted and does not qualify for any exception to the rules precluding the admission of hearsay.</p> <p>Irrelevant to Plaintiff’s Motion (Evidence Code §§ 210, 350). In light of the important caveat language quoted above, this exhibit is not relevant to Plaintiff’s argument—<i>i.e.</i>, that the IARC working group that evaluated glyphosate included two U.S. EPA scientists, so therefore the U.S. EPA would have allowed labeling for glyphosate-based herbicides to include a cancer warning. Any participation in the IARC working group by any U.S. EPA scientist was unofficial and in his individual capacity—not in his official capacity as a representative of the U.S. EPA. Moreover, this exhibit shows that one of the U.S. EPA scientists (Peter Egeghy) was “[u]nable to attend,” so it is incorrect for Plaintiff to contend that Peter Egeghy participated in the IARC working group. To the extent that Plaintiff contends that this exhibit suggests that the U.S. EPA agrees with IARC’s classification of glyphosate as a probable carcinogen, that argument is contrary to numerous repeated conclusions by the U.S. EPA that glyphosate is not carcinogenic, which were issued by the U.S.</p>	

² This list is available on the IARC website at this link:
<https://monographs.iarc.fr/ENG/Meetings/vol112-participants.pdf>.

Material Objected to	Grounds for Objections	Ruling
	<p>EPA before and after the IARC classification was announced in 2015. <i>See, e.g.,</i> 10/30/1991 EPA Memo at 1 [4/4 RJN], Ex. 1]; EPA RED at 14 [3/15 RJN, Ex. 1]; Glyphosate; Pesticide Tolerances, 62 Fed. Reg. 17,723, 17,728 (Apr. 11, 1997) [3/15 RJN, Ex. 2]; Glyphosate; Pesticide Tolerances, 67 Fed. Reg. 60,934, 60,943 (Sept. 27, 2002) [3/15 RJN, Ex. 3]; Glyphosate; Pesticide Tolerance, 69 Fed. Reg. 65,081, 65,086 (Nov. 10, 2004) [3/15 RJN, Ex. 4]; Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008) [3/15 RJN, Ex. 5]; Glyphosate; Pesticide Tolerances, 78 Fed. Reg. 25,396, 25,398 (May 1, 2013) [3/15 RJN, Ex. 6]; 2016 EPA OPP Report at 140-41 [3/15 RJN, Ex. 8]; 2017 EPA OPP Report at 143-44 [3/15 RJN, Ex. 9]; 2017 EPA Response to FIFRA SAP at 11 [4/4 RJN, Ex. 10]; 2018 Lowit Testimony at 8-9 [3/15 RJN, Ex. 10]. To the extent that Plaintiff contends that this exhibit suggests that the U.S. EPA agrees with IARC's classification of glyphosate as a probable carcinogen, that argument also is contrary to the U.S. EPA's formal decisions that repeatedly approved labels for glyphosate-based herbicides that do not provide any cancer warning, including as recently as February 2018. <i>See</i> February 22, 2018 EPA Approval Letter With Label [4/4 RJN, Ex. 8]; October 18, 2016 EPA Approval Letter With Label [4/4 RJN, Ex. 9]; January 25, 2010 EPA Approval Letter With Label [3/15 RJN, Ex. 13]; July 1, 2009 EPA Approval Letter With Label [3/15 RJN, Ex. 15]; March 8, 2006 EPA Approval Letter With Label [3/15 RJN, Ex. 14]; November 20, 2002 EPA Approval Letter With Label [3/15 RJN, Ex. 12]; March 10, 1992 EPA Approval Letter With Label [3/15 RJN, Ex. 11]. Thus, 4/16 Hoke Declaration, Exhibit 6 is irrelevant to Plaintiff's Motion.</p>	
<p>7. 4/16 Hoke Declaration, Ex. 7 (12/7/2015 E-mail from Vince Cogliano)</p>	<p>Hearsay and Multiple Hearsay (Evidence Code §§ 1200, 1201). This exhibit presents out-of-court statements offered for the truth of the matters asserted, including multiple hearsay (hearsay within hearsay) because the author purports to report on what other persons said to him, but the exhibit does not qualify for any exception to the rules precluding the admission of hearsay.</p>	<p>Sustained <input type="checkbox"/></p> <p>Overruled <input type="checkbox"/></p>

Material Objected to	Grounds for Objections	Ruling
	<p>Speculation and Lack of Personal Knowledge (Evidence Code § 702). This e-mail contains speculative, preliminary statements from one employee (Vince Cogliano) in the U.S. EPA's Office of Research and Development ("ORD") about what ORD scientists <i>might</i> conclude about glyphosate. Mr. Cogliano himself characterized his statements in this e-mail thread as "[d]raft thoughts on glyphosate" and reiterated the preliminary nature of his thoughts by making the following statement: "The scientists who reviewed glyphosate materials <i>didn't develop conclusions</i>. If pressed, though, here's what I think <i>might</i> become a joint conclusion." Email from Vince Cogliano to Norman Birchfield (Dec. 7, 2015, 12:01 PM EST) (EPAHQ_0000206-8) (emphasis added).</p> <p>Irrelevant to Plaintiff's Motion (Evidence Code §§ 210, 350). Any alleged assertion that ORD scientists would be split on whether glyphosate is carcinogenic is contrary to numerous repeated conclusions by the U.S. EPA that glyphosate is not carcinogenic, which were issued by the U.S. EPA before and after Mr. Cogliano set forth his preliminary thoughts on the December 2015 e-mail at issue here. <i>See, e.g.</i>, 10/30/1991 EPA Memo at 1 [4/4 RJN], Ex. 1]; EPA RED at 14 [3/15 RJN, Ex. 1]; Glyphosate; Pesticide Tolerances, 62 Fed. Reg. 17,723, 17,728 (Apr. 11, 1997) [3/15 RJN, Ex. 2]; Glyphosate; Pesticide Tolerances, 67 Fed. Reg. 60,934, 60,943 (Sept. 27, 2002) [3/15 RJN, Ex. 3]; Glyphosate; Pesticide Tolerance, 69 Fed. Reg. 65,081, 65,086 (Nov. 10, 2004) [3/15 RJN, Ex. 4]; Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008) [3/15 RJN, Ex. 5]; Glyphosate; Pesticide Tolerances, 78 Fed. Reg. 25,396, 25,398 (May 1, 2013) [3/15 RJN, Ex. 6]; 2016 EPA OPP Report at 140-41 [3/15 RJN, Ex. 8]; 2017 EPA OPP Report at 143-44 [3/15 RJN, Ex. 9]; 2017 EPA Response to FIFRA SAP at 11 [4/4 RJN, Ex. 10]; 2018 Lowit Testimony at 8-9 [3/15 RJN, Ex. 10]. The preliminary thoughts set forth in Mr. Cogliano's December 2015 e-mail also are contrary to the U.S. EPA's formal decisions that repeatedly approved labels for glyphosate-</p>	

Material Objected to	Grounds for Objections	Ruling
	based herbicides that do not provide any cancer warning, including as recently as February 2018. <i>See</i> February 22, 2018 EPA Approval Letter With Label [4/4 RJN, Ex. 8]; October 18, 2016 EPA Approval Letter With Label[4/4 RJN, Ex. 9]; January 25, 2010 EPA Approval Letter With Label [3/15 RJN, Ex. 13]; July 1, 2009 EPA Approval Letter With Label [3/15 RJN, Ex. 15]; March 8, 2006 EPA Approval Letter With Label [3/15 RJN, Ex. 14]; November 20, 2002 EPA Approval Letter With Label [3/15 RJN, Ex. 12]; March 10, 1992 EPA Approval Letter With Label [3/15 RJN, Ex. 11]. Thus, 4/16 Hoke Declaration, Exhibit 7 is not relevant to Plaintiff's Motion.	

II. MONSANTO'S OPPOSITION TO PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE

A. Plaintiff's Request For Judicial Notice Is Untimely.

Plaintiff's request for judicial notice violates CMO No. 6 because it attempts to get the Court to consider additional evidence a month after the deadline for parties to file motions for summary judgment or summary adjudication. *See* CMO No. 6 at 1-2 (providing a March 15 deadline for filing summary judgment/adjudication motions and an April 4 deadline for oppositions to key motions). In particular, Plaintiff failed to include any discussion of this purported evidence in his "separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed." Cal. Civ. Proc. Code § 437c(b)(1) (emphasis added); *see also* Rule 3.1350(f)(3) of the California Rules of Court. Monsanto therefore had no opportunity to address the questionable new material in its timely filed Objections to Evidence Filed by Plaintiff in Support of Plaintiff's Summary Judgment Opposition ("Monsanto's 4/18 Objections"). The after-the-fact request for judicial notice of this new material is clearly prejudicial to Monsanto, because by filing additional evidence with his reply, Plaintiff deprived Monsanto of its right to respond to that evidence and the arguments presented in Plaintiff's Reply. Moreover, matters of substantial consequence require that the opposing party be afforded the opportunity to present "(1) the propriety of taking judicial notice of the matter and (2) the tenor of

1 the matter to be noticed.” Cal. Evid. Code § 455(a). Monsanto was not afforded that opportunity.
2 *See San Diego Watercrafts, Inc.*, 102 Cal. App. 4th at 316 (reversing summary judgment ruling
3 when trial court considered new evidence in party’s reply in support of summary judgment). On
4 the basis of timeliness alone, the Court should not take judicial notice of any of the exhibits in
5 Plaintiff’s 4/25 RJN.

6 **B. The Newly Offered Evidence Is Not The Proper Subject Of Judicial Notice.**

7 Exhibits 1 and 3³ are not proper for judicial notice as they are not executive acts, court
8 records, or facts of common knowledge, nor are they posted on an official government website.
9 Exhibits 1 and 3 were pulled from the National Pesticide Information Center (“NPIC”) website.
10 The third-party website is not operated by the U.S. Government as clearly indicated by the .edu
11 html as well as statements within Plaintiff’s exhibit. *See* National Pesticide Information Center,
12 npic.orst.edu (last visited May 2, 2018); *see also* Plaintiff’s 4/25 RJN Ex. 2 at 2 (noting that it is
13 “Oregon State University, which operates The National Pesticide Information Center”). Plaintiff’s
14 request that the Court notice information posted on a third-party website operated by Oregon State
15 University is improper. *See Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1029
16 (C.D. Cal. 2015) (holding that “information appearing on the third party websites is not a proper
17 subject of judicial notice because it is not capable of accurate and ready determination”). The
18 disclaimer page⁴ of the website makes it clear that it is not operated by the U.S. Government, that
19 the information on the website does not supersede information provided by the U.S. Government,
20 and that Oregon State cannot be held liable for any possible inaccuracy in the content. *See* Website
21 Disclaimer, National Pesticide Information Center, <http://npic.orst.edu/Disclaimer.html> (last
22

23 ³ Plaintiff’s 4/25 RJN Ex. 1 and 3 are also irrelevant to Plaintiff’s motion. *See* Monsanto’s
24 Objections, *supra* p. 4-7.

25 ⁴ A similar disclaimer is found in 4/16 Hoke Declaration Ex. 5, which Plaintiff cites for the
26 proposition that “EPA identifies glyphosate as one of the pesticides that has a ‘demonstrated risk’
27 of NHL.” Plaintiff’s Reply Brief in Support of His Motion for Partial Summary Adjudication at 2
28 (Apr. 16, 2018) (referencing J. Roberts & J. Reigart, *Recognition and Management of Pesticide
Poisonings* 222 (U.S. EPA, 6th ed. 2013) (4/16 Hoke Declaration Ex. 5)). Notably, the 2013
publication contains a disclaimer that “[t]he information in this publication does not in any way
replace or supersede the restrictions, precautions, directions, or other information on the pesticide
label or any other regulatory requirements, nor does it necessarily reflect the position of the EPA.”

1 visited May 2, 2018) (noting that “Oregon State University cannot be held responsible for any
2 circumstances resulting from its use, unavailability, or possible inaccuracy”). Importantly, every
3 single page of the website contains a footer so that the viewer is aware “this publication does not
4 in any way replace or supersede the restrictions, precautions, directions, or other information on
5 the pesticide label or any other regulatory requirements, nor does it necessarily reflect the position
6 of the U.S. EPA.” *See, e.g.*, National Pesticide Information Center, npic.orst.edu (last visited May
7 2, 2018). The Court is therefore left in the untenable position of judicially noticing material for
8 which Oregon State disclaims any responsibility and that does not even represent the official
9 position of the U.S. Government.⁵

10 **C. The Exhibits In Question Are Not Relevant.**

11 Plaintiff attempts to point the Court to a third-party website and EPA postings that are
12 unrelated to glyphosate’s label approval or carcinogenicity in an effort to defeat summary
13 judgment on failure-to-warn and preemption grounds. *See* 4/16 Hoke Declaration, Ex. 1, 3. In
14 particular, Plaintiff directs the Court to a statement on the NPIC website that “some studies
15 suggest that glyphosate has carcinogenic potential,” but the third-party statement is contrary to
16 EPA’s own record in properly admissible evidence that clearly demonstrates its views on
17 glyphosate’s non-carcinogenicity. EPA’s official opinion is well documented in multiple thorough
18 EPA decision documents’, as well as repeated approval of GBH labels without a cancer warning.
19 4/16 Hoke Declaration, Ex. 3; *see also* Monsanto’s Objections No. 3 *supra* at p. 4-7 (listing
20 representative EPA findings of non-carcinogenicity). Plaintiff’s attempt to attribute the third-party
21 statements to EPA demonstrates that admission of these exhibits is likely to confuse the issues or
22 mislead the jury to the prejudice of Monsanto. In determining whether a request for judicial notice
23 is proper, the Court “in its discretion may exclude evidence if its probative value is substantially
24 outweighed by the probability that its admission will (a) necessitate undue consumption of time or

25 ⁵ Exhibit 2 is a posting from EPA’s website and may be subject to judicial recognition; however,
26 in this case, it is irrelevant to the facts and arguments at issue. *See infra* at Section C, p. 15-16.
27 Exhibit 5 is also posted on EPA’s website; however, any relevance is outweighed by the
28 likelihood for confusion. *See* Monsanto’s Objections *supra* at p. 8-9; *see also infra* at Section C, p.
16. Exhibit 4 is an EPA manual and its existence is judicially recognizable, but the facts cited
therein are not. *See infra* at Section D, p. 16-17.

1 (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the
2 jury.” Cal. Evid. Code, § 352; *see also id.*, § 454(a)(2) (“In determining the propriety of taking
3 judicial notice of a matter, or the tenor thereof . . . [e]xclusionary rules of evidence do not apply
4 except for Section 352 and the rules of privilege”); *see e.g. Mitroff v. United Servs. Auto. Ass’n*, 72
5 Cal. App. 4th 1230, 1243 (1999) (“Evidence Code section 453 . . . does not compel the court to
6 admit irrelevant matters that would result in the undue consumption of time.”).

7 Plaintiff’s requests to notice the documents from EPA’s website are similarly irrelevant to
8 summary adjudication and are likely to confuse the jury. *See* 4/16 Hoke Declaration, Ex. 2, 5. For
9 example, Plaintiff’s 4/25 RJN Ex. 2 merely states that EPA has a “cooperative agreement with
10 Oregon State University, which operates The National Pesticide Information Center (NPIC).” 4/16
11 Hoke Declaration, Ex. 2. The exhibit provides no relevant information to support Plaintiff’s
12 argument – *i.e.*, that NPIC website information is evidence of the U.S. EPA’s position regarding
13 whether glyphosate is a carcinogen.

14 Plaintiff also requests judicial notice of an EPA summary publication on pesticide
15 poisonings that contains one sentence reporting on a single case-control study to support
16 Plaintiff’s proposition that “EPA identifies glyphosate as one of the pesticides that has a
17 ‘demonstrated risk’ of NHL.” Plaintiff’s Reply Brief in Support of His Motion for Partial
18 Summary Adjudication at 2 (Apr. 16, 2018) (referencing J. Roberts & J. Reigart, *Recognition and*
19 *Management of Pesticide Poisonings* 222 (U.S. EPA, 6th ed. 2013) (4/16 Hoke Declaration Ex.
20 5)).⁶ As noted above, the publication in question contains a disclaimer that it may not reflect the
21 position of the EPA. *See* Monsanto’s Objections *supra* at p. 8-9 (objecting to the relevancy of Ex.
22 5). Indeed, properly admissible evidence in this case indicates it is not EPA’s position, as multiple
23 200+ page EPA decision documents examining the carcinogenic potential of glyphosate have
24 repeatedly concluded, including twice since Ex. 5’s 2013 publication, that glyphosate is not

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27 ⁶ If the Court decides to judicially notice Ex. 5, it should not notice anything beyond the fact that
28 the document exists. *See Harris v. R.J. Reynolds Vapor Co.*, No. 15-CV-04075-JD, 2016 WL
6246415, at *3 (N.D. Cal. Sept. 30, 2016) (excluding evidence from a government website
“because it summarizes comments, rather than undisputed facts”).

1 carcinogenic.⁷ Importantly, these 200+ page EPA decision documents review the entire glyphosate
2 epidemiology database, instead of merely reporting on one case-control study. Moreover,
3 Plaintiff's regulatory expert admits EPA's position on glyphosate's carcinogenicity has remained
4 the same from 1991 through 2017.⁸ Given the disclaimer in the outdated summary document and
5 the properly admissible, repeated weight-of-evidence findings by EPA concluding that glyphosate
6 is non-carcinogenic, the Court has discretion to exclude this EPA publication. *See, e.g.,*
7 Monsanto's Objections No. 3 *supra* at p. 4-7 (listing representative EPA findings of non-
8 carcinogenicity).

9 **D. The Exhibits In Question Cannot Be Judicially Noticed For The Truth Of The**
10 **Matters Therein.**

11 Even if the exhibits are judicially recognizable, the facts cited therein are not. Courts may
12 judicially recognize the existence of a document but not the truth of its contents. *See N. Beverly*
13 *Park Homeowners Ass'n v. Bisno*, 147 Cal. App. 4th 762, 778 (2007) ("The hearsay rule applies to
14 statements contained in judicially noticed documents, and precludes consideration of those
15 statements for their truth unless an independent hearsay exception exists."); *Cactus Corner, LLC*
16 *v. U.S. Dept. of Agric.*, 346 F.Supp.2d 1075, 1099 (E.D. Cal. 2004) ("The existence and
17 authenticity of a document which is a matter of public record is judicially noticeable . . . , but the
18 veracity and validity of their contents (the underlying arguments made by the parties, disputed
19 facts, and conclusions of fact) are not."); *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242,
20 1266 (2008) ("[W]hile we take judicial notice of the *existence* of the documents in court files, we
21 do not take judicial notice of the truth of the facts asserted in such documents[;]") (emphasis in
22 original), citing *Sosinky v. Grant*, 6 Cal. App. 4th 1548, 1564-1565 (1992). As the Court is well
23 aware, statements like that found in Plaintiff's Reply Brief in Support of His Motion for Partial
24 Summary Adjudication at 2 that "EPA identifies glyphosate as one of the pesticides that has a
25 'demonstrated risk' of NHL'" cannot be considered evidence of causation, for example. Plaintiff
26

27 ⁷ 2016 EPA OPP Report at 141; 2017 EPA OPP Report at 143, 144

28 ⁸ Deposition of Charles Benbrook, Ph.D. at 148:15 – 149:6 (Feb. 8, 2018).

1 offers no justification for how the contents of the 4/25 RJN exhibits can overcome the hearsay
2 rule.

3 * * * *

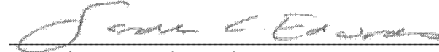
4 In conclusion, for the reasons set forth above, the Court should: (1) sustain Monsanto's
5 objections and decline to consider the evidence filed in support of Plaintiff's Reply (the seven exhibits
6 attached to the 4/16 Hoke Declaration); and (2) decline to take judicial notice of the five exhibits
7 attached to Plaintiff's 4/25 RJN.

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9 Dated: May 4, 2018

Respectfully submitted,

10 FARELLA BRAUN + MARTEL LLP

11
12 By:


Sandra A. Edwards

13 Attorneys for Defendant
14 MONSANTO COMPANY
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