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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF SAN FRANCISCO**

15 DEWAYNE JOHNSON,

16 Plaintiff,

17 v.

18 MONSANTO COMPANY

19 Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S REPLY BRIEF IN
SUPPORT OF HIS MOTION FOR
PARTIAL SUMMARY ADJUDICATION**

Hon. Judge Curtis E.A. Karnow

Hearing Date: May 10, 2018

Time: 9:00 a.m.

Department: 304

[Filed Concurrently with Declaration of
Curtis Hoke]

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **1. It Would Not Be Impossible For Monsanto to Warn About the Risk of NHL with**
3 **Ranger Pro**

4 The Office of Pesticide Programs, (“OPP”) would allow and currently allows warnings about
5 the risk of NHL with glyphosate to be issued to the public. The organization charged by the EPA in
6 responding to inquiries about the risks of pesticides is the National Pesticide Information Center
7 (“NPIC”). The “NPIC is a cooperative agreement between Oregon State University and the U.S.
8 Environmental Protection Agency” that “provides objective, science-based information about
9 pesticides and pesticide-related topics to enable people to make informed decisions about pesticides
10 and their use.”¹ The EPA website directs users to the NPIC to find out about the risks of pesticides.²
11 Currently, the NPIC advises consumers the following in a fact sheet available on its website:

12 Is glyphosate likely to contribute to the development of cancer?

13 When high doses were administered to laboratory animals, some studies suggest that
14 glyphosate has carcinogenic potential. Studies on cancer rates in people have provided
15 conflicting results on whether the use of glyphosate containing products is associated with
16 cancer. **Some studies have associated glyphosate use with non-Hodgkin lymphoma.**³

17 In its guidance to pesticide manufacturers, the EPA actually allows the manufacturers to direct
18 consumers to the NPIC to obtain information about the health effects of glyphosate:

19 The Agency strongly encourages that labels include a company telephone number or a toll-free
20 hotline number that allows users to obtain additional product information. PR Notice 97-4.
21 This is intended for non-emergency product information and is different from the emergency
22 treatment information number (e.g. poison control) that is listed under the First Aid section.
23 **As an option, the National Pesticide Information Center (NPIC) hotline number may be
24 used,** with the suggested statement: “For information on this pesticide product (including
25 general health concerns or pesticide incidents), call the National Pesticide Information Center
26 at 1-800-858-7378, Monday through Friday, 8:00 AM to 12:00 PM Pacific Standard Time. In
27 the event of a medical emergency, call your poison control center at 1-800-222-1222.”⁴

28 ¹ Hoke Decl., Ex. 1, About the NPIC, NPIC website, <http://npic.orst.edu/about.html>;
<https://www.epa.gov/safepestcontrol/pesticides-must-be-registered-epa>

² Hoke Decl., Ex. 2, EPA website, Information on Health Risks of Pesticides,
<https://www.epa.gov/safepestcontrol/pesticides-must-be-registered-epa>

³ Hoke Decl., Ex. 3, Glyphosate General Fact Sheet, NPIC website,
<http://npic.orst.edu/factsheets/glyphogen.html> .

⁴ Hoke Decl., Ex. 4, EPA Label Review Manual, Chapter 15: Company Name and Address, 15-3.

1 Therefore, not only could Monsanto inform the public that glyphosate is associated with NHL via the
2 NPIC, the EPA encourages them to do just that.

3 Additionally, in a collaboration between the EPA and the Medical University of South
4 Carolina, physicians are also warned of the association between glyphosate and NHL. This
5 publication by the EPA, “Recognition and Management of Pesticide Poisonings” was created “to
6 provide healthcare professionals with current consensus recommendations for treating patients with
7 pesticide-related illnesses or injuries.”⁵ In the chapter on chronic diseases, the EPA identifies
8 glyphosate as one of the pesticides that has a “demonstrated risk” of NHL. *Id.* at 222.

9 Finally, the IARC working group that evaluated glyphosate included two scientists from the
10 EPA, Peter P. Egeghy and Matthew Martin.⁶ The Office of Research and Development Branch of the
11 EPA also reviewed the evidence related to glyphosate and concluded “Bottom line: Based on
12 glyphosate discussions to date among ORD scientists – where we have not formally discussed a
13 classification – I believe we would be split between ‘likely to be carcinogenic’ and ‘suggestive
14 evidence.’”⁷

15 There is simply no basis to conclude that the EPA would not allow Monsanto to warn that
16 glyphosate is associated with NHL, where many EPA scientists believe it is carcinogenic and where
17 the EPA itself warns consumers and physicians that glyphosate is associated with NHL.

18 **2. Implied Preemption is Not Applicable under FIFRA**

19 Defendant claims that the *Mensing* and *Bartlett* somehow modify the ruling in *Bates* which
20 precludes an impossibility preemption defense. However, Defendant can cite no case law interpreting
21 FIFRA this way. The one case which examines an argument of implied preemption post-*Bates*
22 squarely rejects Defendant’s arguments. In *Angasay v. Dow Agrosiences, LLC*, involving a personal
23 injury and wrongful death claim against a pesticide manufacture, the court rejected implied preemption
24 holding:

25 *Bates* clearly applies and is not trumped by the later decisions in *Bartlett* and *Mensing*.
Neither *Mensing* nor *Bartlett* overruled *Bates* as it applies to FIFRA. *Mensing* cited

26 ⁵ Hoke Decl., Ex. 5, Robert, et al., EPA, “Recognition And Management Of Pesticide Poisonings”,
27 Sixth Edition, 2013, p. 2

28 ⁶ Hoke Decl., Ex. 6, IARC Monograph 112 List of Participants

⁷ Hoke Decl., Ex. 7, December 7, 2015 email from Vince Cogliano of EPA to Norm Birchfield,
EPAHQ 0000204, 208.

1 approvingly to *Bates*, see *Mensing*, 131 S.Ct. at 2592, and Bartlett also
2 addressed Bates without overruling it, see *Bartlett*, 133 S.Ct. at 2480. In addition, the holdings
3 in *Bartlett* and *Mensing* addressed preemption under the Federal Food, Drug, and Cosmetic
4 Act, which differs from FIFRA in vital ways.

5 153 F. Supp. 3d 1270, 1283–84 (D. Haw. 2015). In noting the absence of an express preemption
6 clause in the FDCA, the Court concluded, “*Mensing* and *Bartlett* are simply not analogous to the case
7 before this court.” *Id.* at 1285.

8 **3. There is Judicial Consensus that Claims against Monsanto aren’t Preempted**

9 In a class action lawsuit alleging that Monsanto’s Roundup label was false and misleading, a
10 federal district court last week denied Monsanto’s motion to dismiss holding that “In light of
11 the *Bates* test, district courts presiding over similar cases involving Roundup have reached a
12 consensus ... that FIFRA does *not* preempt claims for damages under state law.” *THOMAS BLITZ,*
13 *Plaintiff, v. MONSANTO COMPANY, Defendant,*, No. 17-CV-473-WMC, 2018 WL 1785499, at *3
14 In *Blitz*, Monsanto also tried to rely on factual findings by regulators insisting “it is almost
15 universally accepted by regulators and the scientific community, both within and outside the United
16 States, that glyphosate targets an enzyme (‘EPSP synthase’) not found in human or animal cells.” *Id.*
17 at *6. The court rejected that argument holding:

18 Finally, to the extent that defendant is arguing that the EPA’s registration of glyphosate and
19 approval of the Roundup label carry any preemptive force, defendant is simply mistaken.
20 Again, while registration of a pesticide constitutes prima facie evidence that the pesticide’s
21 labeling complies with FIFRA, registration may not serve as a defense to a FIFRA violation.
22 7 U.S.C. § 136a(f)(2). Similarly, there is no “indication that the EPA’s approval of
23 Roundup’s label ha[s] the force of law.” Hardeman, 216 F. Supp. 3d at 1038. In sum,
24 although only the EPA may order a label change, defendant has overstated the legal effect of
25 the EPA’s approval, as well as the import of the relief requested by plaintiff, particularly
26 since plaintiff seeks to recover monetary damages for allegedly false statements that FIFRA
27 itself prohibits. Accordingly, plaintiff’s claims are not preempted by FIFRA.

28 *Id.* at *5

Monsanto seeks to avoid this consensus (not one of the thousands of NHL cases involving
Roundup have been dismissed on preemption) by claiming that new evidence contradicts these
rulings. This is not the case. Monsanto has been making the very same arguments since the outset
of the litigation and Courts have repeatedly found that findings by the EPA regarding the
carcinogenicity of glyphosate do not have a preemptive effect.

1 In *Hernandez v. Monsanto*, Monsanto based its preemption argument on “(1) the EPA's
2 approval of the current Roundup label without a cancer warning; and (2) the EPA's factual findings
3 that glyphosate does not cause cancer” and asserted “that Plaintiffs' claims are preempted to the
4 extent that they contradict these agency decisions.” No. CV 16-1988-DMG (EX), 2016 WL
5 6822311, at *6 (C.D. Cal. July 12, 2016). The Court rejected these arguments holding that
6 “although Monsanto argues that the EPA's factual findings themselves are preemptive, it provides no
7 support for this proposition, nor is the Court aware of any such precedent. Indeed, if the EPA's
8 registration decision is not preemptive, it follows that the factual findings on which it relied in
9 making that decision also are not preemptive. *Id.* at *8.

10 In *Sheppard v. Monsanto Co.*, the Court considered “voluminous material primarily from the
11 U.S. Environmental Protection Agency (“EPA”) and largely regarding (1) glyphosate tolerances
12 related to food; and (2) recent assessments evaluating the carcinogenic potential of glyphosate by an
13 EPA Cancer Assessment Review Committee, and by a joint United Nations/WHO meeting on
14 pesticide residue.” 2016 WL 3629074, at *8 (D. Haw. June 29, 2016). The Court rejected
15 Monsanto’s preemption argument on this basis noting “it is unclear how they provide a basis for
16 deciding — especially when deciding a motion to dismiss where the court must assume the truth of
17 well-pleaded factual allegations — that Roundup cannot be ‘misbranded,’ or (more to the point) that
18 FIFRA preempts Plaintiffs' warnings-based claims.” *Id.*

19 In *Mendoza v. Monsanto Co.*, the Court held “In short, nothing presented by defendant in
20 support of the pending motion to dismiss persuades this court that the failure to warn claims alleged
21 by plaintiff in this case are subject to dismissal on preemption grounds under FIFRA. “ No.
22 116CV00406DADSMS, 2016 WL 3648966, at *4 (E.D. Cal. July 8, 2016). In *Giglio v. Monsanto*
23 *Co.*, the Court held, “Defendant argues that Roundup in fact is not carcinogenic and that the EPA has
24 made determinations that this is the case. However, a motion to dismiss is not the proper vehicle to
25 delve into the import of EPA classifications or what EPA representatives have said in the past, what
26 information they were relying on, and what effect their statements have on the issues before the
27 Court.” No. 15CV2279 BTM(NLS), 2016 WL 1722859, at *3 (S.D. Cal. Apr. 29, 2016)

28 In *Hardeman v. Monsanto Co.*, the Court held that “the mere fact that the EPA has approved
a product label does not prevent a jury from finding that that same label violates FIFRA.” 216 F.
Supp. 3d 1037, 1038 (N.D. Cal. 2016). The Court noted that plaintiff “contends that Roundup's

1 existing label violates FIFRA, implying that the EPA failed to enforce FIFRA correctly when it
2 approved that label. And Bates tells us that the EPA's authority to enforce FIFRA—unlike the EPA's
3 authority to approve all pesticide labeling—isn't exclusive.” *Id.* at 1039.

4 **4. Monsanto’s Impossibility Defense is based on a Fantasy**

5 To accept Monsanto’s arguments that it would be impossible for them to change the label,
6 one would have to pretend that Monsanto has no influence over the EPA and is simply subject to the
7 whims of the EPA. Nothing could be further from the truth. There is a reason Monsanto devotes
8 enormous resources to lobbying congress, lobbying the executive branch; ghostwriting articles;
9 conducting a media campaigns against IARC; and engaging in off-the-book contacts with the EPA.
10 These tactics are effective and have successfully influenced the EPA to the point where the EPA
11 employees in charge of evaluating glyphosate don’t follow the EPA’s own guidelines.

12 Monsanto could easily have devoted these resources to influencing the EPA to follow its
13 guidelines and find that glyphosate is carcinogenic. Instead of “orchestrating outcry” against IARC,
14 Monsanto could have orchestrated support for the IARC decision. Instead of meeting with the EPA
15 administrator to complain about the effect of IARC on their ability to defend legal claims by Mr.
16 Johnson, Monsanto’s CEO could have taken the opportunity at that meeting to argue that the public
17 should be made aware of the carcinogenic potential of glyphosate. Instead of lobbying Congress to
18 pressure the EPA to classify glyphosate as not carcinogenic, Monsanto could have lobbied Congress
19 to pressure the EPA to classify glyphosate as a carcinogen. The record demonstrates that Monsanto
20 has a tremendous amount of influence on the EPA, as detailed in Plaintiff’s Opposition to
21 Defendant’s Motion for Summary Adjudication. Any argument that the EPA would forbid
22 Monsanto from adding a warning about NHL is pure fantasy. Since 1974, Monsanto has, at every
23 turn, used every means available to prevent the EPA from labeling glyphosate as a carcinogen.
24 Monsanto is the driving force behind the current EPA draft classification and they could certainly be
25 the driving force behind a label change to warn consumers of the risk of NHL with glyphosate based
26 herbicides.
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Conclusion

For all the foregoing reasons, Plaintiff asks this Court to enter summary adjudication of facts and claims and dismiss Defendant Monsanto Company’s Affirmative Defenses relating to federal preemption.

Respectfully submitted,

DATED: April 16, 2018

By: /s/ Curtis G. Hoke 

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