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

21 DEWAYNE JOHNSON,
22 Plaintiff,
23 vs.
24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
MOTION *IN LIMINE* NO. 27 TO
EXCLUDE EVIDENCE RELATING TO
PROPOSITION 65**

Trial Date: June 18, 2018
Time: 9:30 a.m.
Department: TBD

1 **I. INTRODUCTION**

2 Defendant Monsanto Company (“Monsanto”) respectfully requests that this Court exclude
3 from trial the introduction of any evidence, argument, or reference to California’s Safe Drinking
4 Water and Toxic Enforcement Act (“Proposition 65”). Specifically, Monsanto seeks to exclude
5 California’s Office and Environmental Health Hazard Assessment’s (“OEHHA”) July 7, 2017
6 listing of glyphosate, OEHHA’s adopted but not yet effective No Significant Risk Level
7 (“NSRL”) for glyphosate, as well as any reference to Proposition 65 warnings and Proposition 65
8 litigation (“Proposition 65 Evidence”). Proposition 65 Evidence cannot be evidence of causation,
9 is not relevant to this litigation and this Plaintiff Dewayne Johnson’s (“Plaintiff’s”) alleged
10 exposure to glyphosate. In addition, introduction of Proposition 65 Evidence would necessitate a
11 significant consumption of time given the complexities of the statutory scheme and pending
12 litigation challenging the listing of glyphosate, which would serve only to mislead, distract, or
13 prejudice the jury. Any reference to Proposition 65 Evidence should be excluded at trial.

14 **II. BRIEF STATEMENT OF FACTS**

15 **A. OEHHA Listing of Glyphosate Was a Ministerial Action Pursuant to**
16 **Proposition 65’s Labor Code Listing Mechanism**

17 Proposition 65 requires businesses to provide a public warning if they knowingly and
18 intentionally expose any individual to a chemical known to the state to cause cancer or
19 reproductive toxicity. *See* Cal. Health & Saf. Code § 25249.5 et seq. The triggering mechanism
20 for the warning requirement is OEHHA’s inclusion of a chemical on the Proposition 65 list of
21 chemicals known to the state to cause cancer or reproductive toxicity. *See* Cal. Health & Saf.
22 Code § 25249.8.

23 Health and Safety Code Section 25249.8 “addresses the content of the Proposition 65 list,
24 and does so principally in two subdivisions.” *Monsanto Co. v. Office of Env’tl Health Hazard*
25 *Assessment* 22 Cal.App.5th 534, 543 (2018) (quotation omitted) (“*Monsanto Co.*”). Subdivision
26 (a) of that Section is referred to as the Labor Code mechanism, which requires OEHHA to list
27 those chemicals “identified by reference in Labor Code Section 6382(b)(1) and those substances
28 identified additionally by reference in Labor Code Section 6382(d).” Cal. Health & Saf. Code §

1 25249.8(a). “Labor Code section 6382 is part of the Hazardous Substances Information and
2 Training Act ... and sets forth criteria for the preparation and amendment of a list of ‘hazardous
3 substances’ in the workplace.” *Monsanto Co.*, 22 Cal.App.5th at 544. Under the Labor Code, the
4 list of hazardous substances in the workplace includes those substances that are “listed as human
5 or animal carcinogens by the International Agency for Research on Cancer (IARC).” Cal. Labor
6 Code § 6382(b)(1). OEHHA must therefore ministerially list under Proposition 65 those
7 chemicals classified by IARC to be a human or animal carcinogen. *Monsanto Co.*, 22 Cal.App.5th
8 at 542-543.

9 In July 2015, IARC issued a monograph that classified glyphosate as Group 2A (probably
10 carcinogenic to humans), after announcing that classification in March 2015. *See* Complaint ¶¶
11 50-51. As a consequence of IARC’s classification of glyphosate, OEHHA began the bureaucratic
12 process of placing glyphosate on the Proposition 65 list in accordance with the state regulations.
13 *See* Cal. Health & Safety Code § 25249.8(a); *see* Cal. Code of Regs. tit. 27 § 25904.

14 Recently, a federal district court issued a preliminary injunction enjoining the warning
15 requirement of Proposition 65 for glyphosate, and held that “the heavy weight of evidence in the
16 record” shows that “glyphosate is not in fact known to cause cancer[.]” *National Ass’n of Wheat*
17 *Growers v. Zeise*, CIV. No. 2:17-2401 WBS EFB, 2018 WL 1071168, at *7, 8 (E.D. Cal. Feb. 26,
18 2018) (“*Wheat Growers*”). Accordingly, the current status of glyphosate under Proposition 65 is
19 that it remains listed on Proposition 65, but there is no requirement to provide a Proposition 65
20 cancer warning on glyphosate-based products.

21 **III. ARGUMENT**

22 **A. Proposition 65 Listing Is Not Evidence of Causation**

23 Proposition 65 Evidence cannot be admissible to establish causation because the statutory
24 scheme that identifies certain chemicals as known to the state to cause cancer differs from what
25 must be demonstrated to prove causation under tort law. *See e.g., Mitchell v. Gencorp Inc.*, 165
26 F.3d 778, 783 n. 3 (10th Cir. 1999) (the methodology employed by a government agency, such as
27 in the state of California, to classify a chemical as a carcinogen “results from the preventive
28 perspective that the agencies adopt in order to reduce public exposure to harmful substances. The

1 agencies' threshold of proof is reasonably lower than that appropriate in tort law, which
2 traditionally makes more particularized inquiries into cause and effect and requires a plaintiff to
3 prove that it is more likely than not that another individual has caused him or her harm”) (quoting
4 *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 198 (5th Cir. 1996)); accord *Wright v.*
5 *Willamette Industries, Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996); see also *Baxter Healthcare Corp.*
6 *v. Denton*, 120 Cal.App.4th 333 (2004) (“*Baxter*”).

7 Proposition 65 is fundamentally a “remedial statute designed in part so the people of
8 California would be informed about exposures to chemicals that cause cancer, birth defects, or
9 other reproductive harm.” *Monsanto Co.*, 22 Cal.App.5th at 551. It does so by requiring
10 businesses to give clear and reasonable warnings before exposing the public to a chemical on the
11 Proposition 65 list. See Cal. Health & Saf. Code § 25249.6. Glyphosate is the only chemical
12 known to Monsanto to have been placed on the Proposition 65 list via the Labor Code mechanism
13 despite the consensus by other agencies which have thoroughly reviewed the scientific literature
14 surrounding glyphosate – some of them identified as authoritative bodies under other parts of
15 Proposition 65 – that glyphosate is not carcinogenic. See e.g. *Monsanto Co.*, 22 Cal.App.5th at
16 541-42 (stating that the Environmental Protection Agency, the German Federal Institute for Risk
17 Assessment, the European Food Safety Authority, the European Commission, the Canadian Pest
18 Management Regulatory Authority uniformly identified glyphosate as not carcinogenic and
19 OEHHA itself found no evidence that glyphosate causes cancer in two prior risk assessments).

20 A business may bring an action for declaratory relief finding it is exempt from any
21 warning requirement if its products do not actually pose a significant risk. See Cal. Health & Saf.
22 Code § 25249.10(c); see also *Baxter*, 120 Cal.App.4th 333. In *Baxter*, the Third District Court of
23 Appeal affirmed the trial court’s finding that a medical device business with products containing
24 Proposition 65 listed chemicals had established that its products posed no significant risk of cancer
25 in humans and obtained judgment declaring the product exempt from Proposition 65. *Id.* at 344.
26 In so doing, the Court of Appeal acknowledged the particularity of the Proposition 65 list, which
27 “includes chemicals that are known to cause cancer in animals, even though it has not been
28 definitively established that the chemicals will cause cancer in humans.” *Id.* at 352; see also Cal.

1 Labor Code § 6382, subdivision (b)(1) (the Labor Code mechanism includes those chemicals
2 deemed by IARC to be “listed as human *or* animal carcinogens”) (emphasis added). The Court of
3 Appeal noted in this instance, deeming the product exempt from the Proposition 65 warning
4 requirement did not act to de-list the chemical under Proposition 65. *See Baxter*, 120 Cal.App.4th
5 at 354. Such distinction underscores the lower threshold for causation under Proposition 65’s
6 statutory scheme.

7 Nor can Plaintiff (or Plaintiff’s experts) rely on the Proposition 65 listing of glyphosate (or
8 pending litigation) as scientific evidence to support their causation opinions. Unlike periodic
9 scientific reviews of glyphosate by EPA and various foreign regulatory agencies, which involve
10 panels of scientists looking at various scientific evidence on the subject, OEHHA proclaimed that
11 it was *not* performing any scientific evaluation in listing glyphosate under Proposition 65.
12 OEHHA and the State Attorney General said, in their answer to a lawsuit challenging the
13 Proposition 65 listing of glyphosate and Proposition 65 warning requirements for glyphosate, that
14 “OEHHA does not independently review the scientific validity of the IARC determination and
15 that the listing is ‘ministerial’ as long as the IARC determination meets the requirements of
16 [certain California statutory and regulatory provisions].” *See* Declaration of Sandra A. Edwards
17 (“Edwards Decl.”) at ¶ 38, Ex. 37 (*Wheat Growers*, CIV. NO. 2:17-2401 WBS EFB, Defendants’
18 Answer to First Amended Complaint ¶ 6 (Docket No. 45) (filed Jan. 9, 2018)) (emphasis added).

19 OEHHA also told the public that it could not consider scientific arguments regarding the
20 listing, as it was a “ministerial” rather than scientific act:

21 “Because these are *ministerial listings*, comments should be limited
22 to whether [IARC] has identified the specific chemical or substance
23 as a known or potential human or animal carcinogen. Under this
24 listing mechanism, [OEHHA] cannot consider scientific
25 arguments concerning the weight or quality of the evidence
26 considered by [IARC] when it identified these chemicals and will
27 not respond to such comments if they are submitted.”

28 *Monsanto Co.*, 22 Cal.App.5th at 542-543 (quoting OEHHA) (emphasis added).

Indeed, at the hearing on Plaintiff’s Motion requesting judicial notice of OEHHA’s listing
of glyphosate – a request Judge Karnow denied for purposes of trial – the Court expressed doubt

1 that the listing of a chemical by OEHHA under Proposition 65 should be presented to the jury as
2 evidence of causation: “But you're not suggesting, are you, that everything on the Prop. 65 list is,
3 by definition, something which you could present to the jury as, therefore, a potential cause or a
4 reasonable cause, or a cause with assurance of 2.0 for a disease. right?” Edwards Decl. at ¶ 39,
5 Ex. 38 (Tr. of Hrg. at 39:9-20 (May 10, 2018)). The Court went on to say, “It doesn't strike me
6 that Prop. 65 lists – or things that meets criteria to be on the Prop 65 list are something that's going
7 to be useful in a jury trial. Do you think I'm wrong about that?” *Id.*

8 Accordingly, the Proposition 65 Evidence cannot be introduced for the purposes of
9 establishing causation. *See e.g., Hendrian v. Safety-Kleen Systems, Inc.*, No. 08-14371, 2014 WL
10 117315, at *7 (E.D. Mich., Jan. 13, 2014) (granting motion *in limine* to exclude Proposition 65
11 warnings for the purposes of establishing causation).

12 **B. Proposition 65 Evidence Is Not Relevant to Plaintiff’s Claims**

13 Proposition 65 Evidence is not relevant to Plaintiff’s claims and should therefore be
14 excluded at trial. *See* Cal. Evid. Code § 210 (defining relevant evidence as “having any tendency
15 in reason to prove or disprove any disputed fact that is of consequence to the determination of the
16 action.”); *see also* Cal. Evid. Code § 350 (“No evidence is admissible except relevant evidence.”).

17 Plaintiff’s claims are premised on his allegation that the Roundup PRO[®] and Ranger Pro[®]
18 products he used from June 2012 through late 2015 (or at the latest January 2016) caused him to
19 develop mycosis fungoides, and that Monsanto failed to warn of this alleged risk. California law
20 requires Monsanto to warn only of risks that were actually known or reasonably scientifically
21 knowable at the time Plaintiff used these products. *See Anderson v. Owens-Corning Fiberglas*
22 *Corp.*, 53 Cal. 3d 987, 999-1000 (1991) (holding that “knowledge or knowability” of risk is a
23 required component of failure to warn claims). Under California law, there is no warning
24 requirement with regard to any “exposure that takes place less than twelve months subsequent to
25 the listing of the chemical in question on the list required to be published” under Proposition 65.
26 *See* Cal. Health & Safety Code § 25249.10(b). The earliest effective date of any requirement to
27 provide warnings under Proposition 65 – a warning that is now enjoined – is July 7, 2018, more
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1 than two years after Plaintiff stopped using any Monsanto glyphosate-based herbicide and likely
2 during the pendency of trial.

3 As noted by this Court in its Order on MILs, any warnings or proposed warnings
4 accompanying Roundup PRO[®] and Ranger Pro[®] after Plaintiff's last use in, at the latest, January
5 2016, could have no possible bearing on his use of, or his employer's decision to purchase,
6 Roundup PRO[®] or Ranger Pro[®]. See April 3, 2018 Order Denying Monsanto's Motion for
7 Continuance of Trial Date and Re: Motions in Limine ("Order on MILs") at 5. Such warnings or
8 proposed warnings have no "tendency in reason to prove or disprove any disputed fact that is of
9 consequence to the determination of the action." Cal. Evid. Code § 210. Evidence regarding
10 OEHHA's listing of glyphosate in July 2017 or other Proposition 65 Evidence is wholly irrelevant
11 to determining whether the alleged inadequacy of Monsanto's warnings was a substantial factor in
12 causing his particular injury. See, e.g., *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 555-56 (1993)
13 (where such materials are not read, "there is no conceivable causal connection between the
14 representations or omissions that accompanied the product and plaintiff's injury"); *id.* ("plaintiff's
15 mother could not have relied upon defendant's advertising because she admittedly did not see or
16 hear it."); *Huitt v. S. Cal. Gas Co.*, 188 Cal. App. 4th 1586, 1603 (2010) (alleged failure to warn
17 cannot be substantial factor in causing plaintiffs' injury where no evidence plaintiffs would have
18 seen and relied upon warning); *Motus v. Pfizer Inc. (Roerig Div.)*, 358 F.3d 659, 661 (9th Cir.
19 2004) (applying California law) ("Because the doctor testified that he did not read the warning
20 label that accompanied Zolofit or rely on information provided by Pfizer's detail men before
21 prescribing the drug to Mr. Motus, the adequacy of Pfizer's warnings is irrelevant to the
22 disposition of this case."); Am. L. Prod. Liab. 3d § 34:43 ("Absent a reading of the warning, there
23 is no causal link between the alleged defect and the injury. The plaintiff, in such a case, has
24 defeated the very purpose behind the duty to warn; giving an adequate warning would have been
25 futile.").

26 Moreover, the ongoing litigation further complicates the picture, since Monsanto's future
27 obligations under the statute (it has none now), have not yet been finally adjudicated. In February
28 2018, U.S. District Court Judge Shubb issued a preliminary injunction enjoining the warning

1 requirement of Proposition 65 as to glyphosate. *Wheat Growers*, 2018 WL 1071168, at *8. Judge
2 Shubb found that “the heavy weight of evidence in the record” shows that “glyphosate is not in
3 fact known to cause cancer.” *Id.*, at *7. It may be that Monsanto never has to provide a warning if
4 a permanent injunction is ultimately granted in that litigation. The same could be true if state
5 litigation challenging the listing itself turns out to be successful. At a minimum, the effective date
6 of any requirement to provide warnings may well depend on the outcome of either action, which
7 cannot be foretold.

8 Proposition 65 Evidence, including discussion about Proposition 65 warnings or evidence
9 that OEHHA listed glyphosate under Proposition 65 is not relevant to this litigation, cannot be
10 evidence of causation, and should be excluded at trial. *See* Cal. Evid. Code §§ 210, 350.

11 **C. Proposition 65 Evidence Would Be Time Consuming and Create a Substantial**
12 **Risk of Misleading the Jury**_____

13 Proposition 65 Evidence should also be excluded at trial because any probative value it
14 could have – and there is none – would be substantially outweighed by the probability that its
15 admission would require a significant consumption of time and create large risk of misleading and
16 distracting the jury. *See* Cal. Evid. Code § 352. There is no causal link between Proposition 65
17 Evidence and Plaintiff’s alleged injury. In particular, given the timing of OEHHA’s process by
18 which it listed glyphosate, a Proposition 65 warning could not have played any role in the
19 warnings that were provided to Plaintiff at the time of his alleged exposure to Monsanto’s
20 glyphosate-based herbicides. Evidence about developments in Proposition 65 that post-date
21 Plaintiff’s exposure and his alleged injury would force jurors to blindly speculate about what
22 actions Plaintiff might have undertaken had the Proposition 65 developments occurred earlier, and
23 would be irrelevant. *Oakland Raiders v. Nat’l Football League*, 93 Cal. App. 4th 572, 591 (2001)
24 (“Evidence leading only to speculative inferences is irrelevant in light of Evidence Code section
25 210...”). In any event, this Court already held that any evidence of ongoing Prop 65 litigation by
26 Monsanto against OEHHA (which post-dates Plaintiff’s exposures) should be excluded at trial.
27 *See* April 3, 2018 Order on MILs at 7-8. The same should be true of all Proposition 65 Evidence,
28 starting with the listing itself and continuing up through the recently proposed NSRL.

1 Indeed, there are on-going developments involving Proposition 65 and glyphosate, ranging
2 from the preliminary injunction through OEHHA’s adoption of an NSRL for glyphosate that is not
3 yet effective, the introduction of any of which carries the significant risk of confusing the jury, and
4 an undue consumption of time as it would lead to a trial within the trial. *See* Cal. Evid. Code §
5 352. To adjudicate this issue properly, both parties would therefore need to introduce evidence to
6 educate the jury on Proposition 65 (including both its listing mechanisms and warning
7 requirements (and exemptions)), the process by which glyphosate became a listed chemical on
8 July 7, 2017 the controversy around that listing, the current status of two different pieces of
9 litigation pending in two different jurisdictions challenging both the listing and warning
10 requirements of Proposition 65, and the impact of U.S. District Court Judge Shubb’s preliminary
11 injunction against the warning requirement-- all of which could impact glyphosate’s status under
12 Proposition 65.

13 Further wasting crucial court time and resources, and likely leading to juror confusion,
14 would be the necessary court instruction that must explain to the jury that the facts and allegations
15 contained within out-of-court pleadings from the unrelated Proposition 65 cases, for example,
16 cannot be relied upon as truth under the hearsay rule. *See* Cal. Evid. Code § 1200. Introduction of
17 Proposition 65 Evidence to the jury therefore serves no useful purpose and should be excluded
18 because it would be extremely time consuming and create large risk of misleading the jury.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should exclude any evidence, argument, or reference
3 to Proposition 65, including OEHHA's listing of glyphosate, Proposition 65 warning language,
4 and Proposition 65 litigation.

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6 Dated: May 24, 2018

Respectfully submitted,

7 FARELLA BRAUN + MARTEL LLP

8 By: 

9 _____
Sandra A. Edwards

10 Attorneys for Defendant
11 MONSANTO COMPANY

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