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17 MONSANTO COMPANY

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. 26 TO
EXCLUDE EVIDENCE OR ARGUMENT
ALLEGING THAT MONSANTO
DECEIVED THE EPA**

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

1 **I. INTRODUCTION**

2 Defendant Monsanto Company (“Monsanto”) respectfully requests that the Court exclude
3 any evidence or arguments that Monsanto deceived the EPA in connection with the registration
4 and approval of glyphosate, including by not disclosing or performing certain studies regarding
5 glyphosate. Such claims are preempted by federal law, irrelevant, prejudicial, and calculated to
6 confuse the jury.

7 **II. FACTUAL BACKGROUND**

8 Through the submission of expert reports, Plaintiff has signaled his intention to present
9 evidence that Monsanto “knowingly mislead [sic] regulators” and engaged in “scientific deceit.”
10 *See* Declaration of Sandra A. Edwards (“Edwards Decl.”) at ¶ 14, Ex. 13 (Expert Report of
11 Charles M. Benbrook (“Benbrook Rep.”) at 112, 185). The report of Plaintiff’s expert Dr.
12 Benbrook is replete with baseless allegations that Monsanto behaved improperly in the course of
13 its decades-long interactions with the EPA. The Court has already ruled that Dr. Benbrook “may
14 not testify Monsanto misled the EPA.” *See* 05/17/2018 Order on *Sargon* and Summary Judgment
15 at 31. However, Monsanto still expects that Plaintiff will try to make such allegations through
16 argumentation or through other witnesses.

17 For example, Plaintiff claims that Monsanto misled the EPA by not disclosing information
18 about a failed study conducted by a European laboratory about glyphosate absorption in rat skin.
19 The study failed to produce reliable results, prompting the study’s author to conclude that “the
20 data presented in this report are not acceptable for regulatory use and risk assessment.” *See*
21 Edwards Decl. at ¶ 36, Ex. 35 (TNO, *In vitro percutaneous absorption study with [¹⁴C]glyphosate*
22 *using viable rat skin membranes*, TNO Report at 3 (July 9, 2003)). Nevertheless, Plaintiff claims
23 that Monsanto deceived the EPA by omitting information about it. *See* Edwards Decl. at ¶ 30, Ex.
24 29 (Expert Report of William Sawyer, Ph.D. at 81-86); Edwards Decl. at ¶ 14, Ex. 13 (Benbrook
25 Rep. at 112).

26 Plaintiff also alleges that Monsanto failed to conduct several studies regarding the
27 genotoxicity of glyphosate that geneticist Dr. James Parry recommended Monsanto conduct in the
28 1990s. Plaintiff may further insinuate that Monsanto ended its relationship with Dr. Parry

1 following his recommendations. However, Monsanto did, in fact, go on to perform and submit to
2 the EPA numerous genotoxicity studies beyond those required by federal law, including an *in vivo*
3 study of the formulated product that evaluated and answered Dr. Parry’s specific questions. *See*
4 Edwards Decl. at ¶ 9, Ex. 8 (Dep. of Donna Farmer, Ph.D, *In re: Roundup Prods. Liab. Litig.*, No.
5 3:16-md-02741-VC (N.D. Cal.) at 432:16-21, 433:3-8, 434:3-13, 435:6-14 (January 12, 2017));
6 Edwards Decl. at ¶ 37, Ex. 36 (Hotz et al., *A Study of the Short-Term effects of Mon35050 in Male*
7 *CD-1 Mice*, July 26, 2002) (study initiated by Monsanto exploring Dr. Parry’s questions, as
8 submitted to the Environmental Protection Agency); Edwards Decl. at ¶ 6, Ex. 5 (Heydens et al.,
9 *Genotoxic Potential of Glyphosate Formulations: Mode-of-Action Investigations*, J. of
10 Agricultural and Food Chemistry (2008), 56(4): 1517-1523) (published version of the Hotz study).

11 **III. ARGUMENT**

12 **A. Fraud-on-the-Agency Arguments are Inadmissible under Buckman**

13 All “fraud on the agency” allegations are inadmissible because they are preempted under
14 *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341 (2001). In *Buckman*, the plaintiffs
15 alleged that defendants made misrepresentations to the U.S. FDA in the course of obtaining the
16 agency’s approval of a medical device. *Id.* at 343. Plaintiffs contended that “[h]ad the
17 representations not been made, the FDA would not have approved the devices, and plaintiffs
18 would not have been injured.” *Id.* The Supreme Court rejected this theory of liability, holding
19 that “plaintiff’s state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-
20 empted by, federal law.” *Id.* at 348. The Court further explained that allowing the imposition of
21 liability on these grounds would “inevitably conflict” with the agency’s “responsibility to police
22 fraud consistently with the Administration’s judgment and objectives.” *Id.* at 350.

23 The Ninth Circuit has confirmed that *Buckman* applies to claims of fraud on the EPA.
24 *Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, 1205, 1208 (9th Cir. 2002) (holding that state
25 law fraud-on-the-EPA claims are preempted). Such allegations “stand ‘as an obstacle to the
26 accomplishment and execution of the full purposes and objectives of Congress’ in enacting
27 FIFRA, and therefore are preempted by that federal statutory scheme.” *Id.* (quoting *Freightliner*
28 *Corp. v. Myrick*, 514 U.S. 280, 287 (1995); see *Giglio v. Monsanto Co.*, No. 15-cv-2279 BTM

1 (NLS), 2016 WL 1722859, at *3 (S.D. Cal. Apr. 29, 2016) (“Plaintiff’s claims based on failure to
2 warn the EPA of dangers of Roundup are preempted.”); *Syngenta Crop Prot., LLC v. Willowood,*
3 *LLC*, No. 1:15-CV-274, 2016 WL 6783628, at *1 (M.D.N.C. Aug. 12, 2016) (“The Court
4 concludes that Syngenta’s Chapter 75 claim, as pled, is little more than a fraud-on-the-EPA claim
5 and is impliedly pre-empted by FIFRA.”).

6 Plaintiff’s arguments that Monsanto knowingly misled regulators, withheld material
7 information, or engaged in “scientific deceit” in its dealings with the EPA are precisely the type of
8 allegations that federal law prohibits. *Nathan Kimmel*, 275 F.3d at 1208. Any evidence or
9 argument about such matters therefore should be excluded.

10 **B. The Allegations are Irrelevant and Calculated to Mislead the Jury**

11 The potential for confusion and prejudice also far outweighs any conceivable probative
12 value this evidence could have. *See* Cal. Evid. Code §§ 210, 350. Such allegations presumptively
13 prejudice Monsanto by inviting the jury to find liability based on conduct that cannot be a basis for
14 liability as a matter of law. They further create the possibility for multiple sideshows.

15 For example, slinging accusations that Monsanto intended to defraud the EPA by
16 withholding the results of a failed *in vitro* study of dermal absorption through rat skin would
17 create a trial-within-a-trial regarding the lab’s and/or Monsanto’s interpretation of the study results
18 and the reactions and intentions of Monsanto’s scientists.

19 Likewise, any argument that Monsanto refused to perform the genotoxicity studies
20 required by the EPA or ignored Dr. Parry’s suggestions to perform such studies is unfounded,
21 because Monsanto conducted studies that answered the very questions that Dr. Parry identified.
22 Introduction of testimony or emails between Monsanto employees discussing whether or not to
23 initiate these studies—and any suggestion that Monsanto refused to conduct the studies—should
24 be excluded as irrelevant and misleading. *See* Cal. Code Evid. § 210; *People v. De La Plane*, 88
25 Cal. App. 3d 223, 242 (1979), *cert. denied*, 444 U.S. 841 (1979), *disapproved on other grounds in*
26 *People v. Green*, 27 Cal. 3d 1, 39 n.25 (1980) (noting that evidence that produces “only
27 speculative inference” is irrelevant and thus inadmissible).

28 The case is complicated enough without these sideshows, which lack any meaningful

1 connection to the issue of whether glyphosate caused Plaintiff's mycosis fungoides, or to any other
2 element of Plaintiff's proof. *See* Cal. Evid. Code §§ 350, 352; *Van v. Language Line Servs., Inc.*,
3 No. 14-CV-03791-LHK, 2016 WL 3566980, at *4 (N.D. Cal. June 30, 2016) (excluding evidence
4 where "[t]he risk of unfair prejudice, confusing the issues, misleading the jury, and wasting time
5 substantially outweighs any minimal to non-existent probative value of this evidence").

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court should exclude any evidence or arguments that
8 Monsanto deceived the EPA in connection with the registration and approval of glyphosate,
9 including by not disclosing or performing the studies discussed herein.

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11 Dated: May 24, 2018

Respectfully submitted,

12 FARELLA BRAUN + MARTEL LLP

13 By: 

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Sandra A. Edwards

15 Attorneys for Defendant
16 MONSANTO COMPANY

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