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MONSANTO COMPANY

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 MOTION *IN LIMINE* NO. 16 TO EXCLUDE ANY EVIDENCE, ARGUMENT, OR REFERENCE, TO TRACE IMPURITIES IN ROUNDUP PRO® OR RANGERPRO®

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

I. INTRODUCTION

Defendant Monsanto Company ("Monsanto") respectfully submits this motion *in limine* to preclude Plaintiff Dewayne Johnson ("Plaintiff") from introducing any evidence or argument that trace "impurities" or "contaminants" present in Roundup PRO® or Ranger Pro® that could have caused Plaintiff's mycosis fungoides ("MF"), or could cause other injuries. As part of the manufacturing process, certain by-products – including formaldehyde and N-nitrosoglyphosate ("NNG") – are present in Roundup PRO® and Ranger Pro® at trace levels that are well within the limits set by the United States Environmental Protection Agency ("EPA"), and are approved as part of EPA's repeated approvals of glyphosate-based formulations ("GBFs"). No expert has proffered an opinion that Plaintiff's injury was caused by any impurity in Roundup PRO® or Ranger Pro®. Accordingly, any reference to these impurities is wholly irrelevant to causation or any other issue in this case, and would serve only to mislead the jury and prejudice Monsanto. Any evidence or argument regarding formaldehyde, NNG, or other trace impurities must be excluded.

II. ARGUMENT

A. Argument That Trace Contaminants or Impurities Can Cause Injury Is Irrelevant and Misleading Because All Scientific Testing and Approval of GBFs Included Approval of These "Impurities"

EPA regulations require that the EPA carefully monitor and regulate herbicides in their *entireties,* not merely the herbicides' active ingredients. *See* Declaration of Sandra A. Edwards ("Edwards Decl.") at ¶ 23, Ex. 22 (EPA, *Product Properties Test Guidelines: OPPTS 830.1000 Background for Product Properties Test Guidelines*, at 10 (Mar. 1998), https://www.regulations.gov/document?D=EPA-HQ-OPPT-2009-0151-0002) (requiring manufacturers to "address impurities which either have been detected by analysis of samples of the product or are expected to be present in quantities equal to or greater than 0.1 percent of the product or at lower concentrations in the case of impurities of toxicological concerns."); *see also* 40 C.F.R. § 158.310.

Impurities are not approved separately from the Roundup PRO® and Ranger Pro® formulated products; rather, when EPA approves the formulated product, it approves the active

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ingredient *and* the levels of its impurities. *See* Edwards Decl. at ¶ 24, Ex. 23 (Dep. of Charles Benbrook ("Benbrook Dep.") at 557:4-13 (Feb. 9, 2018)) ("Q: This is under your subheading Sources of Pesticide Product Risk, and you indicate three potential sources of risk: The Active ingredient; and then impurities; then you talk about inert ingredients. And you agree that EPA regulates all three of these constituent components of the formulated pesticides product as part of the registration process? A: They do their best to do so, yes.").

The trace levels of these substances in Roundup PRO® and Ranger Pro® products have been tested and found to be within the limits set by the EPA. Edwards Decl. at ¶ 9, Ex. 8 (Dep. of Donna Farmer, *In re: Roundup Prods. Liab. Litig.,* No. 3:16-md-02741-VC (N.D. Cal.), at 457:21-458:5 (Jan. 12, 2017)) ("Q. So does that mean that when you have done your testing on technical glyphosate, that that testing also accounts for the presence of impurities at standard percentage doses in those tests? A. Yes, it does. Q. So the impurities have also been tested, correct? A. Yes. They have also been tested, yes."). Even Plaintiff's experts do not contest this. Edwards Decl. at ¶ 24, Ex. 23 (Benbrook Dep. at 559:6-11) ("Q: You're not – you're not claiming in your report or otherwise that EPA has ever determined that the impur- -- any impurity in a glyphosate-based formulation has exceeded the EPA certified limit, are you? A: No. I don't make that assertion.").

In fulfilling its regulatory responsibilities, Monsanto has regularly submitted all required information to the EPA, which has continually approved Roundup PRO® and Ranger Pro® products. Thus, any "impurities" found in any Monsanto GBF were tested in various epidemiological, animal cancer bioassays, and genotoxicity studies of the GBF itself. These studies were all reviewed by the EPA and found to have no association with non-Hodgkin lymphoma ("NHL"). Accordingly, any evidence or argument suggesting that "impurities" can cause NHL – or, indeed, could have caused Plaintiff's injury in this case – is unfounded and irrelevant to a causation analysis.

No witness in the case, including Plaintiff's experts, has proffered an opinion that Plaintiff's injury was caused by an impurity in Roundup PRO® or Ranger Pro®, or that impurities exceeded the EPA-defined safe level. In fact, Plaintiff's expert agrees that the EPA has never recognized the level of impurities in Roundup PRO® and Ranger Pro® as an issue of toxicological

concern. *See* Edwards Decl. at ¶ 24, Ex. 23 (Benbrook Dep. at 560:22 – 561:7) ("Q: EPA has not determined that the level of impurities in glyphosate formulations is an issue of toxicological concern, right? . . . . THE WITNESS: I agree with that. Yes. The answer is yes."). The evidence should be excluded on relevance grounds alone.

B. The Argument That Trace Impurities Can Cause Injury Is Unduly Prejudicial

Even if the Court finds that the presence of such trace impurities in Roundup PRO® and Ranger Pro® products has any minimal relevance to this case – which it does not – any probative value is substantially outweighed by the unfair prejudice to Monsanto and danger of confusing the issues and misleading the jury. *See* Cal. Evid. Code § 352.

Because impurities are not approved separately from the GBF as a whole, reference to the presence of "impurities" or "contaminants" in Monsanto's products, such as formaldehyde and NNG, would serve only to mislead the jury into believing that Monsanto's products were poisoned or "contaminated," when in fact impurities are an unavoidable byproduct of any chemical manufacturing process, and EPA has sanctioned the inclusion of these by-products at the levels present in Monsanto's GBFs. Such evidence would serve only to prejudice Monsanto by motivating the jury to reward or punish Monsanto because of a visceral reaction to the words "impurity" and/or "contaminant" and distract the jury from the primary issues of the case. *See Hernandez v. Cty. of. Los Angeles.*, 226 Cal. App. 4th 1599, 1613 (2014) (explaining that California courts exclude even relevant evidence when it tends to evoke an emotional bias against one party, and would motivate the jury to use information for an illegitimate purpose – i.e., to reward or punish one party because of the jurors' emotional reaction). Evidence or argument regarding this irrelevant, highly prejudicial issue must be excluded. Cal. Evid. Code § 352.

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III. CONCLUSION

For the foregoing reasons, the Court should preclude Plaintiff from introducing any evidence, reference, or argument that trace "impurities" or "contaminants" present in Roundup PRO® or Ranger Pro® caused Plaintiff's MF, or could cause other injuries.

Dated: May 24, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: _____
Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY