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DEWAYNE JOHNSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY

Defendants.

Case No. CGC-16-550128

NOTICE OF MOTION AND PLAINTIFF'S MOTION *IN LIMINE* NO. 12 TO EXCLUDE ANY ARGUMENT AND TESTIMONY THAT EPA REGISTRATION PRECLUDED MONSANTO FROM WARNING OF THE RISK OF NON-HODGKIN'S LYMPHOMA

Trial Judge: TBD

Hearing Date: TBD
Time: TBD
Department: TBD

Trial Date: June 18, 2018

[Filed concurrently with Declaration of Curtis Hoke and [Proposed] Order]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at a date and time set by the trial judge assigned to this matter of the above-entitled Court located at 400 McAllister St. San Francisco, CA 94102-4515, Plaintiff Dewayne Johnson will and hereby does move *in limine* to exclude any argument and testimony that EPA registration precluded Monsanto from warning of the risk of Non-Hodgkin's lymphoma.

This motion *in limine* has been brought pursuant to Evid. Code §§ 210, 350, and 352 and is based on the grounds that Monsanto should not be permitted to argue to the jury that it was precluded from warning Plaintiff of the risks of its Glyphosate-based herbicides in light of this Court's Order dismissing its affirmative defenses on federal preemption. Any argument, suggestion, or testimony that Monsanto could not provide warnings beyond what was included in the EPA approved labeling is an incorrect statement of the law and is entirely irrelevant to Plaintiff's warnings-based claims. Any probative value of the evidence is substantially outweighed by the likelihood that the introduction of such evidence would mislead and confuse the jury.

This motion *in limine* is based on this notice of motion, the motion and accompanying memorandum of points and authorities, the Court's May 17, 2018 Order denying Monsanto's motion for summary judgment and granting plaintiff's motion for summary adjudication, the concurrently filed Declaration of Curtis Hoke, the concurrently filed proposed order, all pleadings and papers on file in this matter, and such further oral and documentary evidence and papers as the Court may consider at the time of the hearing.

Respectfully Submitted,

Dated: May 24, 2018

THE MILLER FIRM, LLC

By: */s/ Curtis G. Hoke*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

On May 17, 2018, this Court granted Plaintiff's motions for summary adjudication of Monsanto's affirmative defenses relating to federal preemption.[1] The Court found that Plaintiff's failure-to-warn claims were not preempted because California product liability law "is equivalent to, and fully consistent with, FIFRA's misbranding provisions." *See*, Order Granting P's Mot. for Sum. Adj. ("Preemption Order") (May 17, 2018) at 39; *quoting Bates v. Dow Agrosciences LLC*, 554 U.S. 431, 444 (2005). In expressly rejecting Monsanto's arguments in support of preemption, this Court concluded that:

> Monsanto's express preemption argument depends on the premise that Monsanto is immune from FIFRA liability so long as it uses a label that has been approved by the EPA or is otherwise consistent with the EPA's factual findings. **That's not true**.

Preemption Order at 40 (emphasis added); see also p. 42 ("EPA approval of a pesticide is *not* a defense for the commission of any offense under FIFRA…")(emphasis in original). The Court again confirmed the legal principle that EPA registration "does not mean that the product complies with California law" when it refused Monsanto's proposed jury instructions on the role of the EPA in regulating pestcides. See Order on Deposition Designations and Certain Proposed Jury Instructions ("Jury Inst. Order") at 7.

Despite the Court's previous Orders, Plaintiff anticipates that Monsanto will seek to introduce argument and testimony that: (1) Monsanto was precluded from warning consumers of risks not contained within the product labeling; and (2) Monsanto cannot be held liable for failing to warn of the risk of Non-Hodgkin's lymphoma because the EPA approved labeling for glyphosate-based herbicides (GBHs) without requiring a cancer warning.[2] Plaintiff seeks to exclude these inaccurate, misleading, and prejudicial statements, including the following arguments and testimony:

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[1] The Court also denied Monsanto's Motion for Summary Judgment on the basis of preemption.

[2] Evidence that GBH's are registered with the EPA amounts to prima facie evidence that the labeling complies with California law. See Jury Inst. Order at 7. EPA's registration of GBH's may be admissible on the question of whether Monsanto's warnings were adequate, however, Monsanto is not entitled to mislead the jury into thinking that Monsanto was foreclosed from warning of additional risks associated with its product because of EPA registration.

- "Once the EPA has. . . approved an herbicide label, the manufacturer is required by FIFRA to use only the labeling that has been approved by the EPA." Monsanto's Memorandum in Support of Summary Judgment ("Def's Mot. for Sum. J.") at 11.
- "EPA's labeling decisions have the force of federal law, and manufacturers that disregard those federal regulatory decisions are subject to legal sanctions under FIFRA." Def's Mot. for Sum. J. at 11.
- "Any label that deviates from EPA's approved safety labeling may be deemed "misbranded" by the Agency." Exhibit A; Expert Report of John Fowle, III, Ph.D., DA BT ("Fowle Rep.") at 49.
- "EPA takes label approval very seriously, and it does not allow companies the freedom to choose to place a warning on the label that the product might cause cancer when EPA has determined that it does not." Fowle Rep. at 49.
- "EPA has the proper processes and procedures and requirements in place to make sure that those – that the public is notified of how to properly use a pesticide, and that stems from the FIFRA, the requirements in FIFRA, that EPA registers pesticides." Deposition of John R. Fowle, III, Ph.D., DABT ("Fowle Dep.") at 50.

Under California law, Monsanto is responsible for adequately warning consumers of the risks associated with GBH's. *Webb v. Special Elec. Co.* (2016) 63 Cal.4th 167, 181 ("manufacturers have a duty to warn consumers about the hazards inherent in their products). It is not the responsibility of the EPA. Under both strict liability and negligent failure to warn, the jury must determine whether the *manufacturer* knew (or should have known) of the dangerous propensities of its product and whether the manufacturer adequately warned of the known risk. Any argument or testimony implying that EPA's registration of GBH's relieves Monsanto of its legal duty is contrary to California law. As the preemption affirmative defense is no longer in the case any such arguments are irrelevant and highly prejudicial.

Indeed, Monsanto's arguments and testimony rely on the premise that EPA's labeling decisions have "the force of law." Def's Mot. for Sum. J. at 11. This premise has already been rejected by the Court. In finding that conflict preemption is not applicable to this case, the Court cited to *Hardeman*

v. Monsanto Company, 216 F. Supp. 3d 1038 (N.D. Cal. 2016) for the principle that "EPA's approval of Roundup's label would preempt conflicting state law if it had the force of law under *Wyeth,* **but finding no indication that EPA's approval of Roundup's label had the force of law**." Preemption Order at 42. Thus, evidence that Monsanto was restricted from warning Plaintiff of Non-Hodgkin's lymphoma because of EPA registration of GBHs misstates the applicable law.

Finally, any argument or testimony that Monsanto could face legal sanctions for warning consumers of the risk of Non-Hodgkin's lymphoma will unnecessarily confuse the jury as to the appropriate standard to be applied in this case. This evidence would be unfairly prejudicial as there is no evidence that the EPA would have considered labeling "misbranded" or initiated sanctions proceedings against a manufacturer for providing *additional* safety warnings to consumers. The Court, counsel, and jurors would become mired in issues surrounding the interpretation of EPA regulations. The probative value of this speculative testimony would be substantially outweighed by risk of undue consumption of time and confusion of the issues.

II. CONCLUSION

Any argument, suggestion, or testimony that Monsanto is not permitted to warn of risks outside of the EPA approved labeling is inaccurate and prejudicial. Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an Order granting this motion *in limine* and excluding any argument or testimony that EPA's registration of GHB's precluded Monsanto from warning Plaintiff of the risk of Non-Hodgkin's lymphoma.

Respectfully submitted,

Dated: May 24, 2018

THE MILLER FIRM, LLC

By: */s/ Curtis G. Hoke*

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