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

20  
21 DEWAYNE JOHNSON,  
22 Plaintiff,

23 vs.

24 MONSANTO COMPANY,  
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S  
SURREPLY IN SUPPORT OF MOTION  
IN LIMINE NO. 20 TO EXCLUDE  
EVIDENCE, ARGUMENT, OR  
REFERENCE TO "GHOSTWRITING"**

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

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County of San Francisco  
**06/18/2018**  
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1 **I. INTRODUCTION**

2 On June 8, 2018, in response to an accident that befell plaintiff’s prior lead trial counsel,  
3 plaintiff designated a new trial team of four attorneys, including Brent Wisner of Baum, Hedlund,  
4 Aristei & Goldman, PC. As noted by the Hon. Judge Chhabria in the U.S. District Court for the  
5 Northern District of California, Mr. Wisner has played multiple roles for plaintiffs in the  
6 glyphosate litigation, acting not only as an attorney but also as “a PR man”<sup>1</sup> and, as relevant to the  
7 present motion, as a lobbyist before the European Union in connection with the EU’s regulation of  
8 glyphosate. In his role as lobbyist, Mr. Wisner presented to the EU the very same allegations of  
9 Monsanto misconduct – including purported “ghostwriting” – that plaintiff seeks to introduce into  
10 evidence in this case. As Monsanto noted in its opening memorandum in support of the present  
11 motion in limine, following Mr. Wisner’s submission, the European Food Safety Authority  
12 (“EFSA”) dismissed these allegations, explaining that “even if the allegations regarding  
13 ghostwriting proved to be true, there would be no impact on the overall assessment as presented in  
14 the EFSA Conclusion on glyphosate” because “[t]he review papers in question represented only  
15 two of approximately 700 scientific references in the area of mammalian toxicology considered by  
16 EFSA in the glyphosate assessment,” and “their provenance was evident from the Declarations of  
17 Interest and Acknowledgements in the papers themselves.” European Food Safety Authority,  
18 *EFSA Statement regarding the EU assessment of glyphosate and the so-called “Monsanto*  
19 *papers”*, [http://www.efsa.europa.eu/sites/default/files/topic/20170608\\_glyphosate\\_statement.pdf](http://www.efsa.europa.eu/sites/default/files/topic/20170608_glyphosate_statement.pdf).  
20 Plaintiffs take issue with this fact in their opposition, contending that “several members of [the  
21 EU] Parliament” are continuing to investigate these allegations. *See* Pl.’s Opp’n to Monsanto’s  
22 MIL No. 20 to Exclude Evidence of Ghostwriting at 6. Mr. Wisner’s EU lobbying effort and the  
23 response thereto are accordingly centrally relevant to the disposition of the present motion and, if  
24 the motion were to be denied, Mr. Wisner’s role as trial counsel would give rise to potential  
25 disqualification under California’s “advocate-witness rule.” *See Comden v. Superior Court*, 20

26 \_\_\_\_\_  
27 <sup>1</sup> *See* Transcript of Proceedings at 23-24, *In re Roundup Prods. Liab. Litig.*, No. 3:16-md-02741-  
28 VC (N.D. Cal. Aug. 24, 2017) (“August 24, 2017 Hearing Transcript”) (Speaking directly to Mr.  
Wisner, Judge Chhabria stated: “Release documents first. Ask questions later . . . because . . . you  
were too focused on being a PR man, and not focused enough on being a lawyer.”).

1 Cal. 3d 906, 913 (1978) (affirming trial court’s exclusion from breach of contract trial under  
2 “advocate-witness rule” of attorney who had participated in negotiations relating to the contract at  
3 issue, finding attorney’s testimony was “necessary” to contested issue despite presence of other  
4 witnesses at negotiations); *Caluori v. One World Techs., Inc.*, No. CV 07-2035 CAS (VBKx),  
5 2012 WL 2004173, at \*5 (C.D. Cal. June 4, 2012) (holding that attorney who drafted underlying  
6 patent applications was a necessary witness and excluded from serving as trial counsel in  
7 infringement trial regarding the same patents).

8 **II. FACTUAL BACKGROUND**

9 Mr. Wisner’s lobbying effort began with his decision – in violation of a protective order in  
10 place in the federal Roundup MDL – to publicly release scores of Monsanto documents designated  
11 as confidential in that proceeding. Mr. Wisner was sharply reprimanded for this conduct by Judge  
12 Chhabria, who repeatedly admonished Mr. Wisner for acting in “bad faith”<sup>2</sup> and stated: “I don’t  
13 see how it would be acceptable to have Mr. Wisner on the Executive Committee [of the MDL]  
14 going forward.... [I]t’s difficult for me to understand how I could be comfortable ... retaining  
15 Mr. Wisner, and perhaps his firm, on the Executive Committee.” *See* August 24, 2017 Hearing  
16 Transcript at 7-8. Soon after an August 24, 2017 show cause hearing, Baum Hedlund notified  
17 Judge Chhabria that it intended to withdraw from the Plaintiff’s Executive Committee, which led  
18 Judge Chhabria to withdraw the show cause order. Pretrial Order No. 29: Order Withdrawing  
19 Order to Show Cause, *In re Roundup Prods. Liab. Litig.*, No. 3:16-md-02741-VC (N.D. Cal.  
20 Sept. 1, 2017) (ECF No. 505).

21 In the meantime, however, Mr. Wisner personally embarked on an extraordinary lobbying  
22 effort, which included direct, in-person participation before the EU Parliament, in an unsuccessful  
23 attempt to convince EU regulators to classify glyphosate as carcinogenic. *See, e.g.*, Letter from  
24 \_\_\_\_\_

25 <sup>2</sup> *See* Transcript of Telephonic Proceedings of the Official Electronic Sound Recording 2:36PM-  
26 2:49PM at 4, *In re Roundup Prods. Liab. Litig.*, No. 3:16-md-02741-VC (N.D. Cal. Aug. 9, 2017)  
27 (“[M]y tentative thinking is that Mr. Wisner acted in bad faith.”), at 5 (“Mr. Wisner, it appears to  
28 me, operated in bad faith in releasing the documents without coming to court first.”); August 24,  
2017 Hearing Transcript at 37-39 (stating that the record supports “a finding of bad faith”; that “at  
an absolute minimum there was misconduct”; and that “either finding [misconduct or bad faith]  
could [justify] removal of Mr. Wisner and/or Baum Hedlund from the Executive Committee.”)

1 Brent Wisner, Esq., Baum Hedland Aristei & Goldman, P.C. to Members of the European  
2 Parliament (Oct. 5, 2017); Baum Hedlund, *US Attorneys Urge EU to Investigate Monsanto*  
3 *Science Manipulation* (Oct. 5, 2017), [https://www.baumhedlundlaw.com/eu-investigate-](https://www.baumhedlundlaw.com/eu-investigate-monsanto-science-manipulation/)  
4 [monsanto-science-manipulation/](https://www.baumhedlundlaw.com/eu-investigate-monsanto-science-manipulation/) (reporting that “Baum, Hedlund, Aristei & Goldman attorneys  
5 R. Brent Wisner and managing partner Michael Baum have asked European Union (EU) officials  
6 to conduct an official inquiry into Monsanto’s manipulation of science and potential collusion  
7 with regulators.”); Baum Hedlund, *Roundup Cancer Victims and Attorneys in EU Ahead of*  
8 *Glyphosate Meeting* (Oct. 4, 2017), [https://www.baumhedlundlaw.com/roundup-cancer-victims-](https://www.baumhedlundlaw.com/roundup-cancer-victims-and-attorneys-in-eu/)  
9 [and-attorneys-in-eu/](https://www.baumhedlundlaw.com/roundup-cancer-victims-and-attorneys-in-eu/) (reporting Baum Hedlund clients and attorneys including Mr. Wisner “in  
10 Europe this week to warn officials about the cancer risk associated with glyphosate”).  
11 Mr. Wisner’s letter to the EU Parliament detailed the same ghostwriting allegations Plaintiff seeks  
12 to introduce in this case, along with Plaintiff’s other company misconduct claims relating, *e.g.*, a  
13 (failed) TNO Study and purported collusion with U.S. regulatory officials. Although Monsanto  
14 does not know the details of Mr. Wisner’s communications with EU Commissioners during his  
15 lobbying trip to Europe, media accounts make clear that he raised these same allegations in those  
16 face-to-face meetings.



26 As noted above and in Monsanto’s opening brief, Mr. Wisner’s allegations were dismissed  
27 by the European regulators, who concluded after a thorough review of the extensive body of  
28

1 epidemiology, animal toxicology and genotoxicology studies that glyphosate is not carcinogenic.<sup>3</sup>  
2 Accordingly, these allegations of “ghostwriting” and other corporate misconduct are nothing but a  
3 smoke screen and bear no relevance to whether Plaintiff’s use of Ranger Pro or Roundup Pro  
4 caused his MF. *See* Cal. Evid. Code §210. Mr. Wisner’s involvement as trial counsel in this case  
5 though raises an additional problem because his personal actions as a lobbyist place him afoul of  
6 California’s “advocate-witness rule.”

7 **III. ARGUMENT**

8 The “‘advocate-witness rule’ ... prohibits an attorney from acting both as an advocate and  
9 a witness in the same proceeding, [and] has long been a tenet of ethics in the American legal  
10 system.” *Kennedy v. Eldridge*, 201 Cal. App. 4th 1197, 1208 (2011); *see also People v.*  
11 *Donaldson*, 93 Cal. App. 4th 916, 928 (2001) (“The foundations of the prohibition against a  
12 lawyer's acting as both advocate and witness lie in due process ... [and] ‘is essentially aimed at  
13 eliminating confusion over the lawyer's role. This confusion could prejudice one or more of the  
14 parties or call into question the impartiality of the judicial process itself.’” (quoting ABA Model  
15 Rules Prof. Conduct Rule 3.7, Legal Background)). As articulated in the California State Bar  
16 Rules of Professional Conduct, an attorney “shall not act as an advocate before a jury which will  
17 hear testimony from the [attorney] unless: (A) The testimony relates to an uncontested matter; or  
18 (B) The testimony relates to the nature and value of legal services rendered in the case; or (C) The  
19 [attorney] has the informed, written consent of the client.” Cal. Rules of Professional Conduct  
20 Rule 5-210.<sup>4</sup>

21 \_\_\_\_\_  
22 <sup>3</sup> In an effort to forestall this conclusion, Mr. Wisner and his firm also submitted to the EU  
23 regulators the expert reports of each of the general causation experts who will be testifying in this  
24 case. *See* Email from Michael Baum, Esq. et al., to Members of the European Commission,  
25 Parliament, and Member States at 1 (Oct. 31, 2017) (“This letter contains a link to six expert  
26 scientist reports explaining the connection between glyphosate-based formulations (“GBFs”) and  
27 the cancer Non-Hodgkin Lymphoma (“NHL”). The reports were written for lawsuits pending  
28 against Monsanto Company in the United States and compile epidemiology, toxicology, and  
oncology evidence important for regulators like the European Commission to assess, along with  
the Monsanto Papers [re ghostwriting, etc.], when determining whether to extend or restrict the  
use of GBFs in Europe.) Those expert reports likewise were rejected.

<sup>4</sup> California courts have explained that the “advocate-witness rule” requires disqualification even  
with the consent of the attorney’s client because “confusion over the lawyer’s role ... could

1 By electing to undertake these extensive lobbying efforts, Mr. Wisner has put himself in  
2 the position of having factual knowledge relevant to Plaintiff's "ghostwriting" allegations, which,  
3 if allowed into evidence in this case, would forfeit his ability to serve as trial counsel under the  
4 "advocate-witness rule." In *Caluori*, for example, the court excluded an attorney from serving as  
5 trial counsel in a patent infringement case, where that attorney had drafted the underlying  
6 application for the patent at issue. *Caluori*, 2012 WL 2004173, at \*4-5. The court found that he  
7 was a necessary witness because "[g]iven his familiarity with the ' 727 patent and its prosecution  
8 history, his testimony is relevant and material" and "is not cumulative or obtainable by other  
9 means." *Id.* at \*5. Similarly, Mr. Wisner has extensive and unique familiarity with the regulatory  
10 lobbying effort in Europe whose lack of success proves Plaintiff's ghostwriting allegations false.


11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court should exclude any reference, evidence, or argument  
13 relating to allegations that Monsanto "ghostwrite" certain scientific articles about glyphosate.

14 Dated: June 18, 2018

Respectfully submitted,

15 FARELLA BRAUN + MARTEL LLP

16 By: 

17 Sandra A. Edwards

18 Attorneys for Defendant  
19 MONSANTO COMPANY

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25 prejudice one or more of the parties or call into question the impartiality of the judicial process  
26 itself." *Donaldson*, 93 Cal. App. 4th at 928; see also *id.* at 929 ("Combining the roles of advocate  
27 and witness can prejudice the opposing party' and confers on the opposing party 'proper objection  
28 where the combination of roles may prejudice that party's rights in the litigation. A witness is  
required to testify on the basis of personal knowledge, while an advocate is expected to explain  
and comment on evidence given by others. It may not be clear whether a statement by an  
advocate-witness should be taken as proof or as an analysis of the proof.'" (quoting Comment to  
ABA Model Rule Professional Conduct Rule 3.7)).