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**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 REPLY IN SUPPORT OF MOTION *IN LIMINE* NO. 27 TO EXCLUDE EVIDENCE RELATING TO PROPOSITION 65**

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

## I. INTRODUCTION

California's Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") is fundamentally irrelevant to this litigation. It is a remedial statute designed to inform Californians of possible exposures to chemicals; it cannot and does not serve to prove causation. More importantly, glyphosate was not a listed chemical at the time Plaintiff used glyphosate-based herbicide ("GBH") products, and even today, no warning is required for GBH products under the statute. There is simply no valid reason to introduce Proposition 65 evidence into this case.

By arguing it should be introduced, Plaintiff makes repeated misstatements of law and fact, which alone are enough to grant Monsanto's motion. But more significantly, Plaintiff identifies no proper purpose for Proposition 65 evidence. First, the complex and contested status of glyphosate under Proposition 65 cannot be introduced into trial to bolster the reputation of IARC, given the very significant risk that it misleads the jury and causes an undue consumption of time.

Second, the listing of glyphosate cannot somehow establish retroactively that Monsanto was on "notice" of a cancer hazard, more than three years *after* Plaintiff's first exposure. Indeed, just a few months ago, a California federal district court rejected this very argument that a GHB product should contain a Proposition 65 warning, concluding "the heavy weight of evidence in the record" shows that "glyphosate is not in fact known to cause cancer[.]" *National Ass'n of Wheat Growers v. Zeise,* CIV. No. 2:17-2401 WBS EFB, 2018 WL 1071168, at *7-8 (E.D. Cal. Feb. 26, 2018) ("*Wheat Growers*").

Third, Judge Karnow already granted Monsanto's motion in limine to exclude any evidence at trial of Monsanto's investigation of IARC and Monsanto's lawsuit against OEHHA finding the evidence would cause an undue consumption of time and risk serious prejudice. *See* 4/3/2018 Order on Motion for Continuance and MILs at 8:3-15. Monsanto's challenge to OEHHA's listing of glyphosate or the warning requirement under Proposition 65 – all of which postdates Plaintiff's exposure and injury – does not and cannot be introduced at trial or used to argue for punitive damages, as Judge Karnow already held.

Simply put, the introduction of Proposition 65 evidence has no bearing on the material issues in dispute in this trial, but it will result in a trial within a trial, with the very high likelihood

that it causes confusion and prejudices the jury.

## II. ARGUMENT

### A. Plaintiff Inaccurately Describes Proposition 65's Listing of Glyphosate

Proposition 65 is a complex statute with a lengthy history of case law and regulatory action that continues to evolve. Plaintiff's opposition inaccurately describes the means by which glyphosate was listed under Proposition 65 on July 7, 2017, and in fact, is replete with incorrect citations and misinformation. For example, Plaintiff quotes the wrong subdivision—subdivision (b) of Section 25249.8 of Health & Safety Code—as the basis for California OEHHA's listing of glyphosate, yet OEHHA's listing of glyphosate occurred under subdivision (a), which is termed the "Labor Code mechanism."[1] Plaintiff's misrepresentation of OEHHA's listing of glyphosate under the Labor Code mechanism is significant: the Labor Code mechanism forces OEHHA to list a chemical without discretion and without performing any independent assessment of the underlying science. *See California Chamber of Commerce v. Brown*, 196 Cal. App. 4th 233, 243 (2011); *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425, 440-441 (1989).

Significantly, when OEHHA performed its own risk assessment of glyphosate in 1997 and 2007, reviewing several carcinogenicity studies involving animals (in addition to other data not reviewed by IARC), it came to the opposite conclusion of IARC, finding the chemical not to be carcinogenic. *See Monsanto Co. v. Office of Envtl. Health Hazard Assessment*, 22 Cal. App. 5th 534, 541 (2018) review filed (May 29, 2018) ("*Monsanto Co.*"). Nonetheless, the statute compelled OEHHA to list glyphosate, and the constitutionality of OEHHA's obligation to do so is the very subject of the litigation in *Monsanto Co.*, in which a petition for review was recently filed at the California Supreme Court.

Plaintiff then attempts to mislead the Court to believe that OEHHA performed an independent review of IARC's determination prior to listing the chemical under Proposition 65,

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[1] The triggering mechanism for OEHHA's listing of glyphosate is termed the "Labor Code mechanism" because it cross-references the California Labor Code to *require* OEHHA to list those chemicals deemed by IARC to be possibly carcinogenic. *See* Cal. Health & Safety Code § 25249.8(a) (both subdivisions (a) and (b) contain discrete methods for OEHHA to list and de-list chemicals under Proposition 65); *see* Cal. Code Regs. tit. 27 § 25904; *see* Pl. Opp'n. at 3:5-9.

stating that OEHHA "conducted its own review of the evidence and concurred with IARC that glyphosate is a carcinogen" and that OEHHA's "qualified experts . . . determined glyphosate is carcinogenic." *See* Plaintiff's Opp'n to MIL No. 27 ("Pl. Opp'n.") at 2:24-26; 6:3-5. This is false -- OEHHA did not substantively review IARC's science in conjunction with listing glyphosate under Proposition 65. As stated above, the only risk assessments or scientific reviews performed by OEHHA when deciding if glyphosate should be listed under Proposition 65 found glyphosate *not* to be carcinogenic. *See Monsanto Co.*, 22 Cal. App. 5th at 541. In so doing, OEHHA agreed with the U.S. Environmental Protection Agency ("EPA"), the German Federal Institute for Risk Assessment, the European Food Safety Authority, the European Commission, and the Canadian Pest Management Regulatory Authority that glyphosate is not carcinogenic. *See Monsanto Co.*, 22 Cal. App. 5th at 541-542.

The only "review" of IARC's science that OEHHA performed – notably now six years *after* Plaintiff's first exposure – was for the limited purpose of establishing a No Significant Risk Level ("NSRL") for glyphosate under Proposition 65, effective July 1, 2018.[2] The purpose of a NSRL is to create a safe harbor, such that a business is not required to provide a Proposition 65 warning for an exposure to a listed chemical that is at or below the NSRL. *See* Cal. Health and Safety Code, § 25249.10(c); *see* Cal. Code Regs. tit. 27 § 25701. Plaintiff is wrong in claiming that a NSRL establishes an "exposure level above which California deems that glyphosate is significantly carcinogenic." *See* Pl. Opp'n. at 4:21-23. As the Third District Court of Appeal confirms, that the "regulatory establishment of a NSRL is only a determination that an exposure below the level is not a significant risk. In OEHHA's words, its establishment of a NSRL 'expressly is not a determination that any level above the NSRL poses a significant risk.'" *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 358 (2004).

The regulatory language confirms the narrow application of a NSRL determination, stating that the NSRL is established "solely for the purposes of Section 25249.10(c) of the Act," the

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[2] The establishment of the NSRL "shall be based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for listing the chemical," which for glyphosate was IARC. *See* Cal. Code Regs. tit. 27 § 25703(a).

provision establishing exceptions to Proposition 65's warning requirement, and that "[n]othing in this article shall be construed to establish exposure or risk levels for other regulatory purposes." *See* Cal. Code Regs. tit. 27 § 25701(d). The express language of Proposition 65 confirms it cannot be relevant outside the context of a Proposition 65 action, which this action is not.[3]

### B. Proposition 65 Cannot Be Introduced To Validate Plaintiff's Reliance on IARC

Plaintiff argues Proposition 65 evidence is relevant to bolster the validity of IARC. *See* Pl. Opp'n. at 2:4-5.[4] Notably, Plaintiff fails to acknowledge that a California federal court found IARC's classification of glyphosate not credible and thus, enjoined OEHHA from requiring businesses to provide Proposition 65 warnings for glyphosate. *See Wheat Growers*, 2018 WL 1071168, at *7-8. This is the current status of glyphosate under Proposition 65 – no warning is required because the court found a warning would be misleading to consumers. The court reasoned that the warning "does not appear to be factually accurate and uncontroversial because it conveys the message that glyphosate's carcinogenicity is an undisputed fact, when almost all other regulators have concluded that there is insufficient evidence that glyphosate causes cancer." *Id.* at *7. Moreover, the court stated "it is inherently misleading" to require a Proposition 65 warning "based on the finding of one organization [IARC] (which as noted above, only found that substance is probably carcinogenic), when apparently all other regulatory and governmental

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[3] Plaintiff also quotes ballot materials arguing in favor Proposition 65 at the time of its 1986 passage in to argue that "the people of California, *mandated that*, 'at a minimum [the] Governor must include chemicals already listed as known carcinogens by two organizations of the most highly regarded national and international scientist: the [NTP] and the [IARC].'" *See* Pl. Opp'n. at 3:9-11 (emphasis added; brackets in original). Plaintiff credits the quotation as coming from the statute, which it does not, demonstrating the real risk that Plaintiff will mislead the jury should Proposition 65 evidence be introduced. The quotation comes from *California Chamber of Commerce v. Brown*, 196 Cal. App. 4th 233, 251 (2011) (quoting Ballot Pamp., Gen. Elec. (Nov. 4, 1986) argument in favor of Prop. 65, p. 54).

[4] Plaintiff improperly quotes from an uncertified copy of a brief allegedly filed on behalf of OEHHA on September 30, 2016 in Fresno Superior Court, an action entirely unrelated to this one. *See* Exhibit A to Hoke Decl ("OEHHA Brief"). Monsanto objects to Plaintiff's reliance on the brief because it constitutes inadmissible hearsay, contains subject matter not relevant to this action, and the document is not properly certified. *See* Cal. Evid. Code §§ 210, 350, 352, 1200; Local Rule 8.6(B).

bodies have found the opposite, including the EPA, which is one of the bodies California law expressly relies on in determining whether a chemical causes cancer." *Id.* Ultimately, the court issued the injunction because "the heavy weight of evidence in the record" shows that "glyphosate is not in fact known to cause cancer[.]" *Id.* at *7, 8. This conclusion is consistent with OEHHA's own risk assessment of glyphosate in 1997 and 2007 finding the chemical not to be carcinogenic. *See Monsanto Co.*, 22 Cal. App. 5th at 541.

The validity of IARC's classification in Proposition 65 does not serve to bolster IARC's credibility.

### C. Plaintiff Articulates No Basis For the Relevance of Proposition 65 to His Claims

Plaintiff's alternative arguments that Proposition 65 is somehow relevant to show that Monsanto was on notice that GBH products are carcinogenic, and that the listing bears a relationship to punitive damages, are red herrings. Plaintiff cites *Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 947 (9th Cir. 1992) ("*Chem. Specialties*") to argue that the Proposition 65 listing of glyphosate could demonstrate "Monsanto should have known their product was carcinogenic." *See* Pl. Opp'n. at 6:22-7:2. Plaintiff's reliance on dicta from the Ninth Circuit is misplaced. There, the Ninth Circuit rejected the idea that a product with an EPA-approved label could later be deemed misbranded under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") if the product was subsequently found to also require a Proposition 65 warning. In so doing, the Ninth Circuit explained that a Proposition 65 listing might be said to provide notice to the manufacturer of a cancer or reproductive *hazard*, but known hazards do *not* equate to knowledge that a product is actually carcinogenic to humans, likely a danger, and/or misbranded under FIFRA.[5] Indeed, in the very next sentence – one that Plaintiff ignored – the Ninth Circuit clarified that "[t]he more likely scenario [for why the EPA approved the label] is that the hazards of a chemical are already known to both the manufacturer and the EPA, but that

[5] Under FIFRA, pesticides "may not be sold (with certain exceptions) unless the EPA first determines that the product's labeling contains warnings and directions for use that are 'adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.'" *Chem. Specialties*, 958 F.2d at 944 (citations omitted).

neither believes that cancer or reproductive toxicity is a likely danger." 958 F.2d at 947. Thus, a manufacturer cannot be found liable under FIFRA for later providing a warning under Proposition 65, and hence a Proposition 65 listing is *not* proof of notice of carcinogenicity. *Id.*

Once again, introduction of Proposition 65 evidence would only cause delay, confusion or prejudice. The ministerial Proposition 65 listing of glyphosate *more than two years later* provides no different or additional evidence of such "notice," and certainly cannot serve as some type of retroactive notice that at the time of Plaintiff's exposure glyphosate was, in fact, carcinogenic. This is particularly true when that that is not the purpose of a cancer hazard identification under IARC's own governing documents or Proposition 65, where other regulatory bodies have found glyphosate not to be carcinogenic, and a California federal court has enjoined any Proposition 65 warning requirement because "the heavy weight of evidence in the record" shows that "glyphosate is not in fact known to cause cancer[.]" *Wheat Growers*, 2018 WL 1071168, at *7, 8; *see also Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 354 (2004).

Similarly, Plaintiff's argument that evidence of Proposition 65 is relevant to punitive damages solely because Monsanto is also involved in litigation concerning Proposition 65 and has challenged the validity of IARC's classification makes no sense and conflicts with Judge Karnow's order excluding evidence of Monsanto's investigation of IARC and lawsuit against OEHHA, finding the evidence would cause an undue consumption of time and risk serious prejudice. *See* 4/3/2018 Order on Motion for Continuance and MILs at 8:3-15. Plaintiff presents nothing to suggest Proposition 65 is relevant to punitive damages.

Last, Plaintiff incorrectly states that Proposition 65's glyphosate listing is properly subject to judicial notice and that Judge Karnow granted judicial notice "with respect to the argument that Proposition 65 'bolster Johnson's experts to the extent they, like the state of California, give weight to IARC's determination that glyphosate is probable carcinogen.'" Pl. Opp'n. at 2:14-18. While Judge Karnow considered Proposition 65's reference to IARC when considering Monsanto's *Sargon* motions and whether Plaintiff's experts' reliance on IARC was permissible under California law, Judge Karnow expressly *denied* Plaintiff's motion for judicial notice of Proposition 65 *at trial* and clearly voiced his skepticism that Proposition 65 should come in at all

before the jury at trial: "But you're not suggesting, are you, that everything on the Prop. 65 list is, by definition, something which you could present to the jury as, therefore, a potential cause or a reasonable cause, or a cause with assurance of 2.0 for a disease. right?" Edwards Decl. at ¶ 39, Ex. 38 (Tr. of Hrg. at 39:9-20 (May 10, 2018)); *see* 5/17/2018 Order on Sargon and Summary Judgment at 3:22-23 ("I will under E.C. § 452(c) take judicial notice of these matters for the purposes of the present motions, but not for purposes of trial"). The Court went on to say, "It doesn't strike me that Prop. 65 lists – or things that meets criteria to be on the Prop 65 list are something that's going to be useful in a jury trial. Do you think I'm wrong about that?" *Id.*

**D. Proposition 65 Should be Excluded At Trial**

The very fact that glyphosate is a Proposition 65 listed chemical that does not require a Proposition 65 warning due to the significant discord as to the validity of the IARC classification demonstrates why Proposition 65 cannot bear any relationship to Plaintiff's claims and cannot serve to bolster IARC. Proposition 65 is purely a right-to-know statute and nothing in Proposition 65 would serve to demonstrate glyphosate allegedly caused Plaintiff's cancer or, given the timing, served to warn of the alleged risk. Instead, Proposition 65 would only serve to cause significant confusion at trial and require a substantial amount of time to educate the jury on the entire complex regulatory scheme that resulted in the listing, as well as the injunction and status of other litigation. Any probative value would be significantly outweighed by the prejudice of confusing the issues and misleading the jury—as Plaintiff has already done with the Court—and cause an undue consumption of time. *See* Cal. Evid. Code § 352.

Plaintiff's mischaracterization of Monsanto documents in his opposition is yet the tip of the iceberg about the "evidence" Plaintiff will seek to introduce – and Monsanto will need to refute – during trial. Requiring the jury to unravel the Labor Code mechanism by which glyphosate was listed, the status of the litigation regarding Proposition 65 and glyphosate, the injunction against any warning requirement and the history and meaning of the NSRL will require a trial within a trial. The evidence should be excluded. *See* Cal. Evid. Code § 352.

Based on the tenor and content of Plaintiff's opposition to the motion, it appears that his primary motive in seeking to introduce Proposition 65 is to mislead and confuse the jury into

believing that the mere listing of glyphosate under Proposition 65 means it has some import in this litigation, which it does not.

## III. CONCLUSION

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

Dated: June 12, 2018

Respectfully submitted,

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