

1 Sandra A. Edwards (State Bar No. 154578)
Joshua W. Malone (State Bar No. 301836)
2 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
3 San Francisco, CA 94104
Telephone: (415) 954-4400; Fax: (415) 954-4480
4 sedwards@fbm.com
jmalone@fbm.com

5 Joe G. Hollingsworth (appearance *pro hac vice*)
6 Martin C. Calhoun (appearance *pro hac vice*)
Kirby T. Griffis (appearance *pro hac vice*)
7 William J. Cople (appearance *pro hac vice*)
Hollingsworth LLP
8 1350 I Street, N.W.
Washington, DC 20005
9 Telephone: (202) 898-5800; Fax: (202) 682-1639
jhollingsworth@hollingsworthllp.com
10 mcalhoun@hollingsworthllp.com
kgriffis@hollingsworthllp.com
11 wcople@hollingsworthllp.com

12 George C. Lombardi (appearance *pro hac vice*)
James M. Hilmert (appearance *pro hac vice*)
13 Winston & Strawn LLP
35 West Wacker Drive
14 Chicago, IL 60601
Telephone: (312) 558-5969; Fax: (312) 558-5700
15 glombard@winston.com
jhilmert@winston.com

16 *Attorneys for Defendant*
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
OPPOSITION TO PLAINTIFF'S
MOTION IN LIMINE NO. 8 TO
EXCLUDE EVIDENCE OF
EXPERT/WITNESS EXPERIENCE
WITH ROUNDUP®**

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

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/07/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson (“Plaintiff”) proffers Dr. William Sawyer as an expert witness
3 to opine that Plaintiff’s cancer resulted from his “exposure” to Roundup PRO® or Ranger Pro®
4 “drift” while applying the herbicide as the Integrated Pest Manager for Benicia Unified School
5 District. The very same expert testified that he, Dr. Sawyer, also personally used Roundup® for
6 25 years and applied it in a “controlled *zero* exposure manner.” Dr. Sawyer’s “zero exposure”
7 manner—using an extension wand, wearing gloves and long pants, and not spraying on windy
8 days—is indistinguishable from Plaintiff’s use, except Plaintiff wore far more protective
9 equipment than Dr. Sawyer. Nevertheless, Dr. Sawyer claims that Plaintiff had “no way to
10 control” the same alleged “drift” that caused “zero exposure” to Dr. Sawyer. Lacking any way to
11 reconcile Dr. Sawyer’s “zero exposure” use of Roundup® and his opinions about Plaintiff’s
12 “exposure,” Plaintiff now seeks to exclude all evidence of Dr. Sawyer’s personal use of
13 Roundup®.

14 Plaintiff’s motion *in limine* is frivolous. Dr. Sawyer’s description of his “zero exposure”
15 application of Roundup® is directly relevant to the very issue on which Plaintiff has proffered Dr.
16 Sawyer to testify—the “exposure” to herbicide “drift” during application. It is also relevant to
17 numerous other issues, including the credibility of Dr. Sawyer’s supposedly long-held belief that
18 Roundup® causes cancer, and to Plaintiff’s assertions that Roundup® is a defective product.
19 Plaintiff has failed to identify any legally cognizable basis for excluding the testimony, and there
20 is none.

21 Although Plaintiff’s motion focuses primarily on Dr. Sawyer, Plaintiff also asks in a
22 footnote that the Court preclude questioning of Dr. Michael Sullivan—Defendant Monsanto
23 Company’s (“Monsanto”) exposure expert—and other expert witnesses regarding their personal
24 experiences with Roundup®. *See* Pl.’s Mot. at 1 n.1. As with Dr. Sawyer, these witnesses’
25 experiences with Roundup® are relevant to their credibility, expertise, and the substance of their
26 opinions. Plaintiff’s motion should be denied in its entirety.

27 **II. BACKGROUND**

28 Dr. Sawyer, a toxicologist, intends to tell the jury that he is “certain to a reasonable

1 toxicological certainty that Mr. Johnson’s glyphosate exposures induced or significantly
2 contributed to the onset of his T-cell lymphoma (mycosis fungoides).” Declaration of Sandra A.
3 Edwards (“Edwards Decl.”) at ¶ 5, Ex. 4 (Expert Report of William Sawyer (“Sawyer Report”) at
4 166 (Dec. 21, 2017)). Dr. Sawyer asserts that Plaintiff “had no way to control” his alleged
5 exposure to Roundup® “drift” from his application wand, despite the fact that Plaintiff always
6 wore extensive personal protective equipment—long pants, gloves, goggles, a hood, mask, and
7 Tyvek® suit—which covered all of his body other than a portion of his face between his goggles
8 and mask. *Id.* at 155.

9 For his own part, Dr. Sawyer has used Roundup® for about 25 years. *See* Edwards Decl. at
10 ¶ 6, Ex. 5 (Dep. of William Sawyer (“Sawyer Dep.”) at 49:20–21 (Feb. 26, 2018)) (“Q. You have
11 Roundup at home? A. I’ve had Roundup at home, yes.”); *id.* at 59:23–60:2 (“Q. Over what period
12 of time have you used Roundup? A. I would have to estimate dating back to about 1993.”). Dr.
13 Sawyer continued to use the herbicide, despite purportedly concluding in 1994 that Roundup®
14 causes cancer. *See id.* at 527:1–2 (Feb. 27, 2018). He explained that he continued to do so
15 because he could use the herbicide in “a controlled zero exposure manner,” which eliminates “any
16 exposure to glyphosate.” *See id.* at 50:11–12 (Feb. 26, 2017) (“Q. When was the last time you
17 used Roundup? A. About two months ago.”); *id.* at 91:5–8 (“Q. You don’t have non-Hodgkins
18 lymphoma, right? A. No, but neither do I have *any exposure* to glyphosate.”); *id.* at 141:16–25
19 (“Q. And you continue to use glyphosate ... right? A. In a *controlled zero exposure manner*,
20 yes....”).

21 Dr. Sawyer’s “controlled zero exposure manner” involves using an application wand like
22 Plaintiff’s and wearing significantly *less* personal protective equipment than Plaintiff. Dr. Sawyer
23 testified:

24 Q. What types of personal protective equipment do you use when
25 mixing and applying Roundup?

26 A. Long pants, gloves and I have a long wand that keeps it away
27 from my body....

28 Q. Do you wear a mask when using Roundup?

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A. No....

Q. Do you wear goggles when using Roundup?

A. Not in the past few years....

Q. Do you wear coveralls when applying glyphosate or Roundup?

A. No.”

Id. at 86:21–88:25.

By contrast, Plaintiff testified:

Q. When you did mixing, did you wear your Tyvek suit?

A. Yes.

Q. Your gloves?

A. Yes.

Q. Boots?

A. Everything.

Q. So goggles and mask as well?

A. Yeah. I never approach a chemical without my chemical suit and everything.”

Edwards Decl. at ¶ 2, Ex. 1 (Dep. of Dewayne Johnson (“Johnson Dep.”) at 537:10–538:11 (Jan. 19, 2018)).

III. ARGUMENT

Plaintiff seeks to exclude any reference to Dr. Sawyer’s use of Roundup® in an effort to insulate his “exposure” opinion from cross-examination with his own inconsistent practices. There is no legal basis for the motion. Dr. Sawyer’s testimony about his “zero exposure” manner of applying glyphosate is directly relevant to his opinions regarding Plaintiff’s “exposure,” his credibility, and other issues including Plaintiff’s claims of a product defect. There is no conceivable reason to preclude Monsanto from introducing this evidence during the cross-examination of Dr. Sawyer, or from inquiring about the topic of Roundup® use with any other witness.

1 **A. Dr. Sawyer’s Zero-Exposure Manner of Applying Roundup® is Directly**
2 **Relevant to His Proffered “Exposure” Opinions and Numerous Other Issues**

3 Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed
4 fact that is of consequence,” including “the credibility of a witness.” Cal. Evid. Code § 210. “In
5 determining the admissibility of evidence, a trial court starts with the proposition [that] ‘all
6 relevant evidence is admissible.’” *Depalma v. Westland Software House*, (1990) 225 Cal. App. 3d
7 1534, 1538 (quoting Cal. Evid. Code § 351). Under these standards, Dr. Sawyer’s testimony
8 about his zero-exposure method of applying Roundup® is relevant.

9 First, the evidence is relevant to the very issue Plaintiff has proffered Dr. Sawyer to testify
10 about: exposure. Plaintiff proffers Dr. Sawyer as an exposure expert. Dr. Sawyer’s supposed role
11 in this case is to assess the degree of Plaintiff’s exposure to Roundup® and then draw conclusions
12 about Plaintiff’s exposure. Accordingly, Dr. Sawyer’s admission that Roundup® can be applied
13 in a “controlled zero exposure” manner such as his, where he used far less personal protective
14 equipment than Plaintiff, tends to disprove Dr. Sawyer’s conclusions about Plaintiff’s inability to
15 control exposure to Roundup®. When factoring in what weight to give Dr. Sawyer’s exposure
16 opinions, the jury must be permitted to hear that wearing protective equipment can prevent drift
17 exposure as confirmed by Dr. Sawyer’s own use of Roundup®. Indeed, it would be extraordinary
18 to exclude such evidence directly refuting an expert opinion on a central issue.

19 Plaintiff complains that Dr. Sawyer’s zero-exposure method is irrelevant because Dr.
20 Sawyer’s method of applying glyphosate is not comparable to Plaintiff’s. That is an issue for the
21 jury to decide in weighing the evidence, not for the Court in determining admissibility. It is also a
22 meritless assertion factually. Dr. Sawyer’s “zero exposure” manner of application involved the
23 use of an application wand, and so did Plaintiff’s. *See* Edwards Decl. at ¶ 6, Ex. 5, (Sawyer Dep.
24 at 291:18–292:5) (“Q. And did Mr. Johnson use a wand when applying glyphosate? A. Yes.... Q.
25 And I believe you testified yesterday that you use a wand in your own application of Roundup,
26 right? A. Yes.”). Indeed, Dr. Sawyer’s “zero exposure manner” involved the use of *significantly*
27 *less* protective equipment than Plaintiff’s, which involved a “chemical suit and everything.”
28 Edwards Decl. at ¶ 2, Ex. 1, (Johnson Dep. at 537:18–19); *see also* Edwards Decl. at ¶ 5, Ex. 4,

1 (Sawyer Report at 155) (“During spraying, Mr. Johnson used personal protective equipment
2 including gloves, boots, a ‘sweatshirt-type hoodie,’ a permeable Tyvek suit, hat and goggles.”).

3 Second, the evidence is relevant to the credibility of Dr. Sawyer’s opinion that Roundup®
4 is capable of causing cancer. Dr. Sawyer stands ready to testify that Roundup® is a dangerous
5 carcinogen, a conclusion he claims to have reached in 1994. Because people do not generally
6 engage in activities that cause harm to themselves, Dr. Sawyer’s decades-long use of Roundup®,
7 at a minimum, tends to undermine the credibility of his opinion that it causes cancer. Indeed, Dr.
8 Sawyer testified that he continued to use Roundup® as little as two months before the deposition
9 took place—a time *after* providing his expert report concluding that it caused Plaintiff’s cancer.
10 That evidence is plainly relevant for the jury in assessing Dr. Sawyer’s credibility as a witness and
11 the credibility of his opinions. *See* Cal. Evid. Code § 210; *Ng v. Hudson*, 75 Cal. App. 3d 250,
12 262 (1977) overruled on other grounds by *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548 (1994)
13 (holding evidence “reasonably related to the credibility” of expert witnesses was properly
14 admitted).

15 Third, Dr. Sawyer’s testimony also tends to disprove other elements of Plaintiff’s claims.
16 For example, Plaintiff must demonstrate that Roundup® is a defective product in order to prevail
17 on his strict liability claims for a design defect. Testimony by Plaintiff’s own hand-picked
18 witness—who continued to use Roundup® for over two decades despite allegedly believing it to
19 be a carcinogen—speaks to the importance of the product, and tends to prove that the benefits of
20 the product outweighed the alleged risks that Dr. Sawyer himself claims to have perceived in
21 Roundup®. *See Morson v. Superior Court* (2001) 90 Cal. App. 4th 775, 785 (“A product is
22 defective if its design embodies excessive preventable danger, unless the benefits of the design
23 outweigh the risk of danger inherent in such design”) (quotations and citation omitted).

24 **B. Plaintiff Has Failed to Identify Any Cognizable Prejudice**

25 There is no basis to exclude evidence critical for the cross-examination of Plaintiff’s
26 exposure expert on the subject matter of his own opinion. Plaintiff offers the empty assertion that
27 the cross-examination using the testimony would be “extremely prejudicial.” Pl.’s Mot. at 3. That
28 assertion misses the point. “Virtually all evidence is prejudicial or it isn’t material.” *Kipp v. City*

1 & *Cty. of San Francisco*, 145 Cal. App. 3d 875 (1983) (citation omitted), *hr'g denied*.

2 The type of prejudicial evidence of concern under section 352 of the Evidence Code is
3 evidence that evokes “an emotional response that has very little to do with the issue on which the
4 evidence is offered,” and thus “poses an *intolerable risk to the fairness of the proceedings* or the
5 reliability of the outcome.” *Piscitelli v. Salesian Soc.*, 166 Cal. App. 4th 1, 11 (2008) (citation
6 omitted). Here, there is nothing inflammatory about the testimony, nothing emotional, and
7 nothing confusing. Plaintiff’s assertion that the jury may unfairly “compar[e] Dr. Sawyer’s
8 personal use to his professional analysis” does not come close to explaining how this evidence
9 presents an intolerable risk to the fairness of the proceedings. There is nothing remotely unfair
10 about cross-examining an expert with his own testimony about the very issue he is presented to
11 testify.

12 **C. Plaintiff’s Motion with Respect to Other Witnesses is Overbroad and**
13 **Unexplained**

14 Plaintiff also appears to be seeking to preclude any witness from being questioned about
15 their personal use of Roundup®. Plaintiff does not identify any specific testimony of concern, or
16 any legal basis for excluding it. The request is overbroad and encompasses plainly relevant
17 evidence. For example, Monsanto proffers Dr. Kassim al-Khatib, a professor of weed science at
18 the University of California-Davis, who is an expert witness in the safe use and application of
19 herbicides. Dr. al-Khatib’s expertise and opinions are based in part on his significant experience
20 in safely applying Roundup® and other herbicides. Likewise, Monsanto has proffered Dr.
21 Sullivan, an industrial hygienist expert, to respond to Dr. Sawyer’s opinions about “exposure.”
22 There is no basis to prevent these or other witnesses from discussing their own expertise or
23 experiences with the safe use of the product.

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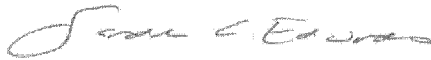
1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should deny Plaintiff's motion *in limine*.

3 Dated: June 7, 2018

Respectfully submitted,

4 FARELLA BRAUN + MARTEL LLP

5
6 By: 

7 Sandra A. Edwards

8 Attorneys for Defendant
9 MONSANTO COMPANY

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