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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. 7 TO EXCLUDE EMAIL FROM DONNA FARMER

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

I. INTRODUCTION AND ARGUMENT

Plaintiff Dewayne Johnson's ("Plaintiff") opposition to Defendant Monsanto Company's ("Monsanto") motion *in limine* exemplifies the irrelevant and misleading way in which Plaintiff will use the email by Dr. Farmer that states in (small) part "you cannot say that Roundup does not cause cancer … we have not done carcinogenicity studies with 'Roundup.'" Plaintiff claims the statement is relevant to Monsanto's purported lack of testing, relying on expert testimony from Dr. Sawyer noting "[t]he significance of Monsanto's failure to do combination testing for carcinogenicity on the glyphosate-containing formulations (such as Roundup)." Plaintiff's Opp'n to MIL No. 7 at 3. Dr. Sawyer goes on to explain his speculative theories about the harms of glyphosate and surfactants in combination, tying such harms to the alleged failure to conduct long-term carcinogenicity tests on the combined product. But Dr. Sawyer fails to mention the most important thing about his "combination testing": it is completely hypothetical as *no pesticide company in history has ever conducted long-term animal carcinogenicity studies on formulated pesticide products*. Notably, Plaintiff's fail to reveal that their own regulatory expert, Dr. Benbrook, admits the testing suggested by Dr. Sawyer is not required, not done by any pesticide manufacturer in the world, and is purely hypothetical:

> Q: Given you're not aware of a single pesticide company in the US or abroad that has conducted a long-term rodent carcinogenicity study on one of its formulated pesticide products, it certainly isn't industry standard for a company to do that kind of testing, correct?
>
> A: Yes, sir, that's exactly what I just said. I agreed with you on that part of your statement.

Declaration of Sandra A. Edwards ("Edwards Decl.") at ¶ 2, Ex. 1 (Dep. of Charles Benbrook ("Benbrook Dep.") at 211:7-15 (May 23, 2018)).

And that is exactly what Dr. Farmer was responding to in her email – a statement about long term rodent carcinogenicity studies on a formulated product. As Dr. Benbrook and Dr. Farmer know, the suite of U.S. Environmental Protection Agency ("EPA") required testing has only one "carcinogenicity" testing requirement. *See* 40 CFR § 158.500 at 870.4200

(Carcinogenicity – two rodent species – rat and mouse preferred). As Section 158.500 makes clear, the required test substance for carcinogenicity studies is the technical grade active ingredient ("TGAI"). Dr. Farmer, in her advice to corporate engagement on how to respond to certain inquiries, was being technically accurate by clarifying that Monsanto's long-term carcinogenicity studies are done on the active ingredient (glyphosate) and not the formulated product (Roundup®.) This is true of all other registrants which have completed and submitted their own long-term carcinogenicity testing of glyphosate to regulators around the globe. None of them have done such tests on formulated products.

This is not to say that Monsanto and independent scientists have not conducted cancer testing on glyphosate-based formulations such as Roundup PRO® or Ranger PRO® – they have, extensively. Each formulated product goes through, at a minimum, a "six-pack" of acute and sub-chronic toxicity tests. In addition, as Dr. Benbrook admitted Monsanto has conducted various genotoxicity studies on various formulated products in the time since Dr. Farmer made her statement.[1,2] Dr. Farmer's statement also pre-dates the results of the largest epidemiology study on pesticide applicators in history – a study larger than all of the other glyphosate epidemiology studies combined, that was conducted by independent scientists and funded by the National Cancer Institute, and decisively concludes there is no association between glyphosate-based *formulations* and NHL.[3,4] As anyone familiar with the pesticide industry knows, epidemiology

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[1] *See* Edwards Decl. at ¶ 2, Ex. 1 (Benbrook Dep. at 271:22-272:1) (admitting that Monsanto "conducted genotoxicity tests on the formulated glyphosate product and the EPA is in possession and has reviewed those studies"); *see also id.* at 273:4-11 (admitting that genotoxicity tests "are used by scientists to gain insight on the mechanism through which exposure to glyphosate-based herbicides could trigger abnormal cell growth").

[2] Monsanto also conducted genotoxicity studies on glyphosate-based herbicides before Dr. Farmer made the statement. *See id.* at 269:8-23.

[3] *See* 5/24/18 Edwards Decl. at ¶ 5, Ex. 4 (Andreotti et al., *Glyphosate Use and Cancer Incidence in the Agricultural Health Study*, 110 J. Nat'l Cancer Inst. 1, 1 (2018)) ("In this large, prospective cohort study, no association was apparent between glyphosate and any solid tumors or lymphoid malignancies overall, including NHL and its subtypes."); *see also* Edwards Decl. at ¶ 3, Ex 2. (Dep. of Christopher Portier at 20:9-13, *In re: Roundup Prod. Liab. Litig.*, 3:16-md-02741-VC (N.D. Cal. Jan. 12, 2018) (agreeing the study has more exposed NHL cases than all the other glyphosate epidemiology studies combined).

[4] As noted in Monsanto's initial motion *in limine*, an earlier version of this study (less follow-up time) also found "no association between glyphosate exposure and NHL." *See* 5/24/18 Edwards

studies are "the study of the formulated product as used in real world dosing situations by farmers and whoever else would apply the product." Edwards Decl. at ¶ 2, Ex. 1 (Benbrook Dep. at 54:22-55:1).

But explaining all of that to a jury and laying that foundation takes a lot of time, while the potentially irreparable harm of spouting off a (technically correct) statement from an email taken out of context takes just five seconds. Cal. Evid. Code §352 (the court, "in its discretion[,] may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice"); *see also See Lemer v Boise Cascade, Inc.*, 107 Cal. App. 3d 1, 10 (1980) (excluding evidence based on "the heavy costs in trial time and expense" that would ensue due to its introduction).

This statement is what motions *in limine* were meant to prevent, and Monsanto respectfully requests that the Court exclude the email and force Plaintiff to make the argument in a way that is factually accurate, not misleading, and not unduly prejudicial.

II. CONCLUSION

For the foregoing reasons, the Court should grant Monsanto's motion *in limine* No. 7 to exclude the email.

Dated: June 12, 2018

Respectfully submitted,

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By: 

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MONSANTO COMPANY

Decl. at ¶ 6, Ex. 5 (De Roos et al., *Cancer Incidence Among Glyphosate-Exposed Pesticide Applicators in the Agricultural Health Study*, 113 Environmental Health Perspectives 49, at 52-53 (2005)).