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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
REPLY IN SUPPORT OF MOTION IN
LIMINE NO. 26 TO EXCLUDE EVIDENCE
OR ARGUMENT ALLEGING THAT
MONSANTO DECEIVED THE EPA**

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

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1 **I. INTRODUCTION AND ARGUMENT**

2 Plaintiff provide no basis for allowing evidence of a fraud-on-the-EPA allegation to go to
3 the jury. First, contrary to Plaintiff’s claim, Monsanto’s argument that “fraud on the agency”
4 allegations are preempted under *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341
5 (2001), did not “fail.” *See* Pl.’s Opp’n to MIL No. 26 at 5. Rather, the Court denied the summary
6 judgment motion as procedurally improper, noting “Monsanto’s contentions [regarding
7 preemption of fraud on the EPA arguments] do not dispose of any cause of action.” 5/17/2018
8 Order on *Sargon* and Summary Judgment Motions at 43. Under these circumstances, a motion *in*
9 *limine* is a proper means by which Monsanto is permitted to exclude evidence of a fraud-on-the
10 agency argument. *See, e.g., In re Trasyolol Prod. Liab. Litig.*, 763 F. Supp. 2d 1312, 1331 (S.D.
11 Fla. 2010); *Bouchard v. Am. Home Prod. Corp.*, 213 F. Supp. 2d 802, 812 (N.D. Ohio 2002).

12 On the merits, Plaintiffs try to distinguish *Buckman* by claiming it applies only to fraud-on-
13 the-FDA (not EPA) arguments. *See* Pl.’s Opp’n to MIL No. 26 at 6 (citing *Buckman Co. v.*
14 *Plaintiffs’ Legal Committee*, 531 U.S. 341, 343 (2001)). But the Ninth Circuit and many other
15 courts have held that *Buckman* applies with equal force to preempt fraud-on-the-EPA claims. *See*
16 *Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, 1205, 1208 (9th Cir. 2002) (preempting state
17 law fraud-on-the-EPA claims because “the rationale articulated by the Supreme Court in *Buckman*
18 applies with equal force to the facts before us and compels a similar result”); *Giglio v. Monsanto*
19 *Co.*, No. 15-cv-2279 BTM (NLS), 2016 WL 1722859, at *3 (S.D. Cal. Apr. 29, 2016) (“Plaintiff’s
20 claims based on failure to warn the EPA of dangers of Roundup are preempted.”); *Syngenta Crop*
21 *Prot., LLC v. Willowood, LLC*, No. 1:15-CV-274, 2016 WL 6783628, at *1 (M.D.N.C. Aug. 12,
22 2016) (“The Court concludes that Syngenta’s Chapter 75 claim, as pled, is little more than a fraud-
23 on-the-EPA claim and is impliedly pre-empted by FIFRA.”). Plaintiff does not dispute this and
24 offers no response whatsoever to *Nathan Kimmel, Inc.*, which refutes his argument. 275 F.3d at
25 1205, 1208.

26 Plaintiff has provided no reason to diverge from the controlling precedent set forth in
27 *Buckman* and *Nathan Kimmel*. Plaintiff claims that the “overwhelming majority of courts have
28 rejected Defendant’s arguments and found that evidence that a company provided inadequate and

1 incomplete data . . . are relevant to Plaintiff’s state law claims for negligence and strict liability
2 failure to warn.” See Pl.’s Opp’n to MIL No. 26 at 6-7. This is simply wrong, as shown above.
3 In many of Plaintiff’s cited cases, there was no indication the plaintiffs would even be introducing
4 the challenged evidence, so the issue was moot. *Placencia v. I-Flow Corp.*, No. CV10-2520 PHX
5 DGC, 2012 WL 5877624, at *6 (D. Ariz. Nov. 20, 2012) (“Plaintiffs state that they make no claim
6 for fraud on the FDA . . . The Court will . . . ensure at trial that no claim for fraud on the FDA is
7 made”); *Frazier v. Mylan Inc.*, 911 F. Supp. 2d 1285, 1301 (N.D. Ga. 2012) (“[P]laintiff does not
8 allege here that Pfizer committed fraud on the FDA, or more specifically, that the FDCA required
9 Pfizer to make disclosures to the FDA and Pfizer made misrepresentations to the FDA when
10 submitting information to the agency”). The others simply leave open the question of
11 admissibility or otherwise are unhelpful to Plaintiff. See, e.g., *In re Vioxx Prod. Liab. Litig.*, No.
12 MDL 1657, 2005 WL 3164254, at *1 (E.D. La. Nov. 21, 2005) (Plaintiff’s fraud on the FDA
13 claims “will have to be dealt with at the time of trial.”); see also *Globetti v. Sandoz Pharm. Corp.*,
14 No. CV98-TMP-2649-S, 2001 WL 419160, at *3 (N.D. Ala. Mar. 5, 2001) (granting defendant’s
15 motion for partial summary judgment on plaintiff’s fraud-on-the-FDA claim).

16 Finally, while Plaintiff claims that Monsanto’s failure to disclose certain data to the EPA
17 or consumers is “relevant,” relevance has no bearing on preemption. See Pl.’s Opp’n to MIL No.
18 26 at 2, 5, 8. See *In re Incretin Mimetics Prod. Liab. Litig.*, No. 13MD2452 AJB MDD, 2014 WL
19 4987877, at *4 (S.D. Cal. Oct. 6, 2014). Further, any argument or testimony suggesting that
20 Monsanto failed to submit certain data to the EPA or refused to conduct certain studies are
21 irrelevant and misleading under Cal. Evid. Code §§ 210, 350. Such allegations prejudice
22 Monsanto by allowing the jury to find liability based on conduct that cannot legally serve as the
23 basis for liability, and create the possibility for sideshows or trials-within-trials, none of which
24 have any bearing on whether Roundup Pro® and Ranger Pro® products caused Plaintiff’s mycosis
25 fungoides.

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1 **II. CONCLUSION**

2 For the foregoing reasons, the Court should exclude any evidence or arguments that
3 Monsanto deceived the EPA in connection with the registration and approval of glyphosate.
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5 Dated: June 12, 2018

Respectfully submitted,

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8 By: 

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