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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN FRANCISCO**

16 Dwayne Johnson

17 Plaintiff,

18 vs.

19 Monsanto Company

20 Defendant

Case No. CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MOTION *IN LIMINE*
NO. 16 TO EXCLUDE EVIDENCE,
ARGUMENT, OR REFERENCE TO
TRACE IMPURITIES IN ROUNDUP
PRO® OR RANGEPRO®**

Trial Judge: TBD

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

1 **INTRODUCTION**

2 Monsanto seeks to exclude any evidence, argument, or reference to trace impurities in
3 the Roundup formulation—impurities that contributed to Mr. Johnson’s cancer—because,
4 according to Monsanto, the formulation has been approved by the EPA and, thus, must be safe
5 as a matter of law. This argument is meritless. If pushed to its logical extreme, Plaintiff would
6 be precluded from presenting *any* evidence that Roundup causes cancer just because the
7 product has been approved by the EPA—an argument this Court has already rejected. Put
8 simply, the Roundup’s impurities are relevant for several reasons, notwithstanding the fact that
9 the formulation has received EPA approval, which, as discussed below, was obtained because
10 Monsanto withheld from the agency important information regarding Roundup’s toxicological
11 profile. Plaintiff has uncovered a trove of evidence indicating that the impurities in Roundup’s
12 formulation contribute to the product’s carcinogenicity and that Monsanto has long been aware
13 of such facts. All such evidence goes to the heart of causation and should be presented to the
14 trier of fact.
15

16 **ARGUMENT**

17 Evidence is relevant if it has a “*tendency in reason* to prove or disprove any disputed
18 fact of consequence to the determination of the action...” Cal. Evid. Code § 210 (emphasis
19 added); *People v. Nelson* (2008) 43 Cal.4th 1242, 1266; *Donlen v. Ford Motor*
20 *Company* (2013) 217 Cal.App.4th 138, 148 *as modified on denial of reh'g* (July 8, 2013).
21 Moreover, section 352 “speaks in terms of *undue* prejudice. Unless the dangers of undue
22 prejudice, confusion, or time consumption ‘substantially outweigh’ the probative value of
23 relevant evidence, a section 352 objection should fail.” *People v. Scott* (2011) 52 Cal.4th 452,
24 490–491 (emphasis in original) (quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 609); *People v.*
25 *Yu* (1983) 143 Cal.App.3d 358, 377 (when applying Section 352, “prejudicial” is not
26 synonymous with “damaging.”).
27

28 **(a) EPA Approval of Roundup is no Bar to Evidence Regarding Impurities in Roundup Formulation**

1 As an initial matter, Monsanto’s argument that Plaintiff should be precluded from
2 presenting any evidence regarding Roundup’s impurities just because the EPA has approved
3 the Roundup formulation is meritless. As this Court has held regarding Monsanto’s preemption
4 argument:

5 Under the express terms of the statute, EPA approval of a pesticide
6 is *not* a defense for the commission of any offense under FIFRA, it
7 is just prima facie evidence that the pesticide and its labeling and
8 packaging are compliant with FIFRA and, accordingly, any state
9 law that imposes labeling requirements consistent with FIFRA is
10 not preempted...Monsanto's conflict preemption argument as to
the design defect claims fails for the same reason as its conflict
preemption argument as to the failure to warn claims.

11 Ex. A to Hoke Decl., Sargon Order at 42-43 (emphasis in original). The same logic applies
12 here. Just because the EPA has approved the Roundup formulation does not preclude Plaintiff
13 from presenting evidence regarding the individual components of the formulation which
14 contribute to Roundup’s carcinogenicity. Regulatory approval provides no shield to central
15 issues of causation, especially since Plaintiff also contends that Monsanto misled the EPA
16 regarding the safety of Roundup’s formulation (as discussed below).

17
18 **(b) Evidence of Monsanto’s Knowledge that Roundup Contains Carcinogenic
19 Impurities is Relevant**

20 Monsanto is well aware that Roundup formulations contain carcinogenic impurities,
21 such as formaldehyde. Indeed, in 2015, Dr. William Heydens, lead toxicologist for Monsanto,
22 identified the “[l]ow level presence of formaldehyde (*carcinogenic by inhalation*) in
23 Roundup.” Ex. B to Hoke Decl., MONGLY00990361 (emphasis added). Moreover, Dr.
24 Heydens also noted the “presence of NNG (N-nitroso-glyphosate) in Roundup - many N-
25 Nitroso compounds are carcinogenic.” *Id.* NNG is formed when glyphosate interacts with
26 nitrites in Roundup formulations, the environment or in the human body. Ex. E to Hoke Decl.,
27 MONGLY00925905 at *2 (“concern has been expressed over the possibility that glyphosate
28 could react with nitrite in the diet to form N- Nitrosophosphonmethyl glycine (NPMG), a

1 putative carcinogen.”). NNG is part of a family of carcinogenic chemicals called nitroso
2 compounds. Nitroso compounds that have been tested have consistently been shown to be
3 carcinogenic. Loh, et al. *N-nitroso compounds and cancer incidence: the European Prospective*
4 *Investigation into Cancer and Nutrition (EPIC)–Norfolk Study*, AM J CLIN NUTR MAY 2011,
5 vol. 93 no. 5 1053- 061. The EPA initially required that Monsanto test for the carcinogenicity
6 of NNG in the 1970s and early 1980s. The testing for NNG by Monsanto was mainly
7 conducted by IBT laboratories which was shut down in the 1970s due to fraud. The EPA
8 determined that these NNG studies were not acceptable to show that NNG was not mutagenic.
9 Ex. F to Hoke Decl, MONGLY01298438 at 2-3.

10 The EPA, however, did not require additional testing on NNG provided that Monsanto
11 keep the levels of NNG below 1 ppm. *Id.* Before getting a pass from the EPA, Monsanto did
12 conduct one long-term carcinogenicity test of NNG in mice outside of IBT laboratories. This
13 study demonstrated a statistically significant increase in malignant lymphomas in male mice.
14 Ex. G to Hoke Decl., MONGLY04272196 at *1-4. There is no evidence that Monsanto ever
15 submitted this study to the EPA. The evidence at trial will also show that NNG levels in
16 glyphosate can exceed 1 ppm and that NNG levels increase the longer glyphosate is stored.

17
18 1, 4 Dioxane is another impurity in the Roundup formulation which has been associated
19 with cancer. Indeed, the substance is a known carcinogen to the State of California. *See*
20 <https://oehha.ca.gov/proposition-65/chemicals/14-dioxane>. Reference to 1, 4 Dioxane will not
21 be found on the Roundup label. Monsanto downplays the existence of 1,4-dioxane precisely
22 because of its carcinogenicity. Ex. H to Hoke Decl., MONGLY01041300 at *1 (“The other
23 thing is that we have to be very careful before we go slinging mud about 1,4-dioxane in
24 Chinese glyphosate in public, because whether it is 1 ppm or 10 ppm, we most likely have it on
25 our products too, and the general public does not understand the difference between 1 ppm and
26 a bucket full...if there is a chemical that is considered to be a cancer-causing, it don't matter
27 how much is in there, just that it is in there!”)

1 Importantly, two of Plaintiff’s experts address the issue of Roundup’s impurities such as
2 NNG and 1, 4 Dioxane: Dr. Benbrook from the regulatory perspective and Dr. Sawyer’s
3 toxicological opinions. *See* Ex. I to Hoke Decl., Benbrook Expert Report at 55-56; Ex. J to
4 Hoke Decl., Sawyer Expert Report at 76-77. Given that Roundup’s carcinogenicity is a central
5 issue of this litigation, evidence regarding the impurities which Plaintiff contends contribute to
6 the carcinogenicity of Roundup (and of which Monsanto was aware) are directly relevant.
7 *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 674 (the trial court cannot
8 “exclude evidence which is *directly relevant to the primary issues of the litigation* ...”).
9 Monsanto’s contentions that the level of impurities in Roundup are not carcinogenic or below
10 the regulatory safe limit go to the *weight* of Plaintiff’s evidence to the contrary, not
11 admissibility. *People v. Solomon* (2010) 49 Cal.4th 792, 818 (“[i]t is the jury, not the
12 reviewing court, that resolves conflicts in the evidence.”).

13 Monsanto’s assertion that such evidence should be excluded because “impurities are not
14 approved separately from the GBF as a whole” is a red herring. Monsanto MIL No. 16 at 3.
15 Surfactants are also part of the “approved” Roundup formulation, but nothing precludes
16 Plaintiff from arguing that surfactants contribute to the carcinogenicity of the formulated
17 product used by Mr. Johnson. Impurities are no different. As discussed above, Monsanto was
18 well aware of the carcinogenic potential of such impurities and provided incomplete
19 information to the EPA regarding Roundup’s impurities, all issues that go to the heart of
20 causation.

21 The jury should be provided with comprehensive evidence of Roundup’s chemical
22 profile, assisted with the proper expert evidence, in order to resolve the central disputes of this
23 case. *People v. Jones* (2013) 57 Cal.4th 899, 948, *as modified on denial of reh'g* (Oct. 2, 2013)
24 (quoting (*People v. Tran* (2011) 51 Cal.4th 1040, 1047) (evidence can only be excluded if it
25 poses an “an *intolerable ‘risk* to the fairness of the proceedings or the reliability of the
26 outcome”). Lastly, given that Monsanto will undoubtedly present evidence in support of the
27 ostensible safety of Roundup and its history of regulatory approval, Plaintiff should be
28

1 permitted to introduce evidence, such as that discussed above, to the contrary for rebuttal
2 purposes. *People v. Nunez* (2013) 57 Cal.4th 1, 27 (“Rebuttal evidence is relevant and thus
3 admissible if it ‘tend[s] to disprove a fact of consequence on which the defendant has
4 introduced evidence.’”).

5 **CONCLUSION**

6 For the foregoing reasons, the Court should deny Monsanto’s Motion *in limine* No. 16
7 and permit Plaintiff to present argument, evidence and reference to impurities in the Roundup
8 formulation that caused Plaintiff’s cancer.

9
10 DATED: June 7, 2018

Respectfully submitted,

11
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