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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
06/12/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

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 REPLY IN SUPPORT
OF PLAINTIFF'S MOTION IN
LIMINE NO. 12 TO EXCLUDE ANY
ARGUMENT AND TESTIMONY
THAT EPA REGISTRATION
PRECLUDED MONSANTO FROM
WARNING OF THE RISK OF NON-
HODGKIN'S LYMPHOMA**

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

21 **ARGUMENT**

22 Monsanto essentially seeks to argue *carte blanche* to the jury that even if Roundup is
23 carcinogenic, and even if Monsanto was aware of such dangers and failed to warn, the EPA's
24 registration of Roundup precluded Monsanto from informing the public that the herbicide can
25 cause cancer. This would gut the jury's ability to assess Monsanto's legal obligations under
26 California law to warn of the dangers of a defective product. Additionally, Monsanto cites to
27 inapposite case law for its argument. Neither *Amos v. Alpha Prop. Mgmt.*, 73 Cal. App. 4th
28

1 895, 901 (1999) nor *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1114-1115 (1996), stand for
2 the proposition that mere registration with the EPA would *preclude* a manufacturer from
3 warning of a product’s dangers, particularly since compliance does not absolve Monsanto of
4 liability under California law. *Stand Up for California! v. State* (2016) 6 Cal.App.5th 686, 703
5 (a case is not authority for a proposition not therein considered); Preemption Order at 42
6 (“EPA’s approval of Roundup’s label would preempt conflicting state law if it had the force of
7 law under *Wyeth*, but finding no indication that EPA’s approval of Roundup’s label had the
8 force of law.”); *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, 540–54
9 (compliance with federal safety standards does not preclude liability for defective design).

10 Lastly, Judge Karnow following U.S. Supreme Court precedent ruled that EPA approval
11 does not preempt negligence causes of action brought under state law. FIFRA allows state
12 juries to make determinations that manufacturers violated FIFRA. 4/17/2018 Order re: Sargon
13 and Summary Judgment, pp. 38-39. “Under the express terms of the statute, EPA approval of a
14 pesticide is not a defense for the commission of any offense under FIFRA...” *Id.* at 42.
15 Therefore, EPA approval cannot be a defense to a negligence per se theory premised on the
16 commission of an offense under FIFRA.

17 The case cited by Defendants involves California regulations in which it was accepted
18 as fact that the Defendant “complied with applicable safety regulations.” *Amos v. Alpha Prop.*
19 *Mgmt.*, 73 Cal. App. 4th 895, 901, 87 Cal. Rptr. 2d 34 (1999). Obviously, where it is
20 undisputed that a defendant did not violation a safety regulation than there can be no
21 negligence per se. Here, however, we are dealing with a federal statute that does not preempt
22 California law; and there is a disputed issue of fact as to whether Monsanto did in fact comply
23 with applicable safety regulations. The fact that the EPA has not concluded there is a violation,
24 does not prevent a California jury from concluding that Monsanto did not comply with FIFRA
25 and therefore liable under a negligence per se theory.

26 **CONCLUSION**

27 For the foregoing reasons, Plaintiff respectfully requests that this honorable Court grant
28 Plaintiff’s Motion *in limine* No. 12 to exclude any argument and testimony that EPA

1 registration precluded Monsanto from warning of the risk of cancer.

2
3 DATED: June 12, 2018

Respectfully submitted,

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THE MILLER FIRM, LLC

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By: /s/ Curtis G. Hoke

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1 PROOF OF SERVICE

2 I, Curtis G. Hoke, declare as follows:

3 I am a citizen of the United States and am employed in Orange County, Virginia. I am over the
4 age of eighteen years and not a party to the within action. My business address is 108 Railroad
5 Avenue, Orange, Virginia 22960. On June 12, 2018 _____, I served the following
documents by the method indicated below:


6 PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE NO. 12 TO
7 EXCLUDE ANY ARGUMENT AND TESTIMONY THAT EPA REGISTRATION
8 PRECLUDED MONSANTO FROM WARNING OF THE RISK OF NON-HODGKIN'S
LYMPHOMA

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14
15 By Electronically Serving the document(s) described above via LexisNexis File & Serve
16 by 7:00 p.m. Pacific Standard Time on all parties appearing on the LexisNexis File & Serve
service list.

17 **SEE ATTACHED SERVICE LIST**

18
19 I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

20
21 Executed on this June 12, 2018 at Orange, Virginia.

22
23 

24 Curtis G. Hoke,
25 Declarant

1 *Johnson v. Monsanto Company, et al.*
2 **San Francisco Superior Court Case No.: CGC-16-550128**

3 **SERVICE LIST**

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28 **PROOF OF SERVICE**