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*Attorneys for Defendant
MONSANTO COMPANY*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: ROUNDUP PRODUCTS LIABILITY LITIGATION)	MDL No. 2741
)	Case No. 3:16-md-02741-VC
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<i>Hardeman v. Monsanto Co., et al.,</i> 3:16-cv-0525-VC)	<u>MONSANTO COMPANY’S NOTICE OF MOTION AND MOTION <i>IN LIMINE</i> NO. 11 RE: ALL OTHER IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE</u>
<i>Stevick v. Monsanto Co., et al.,</i> 3:16-cv-2341-VC)	
<i>Gebeyehou v. Monsanto Co., et al.,</i> 3:16-cv-5813-VC)	
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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT in Courtroom 4 of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, or as ordered by the Court, Defendant Monsanto Company (“Monsanto”) will and hereby does move the Court to preclude all other irrelevant and unfairly prejudicial evidence.

1 DATED: January 30, 2019

2 Respectfully submitted,
3 /s/ Brian L. Stekloff

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MONSANTO COMPANY

1 **I. INTRODUCTION**

2 Defendant Monsanto Company (“Monsanto”) respectfully submits this motion *in limine*
3 to exclude other irrelevant and unfairly prejudicial evidence, including inflammatory
4 characterizations such as “magic tumor” in referring to a particular control-group tumor in a
5 1983 mouse study; references to decades-old fraudulent conduct by Industrial Bio-Test (“IBT”)
6 and/or Craven Laboratories (“Craven”); references to an alleged (and probably faked) letter
7 purporting to be from former EPA employee Marion Copley; media reports about this case, other
8 Monsanto litigation, or other issues related to Monsanto (e.g., the book, *Whitewash: The Story of*
9 *a Weed Killer, Cancer, and the Corruption of Science*, by Casey Gillam); and references to any
10 alleged health effects of glyphosate other than plaintiffs’ injuries. These topics are irrelevant to
11 the issues in this case and would serve only to distract the jury and prejudice Monsanto.
12 Monsanto believes this Motion will largely impact Phase 2 of the trial, but there are at least
13 certain aspects that Plaintiffs might suggest relate to the causation inquiry in Phase 1.

14 **II. ARGUMENT**

15 **A. References to “Magic Tumors” Regarding the 1983 Bio/Dynamics Mouse**
16 **Study**

17 Although the initial pathologist reviewing a mouse study conducted by Monsanto in the
18 early 1980s missed a renal tumor occurring in the study’s control group, later pathology reviews
19 (including by a 1986 Scientific Advisory Panel convened by EPA) confirmed the tumor’s
20 presence. That conclusion has been accepted by regulators for over two decades. Notably, with
21 this Court’s permission, plaintiffs’ expert, Dr. Stephen Francis Badylak, reviewed the slides and
22 failed to provide a report disagreeing with the presence of the tumor. Nevertheless, some of
23 plaintiffs’ experts will likely label the tumor by various non-scientific names, such as the
24 “magic” tumor. Such sarcastic and sensational descriptions are meant to prejudice the jury
25 against the integrity of the multiple pathology reviews that prompted the 1986 Science Advisory
26 Panel and, later, EPA itself, to conclude that glyphosate should not be categorized as a possible
27 human carcinogen. Misleading characterizations of this nature are intended to inflame the jury
28 and are unfairly prejudicial. *See* Fed. R. Evid. 403; *United States v. Skillman*, 922 F.2d 1370,

1 1374 (9th Cir. 1990) (FRE 403 requires exclusion of “evidence which appeals to the jury’s
2 sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a
3 jury to base its decision on something other than the established propositions in the case”)
4 (internal quotations omitted); *United States v. Bundy*, No. 2:16-cr-46-GMN-PAL, 2017 WL
5 521775, at *2 (D. Nev., 2017) (descriptive terms must be *accurate representations* under Rule
6 403).

7 **B. References to IBT or Craven**

8 Evidence concerning irregularities in rodent toxicology studies conducted on Roundup®
9 by IBT and/or Craven—two third party laboratories—is irrelevant. *See* Fed. R. Evid. 401-02.
10 There is no evidence that Monsanto was involved in any way in either company’s misconduct,
11 and Monsanto repeated the rodent toxicology studies to EPA’s satisfaction after the misconduct
12 was identified. The studies play no role in the current registration of Roundup® products and
13 EPA’s classification of glyphosate as ‘not likely to be carcinogenic’ has been consistent
14 throughout the periods of plaintiffs’ use. As such, they have absolutely no bearing on whether
15 plaintiffs’ use of the products caused their non-Hodgkin Lymphoma (“NHL”) and have no
16 bearing on Monsanto’s liability in phase two. *See Crews v. Domino’s Pizza Corp.*, No. CV-
17 083703-GAF-(VBKX), 2010 WL 11508359, at *6 (C.D. Cal. Mar. 5, 2010) (granting motion *in*
18 *limine* to exclude evidence of defendant’s disputes with non-parties as irrelevant).

19 Even if these studies have some relevance, they are inadmissible as unfairly prejudicial
20 under Rule 403. *See Martinez v. City of Chicago*, No. 14-cv-369, 2016 WL 3538823, at *10
21 (N.D. Ill. June 29, 2016) (excluding evidence of misconduct by non-defendants because
22 introduction of it “would create an unnecessary sideshow, and would unduly prejudice
23 Defendants”). Evidence relating to these laboratories would only serve to invite the jury to infer
24 that, because IBT and Craven apparently participated in improper scientific practices, Monsanto
25 did as well. Monsanto would then be forced to expend significant time at trial putting on
26 evidence explaining the details concerning the controversy surrounding the IBT and Craven
27 studies, Monsanto’s product registration and its submissions to EPA. Distracting the jury with
28

1 this irrelevant evidence would only waste the jury's and this Court's time, and prejudice
2 Monsanto.

3 **C. References to the Marion Copley Letter**

4 The Copley letter is a letter purporting to be from a now-deceased former EPA employee
5 accusing Jesudoss Rowland, another former EPA employee, of misconduct. *See* Letter from
6 Marion Copley, Former EPA Employee, to Jesudoss Rowland, Former EPA Employee (March 4,
7 2013) (Ex. 1). However, there is no evidence that it was actually written by Ms. Copley and
8 therefore cannot satisfy the rules of evidence for authenticity or admissibility. Simply put, the
9 letter is inauthentic hearsay.

10 Moreover, this letter, which may well be a fraud and a forgery, should be excluded
11 because it will not assist the jury in determining whether plaintiffs' use of Roundup[®] products
12 caused plaintiffs' NHL, and is therefore irrelevant. *See* Fed. R. Evid. 401-02. There is no
13 evidence that plaintiffs' saw or read the Copley letter before deciding whether to use Roundup[®]
14 products. Therefore, the letter could not have influenced plaintiffs' decision to use the products,
15 and does "not [have] any tendency to make a fact more or less probable than it would be without
16 the evidence." *Id*; *Herrera v. Eli Lilly & Co.*, No. 2:13-CV-02702SVWMAN, 2015 WL
17 12911753, at *1 (C.D. Cal. Aug. 3, 2015) (excluding materials not seen by plaintiff as
18 irrelevant). Such evidence is also inadmissible because it would confuse the jury by placing
19 before it information immaterial to its decision. *See* Fed. R. Evid. 401; 403.

20 Further, admission of the letter—even if somehow admissible under the rules of
21 evidence—would be unduly prejudicial because without any context or testimony from the
22 author it insinuates an improper relationship between Monsanto and EPA, wasting the jury's
23 time with evidence designed to evoke an emotional bias against Monsanto. *See* Fed. R. Evid.
24 403; *see Skillman*, 922 F.2d at 1374.

25 **D. References to Books, Newspaper Articles, Broadcasts, Documentaries, and**
26 **Other Publications Related to Monsanto**

27 These materials—much of them produced by third-party activists in support of the
28 plaintiffs' lawsuit—should be excluded as prejudicial, confusing, and a waste of this Court's and

1 the jury's time. *See* Fed. R. Evid. 403. Recognizing the highly prejudicial nature of newspaper
2 articles and other media publications or productions, courts routinely exclude such evidence. *See*
3 *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1512 (10th Cir. 1997) (affirming trial court
4 exclusion of magazine article that negatively described product at issue in products liability
5 action because its probative value was substantially outweighed by its potential for prejudice);
6 *Apple Inc. v. Samsung Elec. Co.*, No. 11-CV-01846-LHK, 2018 WL 2010621, at *1 (N.D. Cal.,
7 Apr. 30, 2018) (excluding on grounds of prejudice and confusion references to media reports that
8 Apple purposely slowed down iPhone to preserve battery life, where this feature was not related
9 to the specific Samsung patent allegedly infringed). Here, this evidence would serve only to
10 attack Monsanto's reputation as a corporation, and introduce sensationalized claims of profits
11 and revenue, claims about other lawsuits or litigation, and unverified accounts regarding
12 glyphosate that would inflame the passions of the jury and distract jurors from their task at hand:
13 a rational, neutral review of the scientific and factual evidence at issue.

14 **E. Allegations of Glyphosate's Alleged Health Effects other than Those of**
15 **Which Plaintiffs Complain**

16 Allegations that glyphosate causes endocrine disruption, birth defects, and harmful
17 impacts on gut bacterial enzymes are irrelevant. *See* Fed. R. Evid. 401–02; *Ochoa-Valenzuela v.*
18 *Ford Motor Co. Inc.*, 685 F. App'x 551, 555 (9th Cir. 2017) (evidence suggesting that car
19 manufacturer may have designed defective cars in 1960s is not probative of whether
20 manufacturer designed defective cars in 2000). Plaintiffs complain that glyphosate caused their
21 NHL; they *do not* complain that glyphosate harmed their endocrine systems, caused them birth
22 defects, or disrupted their gut bacteria. *See* Complaint at ¶ 111, *Gebeyehou v. Monsanto Co.*,
23 No. 3:16-cv-5813-VC (N.D. Cal. Oct. 7, 2016); Complaint at ¶ 67, *Stevick v. Monsanto Co.*, No.
24 3:16-cv-2341-VC (N.D. Cal. Apr. 26, 2016); First Amended Complaint at ¶ 114, *Hardeman v.*
25 *Monsanto Co.*, 3:16-cv-525 (N.D. Cal. Feb. 12, 2016). But even if this evidence had some
26 relevance, it is inadmissible as unduly prejudicial under Rule 403. Such “evidence”—
27 particularly the insinuations about birth defects—is impermissibly calculated to play on the
28 jury's fears and emotions that *they* or their children are at risk of harm. *See United States v. Hitt*,

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981 F.2d 422, at 424 (9th Cir. 1992) (excluding evidence that could incite “irrational fears” in the jury).

III. CONCLUSION

Monsanto respectfully requests that the Court preclude these irrelevant and unfairly prejudicial arguments and references.

1 DATED: January 30, 2019

2 Respectfully submitted,

3 /s/ Brian L. Stekloff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January 2019, a copy of the foregoing was served via electronic mail to opposing counsel.

/s/ Brian L. Stekloff