

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WILKINSON WALSH + ESKOVITZ LLP

Brian L. Stekloff (*pro hac vice*)
(bstekloff@wilkinsonwalsh.com)
Rakesh Kilaru (*pro hac vice*)
(rkilaru@wilkinsonwalsh.com)
2001 M St. NW, 10th Floor
Washington, DC 20036
Tel: (202) 847-4030
Fax: (202) 847-4005

ARNOLD & PORTER KAYE SCHOLER

Pamela Yates (CA Bar No. 137440)
(Pamela.Yates@arnoldporter.com)
777 South Figueroa St., 44th Floor
Los Angeles, CA 90017
Tel: (213) 243-4178
Fax: (213) 243-4199

HOLLINGSWORTH LLP

Eric G. Lasker (*pro hac vice*)
(elasker@hollingsworthllp.com)
1350 I St. NW
Washington, DC 20005
Tel: (202) 898-5843
Fax: (202) 682-1639

COVINGTON & BURLING LLP

Michael X. Imbroscio (*pro hac vice*)
(mimbrosocio@cov.com)
One City Center
850 10th St. NW
Washington, DC 20001
Tel: 202-662-6000

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
)

Hardeman v. Monsanto Co., et al.,
3:16-cv-0525-VC
Stevick v. Monsanto Co., et al.,
3:16-cv-2341-VC
Gebeyehou v. Monsanto Co., et al.,
3:16-cv-5813-VC

) **MONSANTO COMPANY'S NOTICE OF**
) **MOTION AND MOTION *IN LIMINE***
) **NO. 6 RE: EXCLUDING EVIDENCE OF**
) **AND ARGUMENT ABOUT THE**
) **PARTIES' PUBLIC-RELATIONS**
) **ACTIVITIES**
)

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** in Courtroom 4 of the United States District Court,
3 Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA
4 94102, or as ordered by the Court, Defendant Monsanto Company (“Monsanto”) will and
5 hereby does move the Court to preclude evidence and argument regarding the parties’ public-
6 relations activities.

7
8 DATED: January 30, 2019

9 Respectfully submitted,

10 /s/ Brian L. Stekloff

11 Brian L. Stekloff (*pro hac vice*)
12 (bstekloff@wilkinsonwalsh.com)
13 Rakesh Kilaru (*pro hac vice*)
14 (rkilaru@wilkinsonwalsh.com)
15 WILKINSON WALSH + ESKOVITZ LLP
16 2001 M St. NW, 10th Floor
17 Washington, DC 20036
18 Tel: (202) 847-4030
19 Fax: (202) 847-4005

20 Pamela Yates (CA Bar No. 137440)
21 (Pamela.Yates@arnoldporter.com)
22 ARNOLD & PORTER KAYE SCHOLER
23 777 South Figueroa St., 44th Floor
24 Los Angeles, CA 90017
25 Tel: (213) 243-4178
26 Fax: (213) 243-4199

27 Michael X. Imbroscio (*pro hac vice*)
28 (mimbroscio@cov.com)
One City Center
850 10th St. NW
Washington, DC 20001
Tel: 202-662-6000

Eric G. Lasker (*pro hac vice*)
(elasker@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I St. NW
Washington, DC 20005

- 2 -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Tel: (202) 898-5843
Fax: (202) 682-1639

Attorneys for Defendant
MONSANTO COMPANY

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Monsanto Company (“Monsanto”) moves to preclude evidence and argument
4 regarding the parties’ public-relations activities, such as statements to news reporters or
5 interactions with media outlets to ensure balanced reporting. This evidence clearly should be
6 excluded from Phase 1 of trial, which will focus on the scientific evidence regarding causation.
7 *See* 12/5/18 MDL CMC Tr. 87:4-5 (Ex. 1) (“[I]f this case was only about causation, I would
8 probably say ‘No further discovery on this stuff.’”). And to the extent that Monsanto’s public-
9 relations activities are not constitutionally protected, *see* MIL No: 13 Re: Lobbying, evidence
10 of the activities is inadmissible in Phase 2 because it does not relate to any issue the jury must
11 resolve and would only distract the jury from its proper task. Phase 2 will focus on whether
12 Monsanto had reason to provide additional warnings about glyphosate or to pursue an alternate
13 design, and the company’s public-relations conduct does not bear on either of those issues in
14 any way. Nor could Monsanto’s public-relations activities justify punitive damages, as
15 Plaintiffs have suggested. Under California law, punitive damages are proper only where a
16 defendant has undertaken “vile, base, contemptible, miserable, wretched or loathsome” conduct
17 that decent, ordinary people would look down upon and despise. *See Mock v. Mich. Millers*
18 *Mut. Ins. Co.*, 4 Cal. App. 4th 306, 331 (1992). There is no basis for arguing that Monsanto’s
19 public-relations activities meet this standard: The company’s activities were of the type that
20 corporations throughout the country engage in every day, were motivated by Monsanto’s good-
21 faith belief in science-based arguments about the safety of glyphosate, and often were
22 undertaken in direct response to Plaintiffs’ own extensive media campaign.

23 **II. ARGUMENT**

24 **A. Evidence of Monsanto’s Public-Relations Activity Is Irrelevant and**
25 **Inadmissible in Phase 2.**

26 If Plaintiffs prove causation in Phase 1, Phase 2 will address Monsanto’s liability and
27 the assessment of punitive damages. Monsanto’s public-relations activities do not bear on its
28 liability in any way. The liability questions at the heart of Plaintiffs’ failure-to-warn claims are

1 whether the products to which Plaintiffs were exposed were Monsanto’s, whether Monsanto
2 knew that Roundup was dangerous or likely to be dangerous, whether the safety warnings
3 Monsanto gave were adequate and reasonable, and whether there were safety warnings not given
4 that should have been. *See* Judicial Council of California Civil Jury Instruction (“CACI”) No.
5 1222. Evidence of Monsanto’s public-relations activities has nothing to do with any of these
6 questions. Likewise, to prove their design-defect claims, Plaintiffs will need to show that
7 Roundup did not perform as safely as an ordinary consumer would have expected it to perform
8 when used or misused in an intended or reasonably foreseeable way, and that this failure to
9 perform safely was a substantial factor in causing Plaintiffs’ harm. *See* CACI No. 1203. Again,
10 evidence of Monsanto’s public-relations activities is of no consequence to these questions.

11 Nor could evidence of Monsanto’s public-relations activities support Plaintiffs’
12 punitive-damages claims, as Plaintiffs have suggested recently. *See* CMC Tr. at 53:9-21, 58:1-
13 5, 82:20-84:21, 89:5-93:11 (Ex. 1). For the reasons set forth in Monsanto’s Motion for Summary
14 Judgment on Non-Causation Grounds, Dkt. No. 2419 at 17-21, Plaintiffs have not established
15 any right to seek punitive damages in this case. But in any event, Monsanto’s public-relations
16 activities are not relevant under the law of punitive damages. To justify a punitive-damages
17 award, Plaintiffs must prove that Monsanto acted with malice in designing, selling, and
18 marketing Roundup. *See* Cal. Civ. Code § 3294(a). Malice in turn is “conduct which is intended
19 by the defendant to cause injury to *the plaintiff*,” or “despicable conduct which is carried on by
20 the defendant with a willful and conscious disregard of the rights or safety of others.” *Id.*
21 § 3294(c)(1) (emphasis added). Monsanto’s public-relations activities took place on an
22 international scale, and clearly were not intended to cause injury to *the plaintiffs* in this litigation.
23 Nor were Monsanto’s public-relations activities despicable—i.e., so “vile, base, contemptible,
24 miserable, wretched or loathsome” that decent, ordinary people would look down upon and
25 despise them. *See Mock*, 4 Cal. App. 4th at 331. Monsanto’s public statements, media
26 engagements, and advertising were the kind of public-relations activities that large companies
27 undertake every day. And they reflected the company’s longstanding, good-faith belief in
28

1 science-backed arguments about the safety of its products. Thus, evidence of Monsanto’s
 2 public-relations activities cannot be relevant to Plaintiffs’ punitive-damages claims unless
 3 Plaintiffs mischaracterize or misrepresent the nature of those activities.

4 Evidence of Monsanto’s media-related activities also should be excluded under Rule 403
 5 because introducing it would be unduly burdensome, distracting, and prejudicial. First,
 6 admitting evidence of Monsanto’s media-related activities would require the introduction of
 7 additional witnesses unlikely to otherwise testify and additional documents unlikely to be
 8 otherwise admitted. Second, admitting *only* evidence of Monsanto’s public-relations conduct—
 9 as Plaintiff seem to envision—would mislead the jury with an unfairly one-sided picture, given
 10 that at least some of Monsanto’s conduct was undertaken in response to Plaintiffs’ media
 11 campaigns.¹ Third, admitting the evidence could inflame the passions of the jurors—themselves
 12 consumers—who, if accepting Plaintiffs’ prejudicial characterization of Monsanto’s public-
 13
 14

15 ¹ For example, Plaintiffs are likely to attempt to introduce evidence that Monsanto’s executives have publicly
 16 reiterated their faith in Monsanto’s case. *See, e.g.*, CMC Tr. 53:12-14 (Ex. 1). But Plaintiffs’ counsel have made
 17 similar public comments, to which Monsanto’s often respond. *Compare* Bob Egelko and Peter Fimrite, Judge
 18 slashes award by jury in Monsanto weed-killer cancer case, San Francisco Chronicle, Oct. 22, 2018, *available at*
 19 <https://www.sfchronicle.com/bayarea/article/Judge-dramatically-reduces-punitive-damages-in-13327991.php> (Ex.
 20 3) (“‘This jury was intelligent, diligent, and followed the letter of the law,’ said Brent Wisner, Johnson’s attorney.
 21 ‘We are happy the jury’s voice was acknowledged by the court, even if slightly muted.’ . . . ‘The evidence presented
 22 to this jury was, quite frankly, overwhelming.’”), *with id.* (“‘The Court’s decision to reduce the punitive damage
 23 award by more than \$200 million is a step in the right direction,’ wrote Christopher Loder, a Bayer spokesman.
 24 ‘We continue to believe that the liability verdict and damage awards are not supported by the evidence at trial or
 25 the law and plan to file an appeal . . .”). Similarly, Plaintiffs have alleged that Monsanto improperly provided
 26 information to the media in order to “orchestrate outcry against IARC,” 30(b)(6) Letter at 3. Monsanto disagrees
 27 with that characterization, but Plaintiffs in any event have done just the opposite, engaging with media outlets in
 28 order to buttress IARC’s findings and criticize Monsanto. One of Plaintiffs’ own experts, Dr. Christopher Portier,
 published an open letter to the President of the European Commission calling for reconsideration of the science
 regarding the safety of glyphosate. *See* Letter from Christopher J. Portier to Jean Claude Juncker, President, Eur.
 Comm’n (May 28, 2017), *available at* [https://www.nrdc.org/sites/default/files/open-letter-from-dr-christopher-](https://www.nrdc.org/sites/default/files/open-letter-from-dr-christopher-portier.pdf)
[portier.pdf](https://www.nrdc.org/sites/default/files/open-letter-from-dr-christopher-portier.pdf) (Ex. 4). And while Plaintiffs have alleged that Monsanto helped to publish favorable articles through
 friendly press connections such as Henry Miller, *see* Benbrook Rep. at 140 (Ex. 2), it is Plaintiffs that have done
 so, publishing anti-Monsanto press through Plaintiff-friendly connections like Ms. Carey Gillam. *See, e.g.*,
Monsanto Papers: proof of scientific falsification, *available at* https://www.youtube.com/watch?v=1_s18Qetabo at
 26:50-52 (confirming Plaintiffs’ counsel gave internal Monsanto documents to Gillam for online publication).
 Plaintiffs also have alleged that, in connection with its anti-IARC efforts, Monsanto paid Google to direct searches
 related to Roundup and cancer to favorable press containing some information Monsanto provided to the media.
See 30(b)(6) Letter at 3-4. But googling “Roundup” and “cancer” in fact leads to an incredible number of
 advertisements for Plaintiffs’ attorneys soliciting Roundup plaintiffs in the sponsored-content sections of Google’s
 search results.

1 relations efforts, might feel personally wronged and who certainly would be sidetracked from
2 the trial’s proper focus—each particular plaintiff at issue.

3 **B. Monsanto’s Public-Relations Activities Also Should Be Excluded Because**
4 **They Are In Large Part Protected by the First Amendment.**

5 There is another, independent reason for excluding Monsanto’s public-relations
6 activities. As Monsanto explains in its Motion *in Limine* No. 13 (Lobbying), Monsanto’s
7 lobbying activities fall squarely within the protection of the First Amendment’s Petition Clause.
8 A corollary of that clause, the breathing space principle, likewise protects Monsanto’s public-
9 relations activities. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006) (holding that
10 the breathing space principle extends First Amendment protections beyond “direct
11 communications with legislators” to encompass also a company’s “public relations campaign,”
12 where “the latter’s aim [is] to influence the passage of favorable legislation”). By Plaintiffs’
13 own account, Monsanto’s alleged media manipulations were related to the company’s
14 petitioning activity. *See, e.g.*, Benbrook Rep. at 26-29 (Ex. 2) (expressing dismay at degree to
15 which Monsanto allegedly attempted to “shape the information accessible to regulators,”
16 amplify its “PR messages targeting . . . political leaders,” and “favorably influence current and
17 future possible challenges in the regulatory and public arena”); *id.* at 137, 139-41, 153-54, 162-
18 66; 30(b)(6) Letter at 2 (arguing, among other things, that Monsanto “enlisted a Reuters
19 journalist . . . to write an attack piece on IARC,” which Monsanto then used to “exert political
20 pressure on the [National Cancer Institute]” and to “lobby[] Congress to cut U.S. funding for
21 the IARC monograph program”). Thus, holding Monsanto liable for punitive damages on the
22 basis of this conduct would violate the First Amendment. *See Sosa*, 437 F.3d at 934. Evidence
23 of Monsanto’s public-relations activities must be excluded to avoid this result, and to prevent
24 unconstitutional chilling, *see White v. Lee*, 227 F.3d 1214, 1233 (9th Cir. 2000) (requiring a
25 heightened level of protection to avoid chilling the right to petition).

26 **III. CONCLUSION**

27 Monsanto respectfully requests that the Court grant its motion to preclude evidence and
28 argument regarding the parties’ public-relations activities.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: January 30, 2019

Respectfully submitted,

/s/ Brian L. Stekloff

Brian L. Stekloff (*pro hac vice*)
(bsteckloff@wilkinsonwalsh.com)
Rakesh Kilaru (*pro hac vice*)
(rkilaru@wilkinsonwalsh.com)
WILKINSON WALSH + ESKOVITZ LLP
2001 M St. NW, 10th Floor
Washington, DC 20036
Tel: (202) 847-4030
Fax: (202) 847-4005

Pamela Yates (CA Bar No. 137440)
(Pamela.Yates@arnoldporter.com)
ARNOLD & PORTER KAYE SCHOLER
777 South Figueroa St., 44th Floor
Los Angeles, CA 90017
Tel: (213) 243-4178
Fax: (213) 243-4199

Michael X. Imbroscio (*pro hac vice*)
(mimbroscio@cov.com)
One City Center
850 10th St. NW
Washington, DC 20001
Tel: 202-662-6000

Eric G. Lasker (*pro hac vice*)
(elasker@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I St. NW
Washington, DC 20005
Tel: (202) 898-5843
Fax: (202) 682-1639

Attorneys for Defendant
MONSANTO COMPANY

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28