

1 Kelly A. Evans (*pro hac vice*)
(kevans@efstriallaw.com)
2 Jay J. Schuttert (*pro hac vice*)
(jschuttert@efstriallaw.com)
3 EVANS FEARS & SCHUTTERT LLP
2300 West Sahara Avenue, Suite 900
4 Las Vegas, NV 89102
Tel: (702) 805-0290
5 Fax: (702) 805-0291

6 Tarek Ismail (*pro hac vice*)
(tismail@goldmanismail.com)
7 Joe Tomaselli (*pro hac vice*)
(jtomaselli@goldmanismail.com)
8 GOLDMAN ISMAIL TOMASELLI
BRENNAN & BAUM LLP
9 564 West Randolph Street, Suite 400
Chicago, IL 60661
10 Tel: (312) 881-5970
Fax: (312) 881-5191

11 Attorneys for Defendant MONSANTO
12 COMPANY
13 *Additional counsel listed on signature block

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF ALAMEDA**

17) Case No. RG17862702
18)
19) ASSIGNED FOR ALL PURPOSES TO
20) JUDGE WINIFRED SMITH
21) DEPARTMENT 21
22)
23) **DEFENDANT MONSANTO**
24) **COMPANY'S OPPOSITION TO**
25) **PLAINTIFFS' MOTION FOR**
26) **TEMPORARY INJUNCTION**
27) **PRECLUDING ADVERTISEMENTS BY**
28) **MONSANTO RELATING TO SAFETY,**
) **TESTING, AND STUDIES ON ITS**
) **PRODUCTS UNTIL AFTER ENTRY OF**
) **JUDGMENT IN THIS ACTION**
)
) Complaint Filed: June 2, 2018
) Trial Date: March 18, 2019
)
)
)

17 PILLIOD, et al.
18)
19 Plaintiffs,
20)
21 vs.
22)
23 MONSANTO COMPANY,
24)
25 Defendant.
26)
27)
28)

1 Plaintiffs’ Motion for Temporary Injunction Precluding Advertisements by Defendant
2 Relating to Safety, Testing, and Studies of Roundup® (“Motion”) seeks a unilateral “gag order”
3 against Monsanto that is unconstitutional, unnecessary, and dripping with hypocrisy.

4 The Motion asks this Court to unconstitutionally infringe on Monsanto’s First Amendment
5 right to advertise to its retailers and customers nationwide, because a single print advertisement in
6 the *Wall Street Journal* on March 25, 2019 supposedly risked a fair trial by “preconditioning” the
7 Alameda County jury venire in this case. As a result, Plaintiffs’ Motion requests this Court to gag
8 Monsanto and Bayer while both of Plaintiffs’ counsel—Brent Wisner and his colleagues at Baum
9 Hedlund, as well as Mike Miller and his colleagues at The Miller Firm—and their surrogates
10 continue their onslaught of disparaging Roundup® advertisements across multiple media platforms
11 in the San Francisco Bay Area. As just one glaring example, the Miller Firm ran an ad in the San
12 Francisco Chronicle alleging a “doubling or tripling” of the risk of NHL from Roundup® a mere
13 seven days before the trial date here. Because the jury pool in this case was bombarded with 2,187
14 anti-Roundup® television and radio ads from December 1, 2018 to March 21, 2019 in the local
15 media market alone, *see* Declaration of Rustin Silverstein (“Silverstein Decl.”) Exhibit A at
16 Appendix, Monsanto had to move for a mistrial before opening statements based on saturation of
17 news and misinformation concerning Roundup® in this media market. (Tr. Tran. 1306-1308).

18 Plaintiffs’ proposed “gag order” against Monsanto cannot be imposed, because it is a “prior
19 restraint” on protected First Amendment speech impermissible in all but the most “extraordinary
20 circumstances.” *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1245 (2000); *see also In re Dan Farr*
21 *Prods.*, 874 F.3d 590, 596 (9th Cir. 2017) (“Prior restraints ‘are the most serious and the least
22 tolerable infringement on First Amendment rights.’” (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S.
23 539, 559 (1976)). “Gag orders on trial participants are unconstitutional unless (1) the speech sought
24 to be restrained poses a clear and present danger or serious and imminent threat to a protected
25 competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less
26 restrictive alternatives are available.” *Hurvitz*, 84 Cal. App. 4th at 1241.

27 Plaintiffs have not, and cannot, carry the extraordinary burden on any of these showings.
28 Moreover, the only “preconditioning” that has occurred here is that caused by Plaintiffs’ ongoing

1 media campaign. (Tr. Tran. 835:1-6); Silverstein Decl. at ¶¶ 15, 30. Accordingly, Plaintiffs’
2 Motion should be denied.

3 **BACKGROUND**

4 **I. Plaintiffs’ and Their Surrogates’ Widespread Dissemination of Glyphosate** 5 **Misinformation**

6 Since the issuance of the IARC classification in March 2015, Monsanto’s Roundup®
7 products have been subject to a wide variety of negative public relations attacks by various activists
8 and litigation-related advertising by counsel for plaintiffs in ongoing lawsuits. Declaration of James
9 Guard (“Guard Decl.”) ¶ 3. The misinformation campaign began after the trial date for *Johnson v.*
10 *Monsanto Company*, No. CGC165501128 (S.F. Super. Ct.) was announced on August 30, 2017.
11 Silverstein Decl. ¶ 19. In the three-month period that followed the trial date setting—September
12 through November 2017—247 anti-Roundup® television ads aired in the San Francisco Bay Area.
13 *Id.*

14 Since the *Johnson* Verdict in August 2018, plaintiffs’ counsel and/or their surrogates have
15 doubled down on their media offensive. They have aggressively targeted the San Francisco Bay
16 Area market with ads and op-eds to disparage Monsanto’s Roundup® products and further their
17 interests in the glyphosate litigation. During the *Johnson* trial in August 2018 and the immediate
18 post-trial period in September 2018, anti-Roundup® TV ads, sponsored by plaintiffs’ law firms and
19 aggregators soliciting plaintiffs for the glyphosate litigation, were broadcast locally in the San
20 Francisco Bay Area market 114 times each month. *Id.* at ¶ 22.

21 Baum Hedlund sponsored the most widely aired local television ad. *Id.* at ¶ 24. Baum
22 Hedlund’s Roundup® litigation ad aired 223 times from August 21 through September 16, 2018—
23 an average of 8 times per day. It featured Robert F. Kennedy, Jr. noting his and Baum Hedlund’s
24 recent winning of an award of “nearly \$300 million” on behalf of a plaintiff “who got non-
25 Hodgkin’s lymphoma from spraying Roundup which Monsanto said was safe.” *Id.*

26 While Roundup® litigation ads on local *broadcast* networks in the San Francisco Bay Area
27 peaked in August and September of 2018, advertising on local *cable* networks here increased
28 significantly towards the end of 2018 and into the beginning 2019. *Id.* at ¶ 27. About 1,888

1 television ads aired locally on cable television networks in the San Francisco Bay Area from
2 January 1, 2018 through March 21, 2019. *Id.*; *see also* Silverstein Decl. Ex. A at Appendix. Nearly
3 all of those ads aired in January 2019 (623 ads) and February 2019 (644 ads)—the months leading
4 up to the commencement of the *Hardeman* and *Pilliod* trials. *Id.* December 2018 also marked the
5 first month of an aggressive anti-Roundup® radio advertising campaign in the San Francisco Bay
6 Area by the same types of sponsors. *Id.* at ¶ 29. San Francisco Bay Area stations broadcasted 216
7 anti-Roundup® radio ads in 2018. Notably, 202 of these ads aired in a two-week period in
8 December 2018—an average of 14 ads per day. *Id.*

9 On top of local ads, television viewers in the San Francisco media market were exposed to
10 Roundup litigation ads airing nationally on national broadcast and cable networks and during
11 nationally-syndicated programming. *Id.* at ¶ 31. In 2018, an estimated \$5.2 million was spent to air
12 over 3,500 ads nationally. There was a noticeable increase in this advertising from December 2018
13 through February 2019, when over 2,800 ads aired nationally. *Id.* As with some of the local San
14 Francisco Bay Area ads, some of the 2018 national ad conveyed messaging beyond mere
15 solicitations for legal representation and touched on Monsanto’s alleged culpability and liability.
16 *Id.* at ¶ 32.

17 Plaintiffs’ counsel has partnered with celebrities to amplify their anti-Roundup® rhetoric.
18 Baum Hedlund’s Mr. Kennedy publicly discussed the litigation multiple times in blog and
19 Facebook posts during the *Johnson* trial. Declaration of Sandra Edwards (“Edwards Decl.”) ¶ 2.
20 Neil Young and Daryl Hannah sought to influence Judge Bolanos by writing an op-ed in the S.F.
21 Chronicle on October 14, 2018 that urged her to maintain the *Johnson* jury verdict. *Id.* at ¶ 4. Erin
22 Brockovich is featured in a Weitz & Luxenberg ad about Roundup® and authored a December 6,
23 2018 op-ed critical of glyphosate that discusses the *Johnson* case. *Id.* at ¶ 5. The Brockovich ad
24 features her stating that “corporations [are] putting their profits over our safety and it’s happening
25 now with Monsanto.” Silverstein Decl. ¶ 25.

26 Baum Hedlund and the Miller Firm LLC, co-lead counsel in this case, have continued to
27 generate negative preconceptions against Monsanto’s Roundup® products in the weeks leading up
28 to this trial. See Edwards Decl. at ¶ 6; Silverstein Decl. Ex. A at 14-16. The Miller Firm LLC paid

1 for the following print advertisement in the San Francisco Chronicle a week before the March 18
 2 trial date here:

NON-HODGKIN LYMPHOMA SUFFERERS

Have you used **Roundup**[®] weed killer in the past and developed Non-Hodgkin Lymphoma?

You may be entitled to **financial compensation.**



Recent studies have shown repeated use of **Roundup**[®] products can double or triple your risk of developing **Non-Hodgkin Lymphoma.**

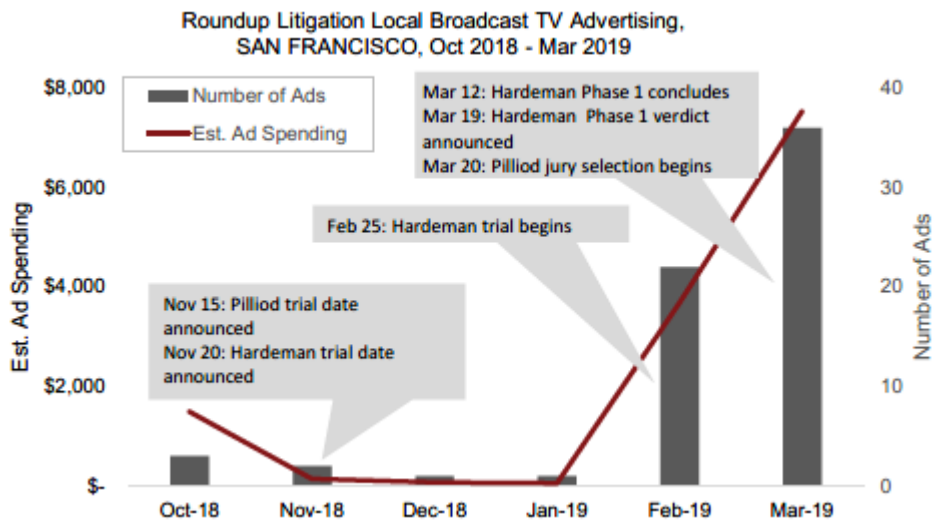
The Miller Firm is the first law firm to win a Roundup[®]/NHL trial.

Call **1-800-882-2525** to speak to a Roundup[®] / Lymphoma attorney.

The Miller Firm LLC
 TRIAL LAWYERS
 www.MillerFirmLLC.com
 108 Redwood Ave., Orange, VA 22960

CALL NOW 800-882-2525

16 See Silverstein Decl. Ex. A at 16. As the graph below shows, and as set forth in greater detail in the
 17 Silverstein Declaration, there was a considerable increase in anti-Roundup[®] advertisements in the
 18 San Francisco Bay Area starting at the beginning of 2019 in advance of this trial:



28 See Silverstein Decl. Ex. A at 6.

1 **II. Monsanto’s Response to the Dissemination of Glyphosate Misinformation**

2 Monsanto’s market research has indicated that negative public relations activities following
3 the IARC classification, California’s listing of glyphosate under Proposition 65, and litigation-
4 related advertising have negatively impacted the Roundup® brand and sales. Guard Decl. ¶ 4.

5 It is therefore imperative that Monsanto communicate—consistent with its First Amendment
6 rights—to its retailers and customers across the country accurate information about the scientific
7 and regulatory record supporting the safe use of glyphosate and Roundup® products. *Id.* at ¶ 9.

8 To that end, Monsanto’s marketing and advertising activities are primarily conducted on a
9 nationwide basis. *Id.* at ¶¶ 6-8. The majority of Roundup® television ads run nationwide, and are
10 not targeted at specific geographic markets. *Id.* Radio and print advertising for Roundup® is
11 likewise created and run on a primarily nationwide basis, rather than for use in particular
12 geographic markets. *Id.* The vast majority of the Roundup® media spend is directed to advertising
13 that is consistent throughout the United States. *Id.* Print advertisements, like the one in the *Wall*
14 *Street Journal* on March 25, 2019, are an example of this media approach. *Id.* at ¶ 7.

15 **ARGUMENT**

16 **I. Applicable Legal Standards**

17 Prior restraints on speech are “administrative and judicial orders forbidding certain
18 communications when issued in advance of the time that such communications are to
19 occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotations and emphasis
20 omitted). “Temporary restraining orders . . . that actually forbid speech activities” like the one
21 sought here “are classic examples of prior restraints.” *Id.* Prior restraints on speech “are the most
22 serious and the least tolerable infringement on First Amendment rights.” *In re Dan Farr Prods.*,
23 874 F.3d at 596 (quoting *Neb. Press*, 427 U.S. at 559); *Steiner v. Superior Court*, 220 Cal. App. 4th
24 1479, 1486 (2013). They impose “an immediate and irreversible sanction” that does not merely
25 “chill[] speech,” but rather “‘freezes’ it at least for the time.” *Neb. Press*, 427 U.S. at 559 (citation
26 omitted). As a result, “[t]here is a heavy presumption against” their validity and “they are subject to
27 the strict scrutiny standard of review.” *In re Dan Farr Prods.*, 874 F.3d at 593 n.2.

1 A gag order can survive constitutional scrutiny only if “(1) the speech sought to be
2 restrained poses a clear and present danger or serious and imminent threat to a protected competing
3 interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive
4 alternatives are available.” *Hurvitz*, 84 Cal. App. 4th at 1241; *see also Maggi v. Superior Court*, 119
5 Cal. App. 4th 1218, 1225 (2004). “Where a party contends his or her right to a fair trial has been or
6 will be compromised by pretrial publicity, the law has long imposed on that party the burden of
7 producing evidence to establish the prejudice.” *Hurvitz*, 84 Cal. App. 4th at 1241. Unlike
8 Monsanto, which produces herewith voluminous evidence showing Plaintiffs’ counsel has
9 deliberately and strategically sought to precondition the jury pool to advance litigation interests,
10 Plaintiffs have completely failed to present any evidence that a single *Wall Street Journal* article
11 poses any risk to their ability to obtain a fair trial. Plaintiffs have not, and cannot, produce
12 evidence satisfying their extraordinary burden to justify the unilateral gag order they seek.

13 **II. The Requested Temporary Restraining Order Is A Presumptively Unconstitutional**
14 **Prior Restraint On Monsanto’s Speech That Fails Scrutiny.**

15 Notwithstanding the double standard that their Motion would impose, Plaintiffs’ request for
16 the extraordinary remedy of silencing Monsanto during this multi-month trial is unconstitutional
17 under the First Amendment for two independent reasons. First, it seeks to prohibit speech that does
18 not pose a serious and imminent threat to Plaintiffs’ rights to a fair trial. Second, less restrictive
19 alternatives to the prior restraint on Monsanto are readily available.

20 **A. Monsanto’s Speech Does Not Pose A Serious And Imminent Threat To A Fair**
21 **Trial In This Case.**

22 A prior restraint to ensure a fair trial is impermissible unless “it is clear” that its absence
23 would so distort the views of the jurors that they could not, with proper instructions from the Court,
24 fulfill their sworn duty to render a verdict based only on admitted evidence. *See Neb. Press*, 427
25 U.S. at 569; *In re Dan Farr Prods.*, 874 F.3d at 593; *Hunt*, 872 F.2d at 295. In other words, “[i]t is
26 not enough for a court to decide that the fair trial right may be affected by the exercise of free
27 speech,” *Hurvitz*, 84 Cal. App. 4th at 1241, rather the speech “must threaten to prejudice the entire
28 community so that twelve unbiased jurors cannot be found.” *CBS, Inc. v. U.S. Dist. Court for Cent.*

1 *Dist. of California*, 729 F.2d 1174, 1180 (9th Cir. 1984) (granting petition for writ of mandamus
2 where district court, before issuing prior restraint order, did not assess capacity of pretrial publicity
3 to prejudice the entire community).

4 Plaintiffs have not met this standard. They did not present any evidence that a single
5 member of the jury venire was aware of the *Wall Street Journal* advertisement, let alone establish
6 that this advertisement or similar future speech would actually impact Plaintiffs' ability to obtain a
7 fair trial. *See In re Dan Farr Prods.*, 874 F.3d at 593 (rejecting prior restraint where "there is no
8 evidence connecting the scope of Petitioners' speech with the relevant jury pool"). They presented
9 no evidence to support their speculative (and frankly imaginary) claim that the advertisement
10 preconditioned the jury venire.

11 **B. Less Restrictive Alternatives to a Prior Restraint on Monsanto's Speech Are**
12 **Readily Available.**

13 The Court should deny Plaintiffs' Motion for the additional, independent reason that their
14 proposed prior restraint on Monsanto's speech is not the least restrictive means of ensuring a fair
15 trial. "It is well established that 'frequent and specific cautionary admonitions and jury instructions
16 . . . constitute the accepted, presumptively adequate, and plainly less restrictive means of dealing
17 with the threat of jury contamination.'" *Steiner*, 220 Cal. App. 4th at 1490 (2013) (quoting *NBC*
18 *Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1221 (1999)). Indeed, the Court
19 has repeatedly and consistently instructed this jury to avoid media during the pendency of this trial.

20 The Court of Appeal in *Steiner* expressly rejected that a gag order "is the appropriate means
21 of handling the threat of jury contamination" as opposed to juror admonishments. *Id.* In *Steiner*,
22 after the jury was impaneled, the defendant moved for an order requiring plaintiffs' attorney to
23 remove pages from her law firm's website regarding recent successes against the manufacturer in
24 similar suits. 22 Cal. App. 4th at 1483. The Superior Court, Santa Barbara County, granted
25 defendant's motion *and* instructed jurors to not conduct any internet searches regarding the
26 attorneys or read any articles about the case or anyone involved. *Id.* "Concerned that a juror might
27 ignore these admonitions, the court ordered the attorney to remove for the duration of trial two
28 pages from her web site discussing the similar cases." *Id.* at 1482. The Court of Appeal held that

1 “this was an unlawful prior restraint on the attorney’s free speech rights under the First
2 Amendment.” *Id.* at 1482. Instead, the trial court should have merely instructed the jurors not to
3 conduct web searches and trusted that the jurors would follow its instructions. *Id.* at 1492 (citations
4 omitted). The Court of Appeal stated that such a belief was “necessary to maintain some balance
5 with the greater mandate that speech shall be free and unfettered.” *Id.*

6 In sum, Plaintiffs have not met their burden to show that Monsanto’s speech presents an
7 actual threat of imminent prejudice to Plaintiffs’ right to a fair trial nor shown that there are no
8 viable alternatives to a prior restraint on Monsanto’s speech. Unlike Monsanto, who presents real
9 evidence showing a deliberate intention by plaintiffs’ law firms to precondition potential San
10 Francisco Bay Area jurors with misinformation, Plaintiffs have come forward with no evidence
11 justifying a prior restraint of Monsanto’s speech nationwide during the pendency of this trial.

12 **CONCLUSION**

13 For the reasons set forth above, the Court should deny Plaintiffs’ Motion for Temporary
14 Restraining Order.

1 DATED: April 3, 2019

Respectfully submitted,

2 /s/ Kirby Griffis

3 Kirby Griffis (*pro hac vice*)
4 (kgriffis@hollingsworthllp.com)
5 Martin C. Calhoun (*pro hac vice*)
6 (mcalhoun@hollingsworthllp.com)
7 HOLLINGSWORTH LLP
8 1350 I Street, N.W.
9 Washington, DC 20005
10 Tel: (202) 898-5800
11 Fax: (202) 682-1639

12 Kelly A. Evans (*pro hac vice*)
13 (kevans@efstriallaw.com)
14 Jay J. Schuttert (*pro hac vice*)
15 (jschuttert@efstriallaw.com)
16 EVANS FEARS & SCHUTTERT LLP
17 2300 West Sahara Avenue, Suite 900
18 Las Vegas, NV 89102
19 Tel: (702) 805-0290
20 Fax: (702) 805-0291

21 Tarek Ismail (*pro hac vice*)
22 (tismail@goldmanismail.com)
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25 GOLDMAN ISMAIL TOMASELLI
26 BRENNAN & BAUM LLP
27 564 West Randolph Street, Suite 400
28 Chicago, IL 60661
Tel: (312) 881-5970
Fax: (312) 881-5191

Eugene Brown
(ebrown@hinshawlaw.com)
Amee Mikacich
(amikacich@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, CA 94111
Tel: (415) 362-6000
Fax: (415) 834-9070

Attorneys for Defendant
MONSANTO COMPANY