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**FILED**  
ALAMEDA COUNTY

APR 04 2019

CLERK OF THE SUPERIOR COURT

By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

ALVA AND ALBERTA PILLIOD,

Plaintiffs,

v.

MONSANTO COMPANY; WILBUR-ELLIS  
COMPANY, LLC; and WILBUR-ELLIS FEED,  
LLC,

Defendants.

Case No. RG 17862702

ORDER DENYING MOTION OF  
PLAINTIFFS TO PRECLUDE  
ADVERTISEMENTS RELATED TO  
SAFETY, TESTING, AND STUDIES

DATE 4/3/19  
TIME 9:00 AM  
DEPT 21

The motion of Plaintiffs to preclude Monsanto from publishing advertisements related to safety, testing, and studies regarding Roundup came on for hearing on Thursday 4/3/19, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Having reviewed the papers and having heard the arguments of counsel, and good cause appearing, IT IS HEREBY ORDERED: The motion of Plaintiffs to preclude Monsanto from publishing advertisements related to safety, testing, and studies regarding Roundup is DENIED.

1   FACTS

2           The parties are presenting the case to the jury in the courtroom against the backdrop of  
3 substantial press coverage outside the courtroom of similar cases in which plaintiffs have alleged  
4 that Monsanto's product Roundup has caused personal injury generally and non-Hodgkins  
5 Lymphoma generally.

6           The court considers the evidence of and/or takes judicial notice of the following:

- 7
- 8           1. Monsanto, sells Roundup, Roundup is a consumer product, and Monsanto has  
9           ongoing advertising directed to consumers nationwide. Monsanto's advertising  
10           includes statements regarding safety of Roundup. (Guard Dec., para 5-7.)  
11           (Esfandiary Dec., Exh 2. SI #12.)
  - 12           2. On 8/11/18 there was a jury verdict in favor of the plaintiff in *Johnson v. Monsanto*,  
13           San Francisco Sup Ct. There was substantial local publicity about the jury verdict.
  - 14           3. From 8/1/18 through 2/28/19, there was a substantial increase in Roundup litigation  
15           advertising on national TV. (Silverstein Dec., Exh A p11.)
  - 16           4. From 12/1/18 through 3/31/19, there was a substantial increase in Roundup litigation  
17           advertising on San Francisco area radio. (Silverstein Dec., Exh A, p14.)
  - 18           5. On 3/11/19, the Miller Firm, counsel for plaintiffs in this case, published a quarter-  
19           page Roundup litigation advertisement in the San Francisco Chronicle. (Silverstein  
20           Dec., Exh A, p15-16.)
  - 21           6. On 3/19/19 there was a phase 1 jury verdict in favor of the plaintiff in *Hardeman v.*  
22           *Monsanto*, N.D. Cal. on the issue of whether plaintiff's exposure to Roundup was a  
23           substantial factor in causing his non-Hodgkin's lymphoma. There was substantial  
24           local publicity about the jury verdict.  
25  
26

- 1 7. On 3/25/19 jury selection began in this case.
- 2 8. On 3/25/19 Monsanto published a full-page advertisement in the Wall Street Journal
- 3 stating that Roundup has been thoroughly tested. (Esfandiary Dec., Exh 1.)
- 4 9. On 3/27/19 there was a phase 2 jury verdict in favor of the plaintiff in *Hardeman v.*
- 5 *Monsanto*, N.D. Cal. on the issue of specific causation and damages. There was
- 6 substantial publicity about the jury verdict.
- 7
- 8 10. There are several hundred cases in the California coordinated proceeding, *In re*
- 9 *Roundup Products Cases*, JCCP 4953.
- 10 11. There are several hundred cases in the federal multidistrict litigation, *In re Roundup*
- 11 *Products Liability Litigation*, MDL 2741.
- 12

### 13 THE RIGHT TO FREE SPEECH AND THE RIGHT TO A FAIR JURY TRIAL

14 The United States Constitution, First Amendment, and the California Constitution, Art I,

15 sec 2(a), both protect free speech. Free speech includes the right to engage in commercial

16 speech. (*Nike v. Kasky* (2002) 27 Cal.4<sup>th</sup> 939, 951- 959) Plaintiffs seek a prior restraint on

17 speech, and a prior restraint is the “most serious and the least tolerable infringement on First

18 Amendment rights. ... This case law makes clear that ... the risk that witnesses in a civil trial

19 might be influenced by reading news reports of the testimony of other witnesses—cannot

20 possibly justify the censorship imposed.” (*Freedom Communications, Inc. v. Superior Court*

21 (2008) 167 Cal.App.4<sup>th</sup> 150, 153-154.) (See also *Steiner v. Superior Court* (2013) 220

22 Cal.App.4<sup>th</sup> 1479, 1486-1487.)

23

24

25 The United States Constitution, 6<sup>th</sup> Amendment, and the California Constitution, Art 1,

26 sec 16, both protect the right to trial by an impartial jury. The California Supreme Court has

1 recognized that in some “extraordinary” cases “adverse pretrial publicity may be so strong as to  
2 create a presumption of prejudice” but it has also refused to “presume that exposure to publicity,  
3 by itself, causes jurors to prejudge a defendant's guilt.” (*People v. Mackey* (2015) 233  
4 Cal.App.4<sup>th</sup> 32, 85.)

5 The court addressed the publicity surrounding the Roundup cases in voir dire. (*People v.*  
6 *Mackey* (2015) 233 Cal.App.4<sup>th</sup> 32, 83-84 [voir dire can limit the potential for prejudice].) The  
7 court has directed the jurors to not read, view, or consider information outside the courtroom  
8 regarding Roundup or claims against Monsanto. “It is well established that “frequent and  
9 specific cautionary admonitions and jury instructions ... constitute the accepted, presumptively  
10 adequate, and plainly less restrictive means of dealing with the threat of jury contamination.”  
11 (*Steiner v. Superior Court* (2013) 220 Cal.App.4<sup>th</sup> 1479, 1490.) “As a “general rule,” courts  
12 presume that juries can and will dutifully follow the instructions they are given.” (*People v.*  
13 *Washington* (2017) 15 Cal.App.4<sup>th</sup> 19, 26.)

14  
15  
16 THE ORDER

17 The motion of Plaintiffs to preclude Monsanto from publishing advertisements related to  
18 safety, testing, and studies regarding Roundup is DENIED.

19 There is a high burden for a prior restraint on Monsanto’s speech. The court follows the  
20 intermediate scrutiny standard set by case law. (*Steiner v. Superior Court* (2013) 220  
21 Cal.App.4<sup>th</sup> 1479, 1488.) First, the court must determine whether the speech concerns lawful  
22 activity and is not misleading. Monsanto’s advertising generally and the Wall Street Journal  
23 advertisement specifically are lawful and not misleading. The court could stop the analysis there.  
24 Second, and assuming the advertising were misleading, the asserted governmental interest in an  
25 impartial jury is substantial and the restraint would directly advance that interest but the prior  
26

1 restraint requested would be substantially more extensive than is necessary to serve the  
2 governmental interest. Plaintiffs have not demonstrated that Monsanto's advertising has a  
3 significant probability of creating prejudice by causing the jurors to prejudge the case.

4 The court also considers other factors that are particular to this case.

5 First, Monsanto's advertisement in the Wall Street Journal must be viewed in the context  
6 of the publicity surrounding the *Johnson* verdict on 8/11/18, the increase in Roundup litigation  
7 advertisements for the next four months, and the publicity surrounding the *Hardeman* phase 1  
8 verdict on 3/19/19. There has been a wide range of publicity, advertising, and available  
9 information regarding Roundup and the claims against Monsanto in a variety of media outlets.  
10

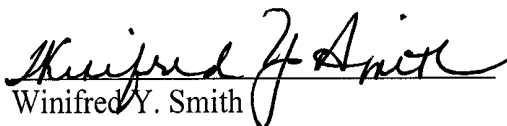
11 Second, this case is the first of several hundred cases in the California coordinated  
12 proceeding, *In re Roundup Products Cases*, JCCP 4953. The court should not restrain  
13 Monsanto from publishing information about the safety of Roundup in this case if the court is not  
14 willing to restrain both Monsanto and counsel for plaintiffs from publishing information about  
15 the safety of Roundup for the next three or four years. A restraining order of that length and  
16 breadth would be unconstitutional.  
17

18 Third, Monsanto's subjective intent is not a factor in the court's analysis. Assuming  
19 intent were a factor, then the court would find that the Wall Street Journal advertisement on  
20 3/25/19 was more likely to have been a reaction to the phase 1 jury verdict in *Hardeman v.*  
21 *Monsanto* on 3/19/19 and directed at investors and less likely to have been an effort to influence  
22 the jurors in this case.  
23

24 Fourth, at the hearing on 4/4/19, counsel for plaintiff asserted that Monsanto was using  
25 geofencing or geomarketing to target advertisements about the safety of Roundup to cellphones  
26 and other mobile electronic devices that in the area of the courthouse. Plaintiffs assert that this

1 targeted advertising on a central issue in this case is jury tampering. This raises a number of  
2 issues. There is the assertion of counsel, but no evidence that Monsanto is geomarketing to the  
3 courthouse. (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 176 [“argument of counsel does not  
4 constitute evidence”].) Assuming evidence, targeted high-tech advertising is different from, but  
5 very similar to, the low-tech practice of people carrying signs outside a courthouse or carrying  
6 placards or wearing buttons inside a courtroom. (*People v. Houston* (2005) 130 Cal.App.4<sup>th</sup> 279,  
7 309-318.) Assuming arguable misconduct, there are practical concerns. In contrast to persons in  
8 a courtroom with placards or buttons, the court cannot readily observe geomarketing. The court  
9 could, but will not, order plaintiffs and Monsanto to cease and desist from geomarketing the  
10 courthouse and to submit declarations of compliance. Even if issued, any such order precluding  
11 geomarketing would not preclude general marketing in Alameda County and the Bay Area, and  
12 the jurors might be exposed to such marketing at home and on their ways to and from the  
13 courthouse. The court is not persuaded that the alleged geomarketing is materially different  
14 from carrying signs outside a courthouse or carrying placards or wearing buttons inside a  
15 courtroom or that it requires a different judicial response.  
16  
17

18  
19 April 4, 2019  
Date

  
Winifred Y. Smith  
Coordination Trial Judge