



1 Michael L. Baum, Esq. (SBN: 119511)
 2 mbaum@baumhedlundlaw.com
 3 R. Brent Wisner, Esq. (SBN: 276023)
 4 rbwisner@baumhedlundlaw.com
 5 Pedram Esfandiary (SBN: 312569)
 6 pesfandiary@baumhedlund.com
 7 **BAUM HEDLUND, ARISTEI, &**
 8 **GOLDMAN, P.C.**
 9 10940 Wilshire Blvd., 17th Floor
 10 Los Angeles, CA 90024
 11 Telephone: (310) 207-3233
 12 Facsimile: (310) 820-7444

Michael Miller (*pro hac vice*)
mmiller@millerfirmllc.com
 Curtis G. Hoke (SBN: 282465)
choke@millerfirmllc.com
THE MILLER FIRM, LLC
 108 Railroad Ave
 Orange, VA 22960
 Telephone: (540) 672-4224
 Facsimile: (540) 672-3055

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Attorneys for Plaintiffs

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

12 Alva and Alberta Pilliod,
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 14 Plaintiffs,
 15 vs.
 16 Monsanto Company,
 17
 18 Defendant.

Case No.: RG17862702

**PLAINTIFFS' OPPOSITION TO
 MONSANTO COMPANY'S REQUEST
 FOR JUDICIAL NOTICE OF U.S.
 ENVIRONMENTAL PROTECTION
 AGENCY'S APRIL 2019 GLYPHOSATE
 DOCUMENT**

Hon. Judge Winifred Smith
 Dept. 21
 Trial Date: March 18, 2019

ARGUMENT

22 Several days following conclusion of Plaintiffs case-in-chief, the EPA published an updated
 23 interim evaluation of glyphosate, requesting comments from the public and scientific community. It
 24 is still not a final report and it makes the same methodological errors of not following the EPA's
 25 proper guidelines that flawed its earlier analyses. *See* Ex. A. to Brown Decl. The agency's bottom-
 26 line conclusion is the same, namely that "glyphosate is unlikely to be carcinogenic to humans." *Id.* at
 27 19. Similar to other EPA and regulatory evaluations, the 2019 document contains multiple levels of
 28 hearsay which the Court previously held are not admissible under the public records exception of

1 Evidence Code 1280. However, unlike the other EPA reports, there has been no opportunity for
2 Plaintiffs' experts to evaluate and present testimony regarding this latest interim report. Plaintiffs
3 submit that none of this document should be presented to the jury at this late stage of the trial—it is
4 unduly prejudicial and cumulative. If the Court is inclined to admit any part of the document,
5 Plaintiffs request that only portions of the document be judicially noticed consistent with the Court's
6 earlier rulings. However, admitting anything more than the agency's conclusion—including the
7 portions of which Monsanto seeks judicial notice in the alternative—would subject Plaintiffs to
8 extreme prejudice and be improper under Evidence Code 352. The 2019 evaluation was published
9 *after* Plaintiffs rested, and by its own words, contains new analyses “reflect[ing] the conclusions of
10 EPA's most recent risk assessments” which have not been subject to testimony from Plaintiffs'
11 experts, are not relied upon by Monsanto's experts, and with which the jury has no familiarity.
12 Exhibit A. to Brown Decl. at 6. Indeed, the latest evaluation responds to criticisms—some of the
13 ones raised by Plaintiffs' experts—that the EPA failed to evaluate the safety of the formulated
14 product used by Plaintiffs, additional critiques and responses to IARC and the 2017 Scientific
15 Advisory Panel (“SAP”), and an updated comment on the Agricultural Health Study (“AHS”). *See*
16 *id.* at 7-11. Accordingly, several reasons militate against admitting these new opinions of the agency.

17 *First*, Plaintiffs never had an opportunity to address the revised 2019 evaluation through
18 competent expert testimony during Plaintiffs' case-in-chief, despite the document raising additional
19 criticisms of the IARC classification and responding to the 2017 SAP comments. *Second*, there is no
20 evidence in the record regarding the bases or process of the EPA's new analysis. *Third*, none of
21 Monsanto's witnesses rely on the April 2019 evaluation, thereby precluding effective cross-
22 examination regarding the quality of the agency's new assessment and rendering the hearsay
23 document disembodied from any form of in-court testimony. This is the very definition of undue
24 prejudice. *See* Evid. Code, § 352 (evidence may be excluded if likely “to create substantial danger of
25 undue prejudice, of confusing the issues, or of misleading the jury.”).¹

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27
28 ¹ It is worth noting that the incomplete, interim status of the evaluation decreases its probative value even further.

1 Notwithstanding, if the Court is inclined to rule that select portions of the document do not
2 contain impermissible hearsay— e.g., the portions identified in Monsanto’s brief as pages 1, 7-11,
3 and 19—Plaintiffs propose that all references to the EPA’s new analyses, critiques, and additional
4 responses to IARC and SAP in those pages be redacted except the agency’s bottom line conclusion
5 regarding the carcinogenicity of glyphosate (with which the jury is already familiar) found on page
6 19, namely that “the agency has determined that glyphosate is not likely to be carcinogenic to humans
7 and therefore a quantitative cancer assessment was not conducted.” Ex. A to Brown Decl. at 19.
8 Portions identifying this document as an interim report and still subject to modification following an
9 open comment period should be read as well. This will mitigate the certain prejudice that would
10 occur if the jury is presented with evidence regarding the agency’s glyphosate evaluation which has
11 not been a subject of *any* testimony, fact or expert, while permitting Monsanto to introduce evidence
12 it believes supportive of its case.

13 Moreover, Plaintiffs have a right to present rebuttal evidence in the event that the Court takes
14 judicial notice of such new facts. *See Tramonte v. Fibreboard Corp.* (5th Cir. 1991) 947 F.2d 762,
15 764 (“The trial court generally admits rebuttal evidence either to counter facts presented in the
16 defendant’s case in chief...or to rebut evidence unavailable earlier through no fault of the
17 plaintiff[.]”). In direct rebuttal to the 2019 evaluation, Plaintiffs intend to play a short segment
18 (estimated to last no longer than 10 mins) from the video deposition of Monsanto corporate witness,
19 Mr. Todd Rands.² Mr. Rands worked as the “External Affairs Lead and Strategic Transactions
20 Counsel” at Monsanto and was proffered to testify as a PMK and in his personal capacity. *See* Ex. 1,
21 Rands Dep. at 17:22-18:1. At deposition, Mr. Rands testified that Monsanto hired a consulting firm,
22 Hakluyt, to conduct “corporate intelligence” work at agencies and organizations—such as the EPA—
23 for Monsanto to gauge its relationship with external entities and potential for adverse regulatory
24 outcomes relative to glyphosate. *See* Ex. 1, Rands Dep. at 364:18-365:17; Ex. 661 at 2 (“We asked
25 our associates in Washington, D.C. to take the temperature on current regulatory attitudes to
26 glyphosate.”). Mr. Rands testified that this work, and the report generated by Hakluyt, were executed
27

28 ² Mr. Rands’ deposition was not previously played.

1 and received in the regular course of Monsanto's business. *See* Ex. 1, Rands Dep. at 364:18-22.
2 Hakluyt concluded that, as of July 2018, the "deregulatory and pro-business agenda of the White
3 House is seen as favoring [Monsanto];]" that the executive "ha[s] Monsanto's back on pesticides
4 regulation; and that "Monsanto need not fear any additional regulation from this administration."
5 Ex. 661 at 2; Ex. 1, Rands Dep. at 387:1-23 ("Q. And according to this report, the political
6 environment was favorable to Monsanto with respect to glyphosate, right? A. That's the gist of what
7 their report is summarizing.").

8 This evidence goes directly to the credibility of the 2019 EPA glyphosate evaluation, issued
9 by an administration which holds itself out as favoring Monsanto's business interests. If the 2019
10 document is admitted, the jury should be permitted to assess the evidentiary weight afforded to the
11 latest EPA evaluation with consideration of evidence evincing bias. Accordingly, Plaintiffs request
12 that, if the Court is inclined to take judicial notice of any part of the 2019 EPA glyphosate evaluation
13 document, Plaintiffs be permitted to proffer this limited rebuttal evidence.

14 CONCLUSION

15 For the aforementioned reasons, Plaintiffs respectfully request that the Court deny
16 Monsanto's request to take judicial notice of the 2019 EPA glyphosate evaluation document. To the
17 extent that the Court is inclined to admit select portions of the document, Plaintiffs request that this
18 be limited to the agency's bottom-line conclusion on page 19 of the document.

19
20 Dated: May 4, 2019

BAUM HEDLUND ARISTEI & GOLDMAN, P.C.

21
22 

23 Pedram Esfandiary (SBN: 312569)

pesfandiary@baumhedlundlaw.com

24 Michael L. Baum (SBN: 119511)

mbaum@baumhedlundlaw.com

25 R. Brent Wisner (SBN: 276023)

rbwisner@baumhedlundlaw.com

26 10940 Wilshire Blvd., 17th Floor

27 Los Angeles, CA 90024

Telephone: (310) 207-3233

28 Facsimile: (310) 820-7444

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THE MILLER FIRM, LLC
Michael Miller (*pro hac vice*)
mmiller@millerfirmllc.com
108 Railroad Ave
Orange, VA 22960
Telephone: (540) 672-4224
Facsimile: (540) 672-3055

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

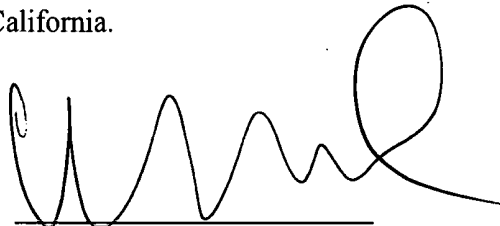
3 I am employed in the county of Los Angeles, State of California. I am over the age of 18 and
4 not a party to the within action; my business address is: 10940 Wilshire Blvd., 17th Floor, Los Angeles,
5 CA 90024.

6 On May 6, 2019, I served the foregoing document described as **PLAINTIFFS' OPPOSITION**
7 **TO MONSANTO COMPANY'S REQUEST FOR JUDICIAL NOTICE OF U.S.**
8 **ENVIRONMENTAL PROTECTION AGENCY'S APRIL 2019 GLYPHOSATE DOCUMENT**
9 on the interested parties and/or through their attorneys of record by depositing the original or true copy
10 thereof as designated below, at Los Angeles, California, addressed to the following:

11 **(X) E-MAIL OR ELECTRONIC TRANSMISSION:** In accordance with the Court's Order
12 (CMO No. 2) governing Case No. JCCP 4953 authorizing all documents to be served electronically
13 upon interested parties via Case Anywhere and its litigation system.

14 **(X)** I declare under penalty of perjury under the laws of the State of California that the
15 above is true and correct.

16 Executed on May 6, 2019 at Los Angeles, California.

17 

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19 Valeriya Adlivankina