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11 IN THE UNITED STATES DISTRICT COURT  
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 13

14  
 15 **NATIONAL ASSOCIATION OF WHEAT  
 GROWERS ET AL.,**

16 **PLAINTIFFS,**

17 **v.**

18 **LAUREN ZEISE, IN HER OFFICIAL  
 19 CAPACITY AS DIRECTOR OF THE  
 OFFICE OF ENVIRONMENTAL  
 20 HEALTH HAZARD ASSESSMENT; AND  
 XAVIER BECERRA, IN HIS OFFICIAL  
 21 CAPACITY AS ATTORNEY GENERAL  
 OF THE STATE OF CALIFORNIA,**

22 **DEFENDANTS.**  
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**DEFENDANTS' OBJECTIONS TO  
 EVIDENCE IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR A  
 PRELIMINARY INJUNCTION**

Date: February 20, 2018  
 Time: 1:30 p.m.  
 Courtroom: 5  
 Judge: The Honorable William B.  
 Shubb  
 Trial Date: None set.  
 Action Filed: November 15, 2017

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1 Defendants Dr. Lauren Zeise, Director of the Office of Environmental Health Hazard  
2 Assessment (“OEHHA”) and Xavier Becerra, Attorney General of the State of California (jointly,  
3 “State Parties”) submit the following objections to the evidence submitted in support of the  
4 motion for a preliminary injunction filed by Monsanto Chemical Company and the plaintiff trade  
5 associations (collectively, “Monsanto”).  
6

### 7 INTRODUCTION

8 Much of the evidence submitted by Monsanto in support of its motion for a preliminary  
9 injunction is not fact, but rather is speculation built on multiple false assumptions: that it is certain  
10 that the plaintiffs will be required under Proposition 65, Health & Safety Code, § 25249.5 et seq.,  
11 to warn consumers about the risks of exposure to glyphosate, and further, that the language of that  
12 warning will be false and controversial. As discussed in the State Parties’ opposition to  
13 Monsanto’s preliminary-injunction motion (“Opposition”): there is no such present warning  
14 requirement; it is far from certain that any of the plaintiffs will ever be subject to a warning  
15 requirement; and, should a warning be required in the future, the warning can be tailored to the  
16 product and chemical in question so that it is factual and uncontroversial.

17 Based on these false premises, plaintiffs’ declarants speculate that a Proposition 65 warning  
18 requirement will cause an array of harm, from loss of reputation to disruption of food supply and  
19 private enforcement litigation. Declarants’ sky-is-falling speculations do not constitute evidence,  
20 however, and the rules of evidence prohibit such speculation by lay witnesses. Thus, under Rules  
21 403 and 602 of the Federal Rules of Evidence, the State Parties object to portions of the  
22 declarations submitted by Monsanto as identified below.

23 In addition, as specified below, the State Parties object to the declarants’ proffered hearsay  
24 evidence under Rule 802 of the Federal Rules of Evidence.

25 Thus, the State Parties request that the Court exclude the identified portions of declarations  
26 or, at a minimum, disregard them in its consideration of Monsanto’s preliminary-injunction  
27 motion.  
28

1 **LEGAL BACKGROUND**

2 A defendant may oppose a motion for injunctive relief by raising any applicable objections,  
3 including evidentiary objections. *See, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213  
4 F.Supp.2d 1146, 1153–1156 (C.D. Cal. 2002). While a preliminary-injunction applicant may be  
5 allowed to submit evidence that is “less formal” and “less complete” than required for normal  
6 motion practice, and it need not meet normal evidentiary standards, *see, e.g., Heideman v. S. Salt*  
7 *Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003), the “weight to be given such evidence is a  
8 matter for the Court’s discretion, upon consideration of the competence, personal knowledge, and  
9 credibility of the [declarant].” *Bracco v. Lackner*, 462 F.Supp. 436, 442 n.3 (N.D. Cal. 1978); *see*  
10 *also Marshall Durbin Farms, Inc. v. National Farmers Org. Inc.*, 446 F.2d 353, 357 (5th Cir.  
11 1971) (while hearsay may support the motion, “courts have shown appropriate reluctance” to  
12 issue an injunction when the moving party substantiates allegations on information and belief).  
13 Here, the Court should give no weight to the portions of Monsanto’s declarations that fail to meet  
14 the basic evidentiary standards for the competence and personal knowledge of the declarants, and  
15 for relevance to the issues at hand.

16 **OBJECTIONS**

17 **I. OBJECTIONS TO SPECULATION (FED. R. EVID. 403, 602)**

18 Under Rule 602 of the Federal Rules of Evidence, “[a] witness may testify to a matter only  
19 if evidence is introduced sufficient to support a finding that the witness has personal knowledge  
20 of the matter.” Fed. R. Evid. 602. Witnesses are not “permitted to speculate, guess, or voice  
21 suspicions.” 27 Charles Alan Wright Et Al., *Federal Practice & Procedure Evidence* § 6026 (2d  
22 ed. 2007). Where lay “testimony is mere speculation,” it does not assist the trier of fact, and thus  
23 is inadmissible. 4-701 Weinstein’s *Federal Evidence* § 701.03 (2017). Thus, evidence that is  
24 purely speculative, or is based on unidentified—and, moreover, incorrect—assumptions should be  
25 excluded under Rule 602.

26 The declarants’ speculative assertions should also be excluded under 403 of the Federal  
27 Rules of Evidence because, even if they were marginally probative of any material issue in these  
28

1 proceedings (which they are not), that probative value would be substantially outweighed by the  
2 danger of unfair prejudice or confusion of the issues.

3 **A. The declarants speculate that the plaintiffs and their members will be**  
4 **forced to provide a “false, misleading, and highly controversial warning.”**

5 Many of the declarants supporting Monsanto’s motion assert that the plaintiffs and their  
6 members will be forced to provide a “false, misleading, and highly controversial warning,”  
7 Heering Decl. Supp. Mot. Prelim. Inj.,<sup>1</sup> ¶ 34, that “any product containing glyphosate residues  
8 sold in California... ‘contains a chemical known to the State of California to cause cancer’” Hurst  
9 Decl., ¶ 9. This assertion is speculative and based on false assumptions.

10 As explained in the State Parties’ Opposition, the plaintiffs and their trade association  
11 members may never be required to provide a Proposition 65 warning. See Opp’n at 5-6, 21-25.  
12 And, even if Plaintiffs or their members are required to warn, factual and uncontroversial  
13 Proposition 65 warnings can be crafted to accurately convey the cancer risk from the glyphosate  
14 in the specific product. See Opp’n at 6-10, 25, 31-33.

15 Thus, the declarants’ statements that they are or will be forced to provide a “false” or  
16 “controversial” warning, or any warning at all, are purely speculative and should be disregarded  
17 under Rules 602 and 403 of the Federal Rules of Evidence. On that basis, the State Parties object  
18 to the following paragraphs of the declarations in which the declarants speculate that they will be  
19 required to provide a “false” or “controversial” warning on their products:

- 20 • Brinkmeyer Decl., ¶¶ 7, 9;
- 21 • Heering Decl., ¶¶ 34, 40, 44, 54;
- 22 • Hurst Decl., ¶¶ 9, 19-20;
- 23 • Inman Decl., ¶¶ 10-11;
- 24 • Jackson Decl., ¶¶ 12-14;
- 25 • Kessel Decl., ¶ 6;
- 26 • Martinson Decl., ¶¶ 11, 18-19;

27 \_\_\_\_\_  
28 <sup>1</sup> All references to declarations refer to declaration submitted in support of Monsanto’s  
motion for a preliminary injunction.

- 1 • McCarty Decl., ¶¶ 7-10, 13;
- 2 • Mehan Decl., ¶¶ 8-10;
- 3 • Novak Decl., ¶ 7;
- 4 • Pinel Decl., ¶¶ 15, 17;
- 5 • Stoner Decl., ¶ 10;
- 6 • Wogsland Decl., ¶¶ 11, 17;

7 These paragraphs should be excluded, or, at a minimum, disregarded by the Court in its  
8 consideration of Monsanto’s motion for a preliminary injunction.<sup>2</sup>

9 **B. The declarants speculate that the glyphosate warning will damage the**  
10 **plaintiffs’ reputations, placing them at a competitive disadvantage.**

11 Monsanto’s declarations repeatedly speculate that a potential Proposition 65 warning would  
12 amount to “compelled speech” and “misinformation” that will disparage the reputation of their  
13 members’ businesses and crops. See, e.g., Brinkmeyer Decl., ¶ 9; Heering Decl., ¶¶ 39, 45, 53;  
14 Hurst Decl., ¶¶ 19-20; Inman Decl., ¶¶ 10-11; Jackson Decl., ¶ 13. And the declarants build upon  
15 this speculation to further speculate that this “misinformation” will negatively impact consumer  
16 preferences and place plaintiffs and their members at a competitive disadvantage. See, e.g.,  
17 Heering Decl., ¶ 52; Hurst Decl., ¶ 21; Inman Decl., ¶ 17; Jackson Decl., ¶ 19.

18 But, again, as explained above and in the State Parties’ Opposition, even if the plaintiffs  
19 and their members cause detectable levels of exposure to glyphosate, Proposition 65 warnings  
20 may never be required, and factual and uncontroversial Proposition 65 warnings can be crafted to  
21 accurately convey the cancer risk from the glyphosate in the specific product. See Opp’n at 5-10,  
22 21-25, 31-33. Thus, it is presently unknown whether the plaintiffs or their members will cause  
23 any detectable—let alone significant—exposures to glyphosate, whether any plaintiffs or their  
24 members will have to warn, what that warning would be, whether the warning would damage  
25 their reputations, and whether that damage would then place them at a competitive disadvantage.

26  
27 \_\_\_\_\_  
28 <sup>2</sup> A consolidated list of the declarations and paragraphs objected to on any grounds are provided in the Proposed Order filed herewith.

1 Thus, the declarants' statements that they will required to spread false information about  
2 their products that will harm their reputations and place them at a competitive disadvantage are  
3 purely speculative and should be disregarded under Rules 602 and 403. On that basis, the State  
4 Parties object to the following paragraphs of the declarations in which the declarants speculate as  
5 to the reputational harm and resultant competitive disadvantage they believe they will suffer if  
6 subjected to a Proposition 65 warning requirement:

- 7 • Brinkmeyer Decl., ¶¶ 7-9, 15-16;
- 8 • Heering Decl., ¶¶ 39, 45; 52-54;
- 9 • Hurst Decl., ¶¶ 19-21;
- 10 • Inman Decl., ¶¶ 10-11, 17;
- 11 • Jackson Decl., ¶¶ 13, 19;
- 12 • Kessel Decl., ¶ 11;
- 13 • Martinson Decl., ¶¶ 18-19;
- 14 • McCarty Decl., ¶¶ 10, 14;
- 15 • Mehan Decl., ¶ 12;
- 16 • Novak Decl., ¶ 7;
- 17 • Pinel Decl., ¶ 17;
- 18 • Stoner Decl., ¶¶ 10, 16;
- 19 • Wogsland Decl., ¶¶ 17-18;
- 20 • Zander Decl., ¶¶ 8, 13.

21 These paragraphs should be excluded, or, at a minimum, disregarded by the Court in its  
22 consideration of Monsanto's motion for a preliminary injunction.

23 **C. The declarants speculate that the glyphosate warning will disrupt the**  
24 **herbicide, and agricultural industries and decrease demand for the**  
25 **plaintiffs' products.**

26 The declarants further speculate that the Proposition 65 warning requirement would cause  
27 severe disruption throughout the agricultural and herbicide industries and reduce the demand for  
28 their crops and for glyphosate products. For example, declarants speculate: that farmers will be  
forced to cease or limit use of glyphosate or to segregate the glyphosate-treated crops in the

1 supply chain, see, e.g., Brinkmeyer Decl., ¶ 10; Hurst Decl., ¶¶ 6, 11, 14, 16-18; Jackson Decl., ¶¶  
2 10, 16; that crop purchasers will require the collection of data and testing, see, e.g., Inman Decl.,  
3 ¶¶ 12-13; and, finally, that a Proposition 65 warning will reduce consumer or food producer  
4 demand, Hurst Decl., ¶ 13; Jackson Decl., ¶ 14; McCarty Decl., ¶ 8; Heering Decl., ¶¶ 46-48, 50-  
5 52.

6 But, again, as explained above, these statements are pure speculation, and are based upon a  
7 flawed assumption: that the plaintiffs and their members are certain to be subject to a warning  
8 requirement requiring them to state their products contain a chemical known to cause cancer. See  
9 Opp'n at 5-10, 21-25, 31-33. Thus, concerns over disruption of supply chains and decreased  
10 demand for products—on the basis of a hypothetical warning requirement—are also purely  
11 speculative.

12 Under Rules 602 and 403 of the Federal Rules of Evidence, such speculation is  
13 inadmissible. The State Parties therefore object to the following paragraphs of the declarations in  
14 which the declarants speculate as to industry impacts and reduced product demand they believe  
15 will result from a Proposition 65 warning requirement:

- 16 • Brinkmeyer Decl., ¶¶ 10, 13-14;
- 17 • Heering Decl., ¶¶ 35, 38-41, 44, 46-54;
- 18 • Hurst Decl., ¶¶ 6, 11-14, 16-18;
- 19 • Inman Decl., ¶¶ 12-13;
- 20 • Jackson Decl., ¶¶ 10, 14, 16-18;
- 21 • Kessel Decl., ¶¶ 7-10;
- 22 • Martinson Decl., ¶¶ 15-17;
- 23 • McCarty Decl., ¶¶ 8-9, 11-12;
- 24 • Mehan Decl., ¶¶ 10-11;
- 25 • Novak Decl., ¶ 8;
- 26 • Pinel Decl., ¶ 14;
- 27 • Stoner Decl., ¶¶ 12, 14-15;
- 28 • Wogsland Decl., ¶¶ 13-15;

- Zander Decl., ¶¶ 9-12.

These paragraphs should be excluded, or, at a minimum, disregarded by the Court in its consideration of Monsanto's motion for a preliminary injunction.

**D. The declarants speculate that sampling and testing requirements will be disruptive and burdensome.**

Monsanto's declarants further speculate that they will be required to collect data on, and test for, glyphosate residue in crops, either based on purchaser demands or to defend themselves against private enforcement litigation. See, e.g., Inman Decl., ¶¶ 12-13; Brinkmeyer Decl., ¶ 13; Hurst Decl., ¶ 13; Jackson Decl., ¶ 18; McCarty Decl., ¶ 11; Pinel Decl., ¶ 16. But, again, pure speculation by lay witnesses is not permitted under the Federal Rules of Evidence, and must be disregarded.

In addition, federal law already sets a maximum legal residue limit (called a tolerance) for glyphosate on agricultural food products. See Opp'n at 38, n58. Thus, the declarants' assertions implicitly speculate that any testing for glyphosate levels will be in some way different from what is already required under federal law in order to satisfy these tolerances.

Under Rules 602 and 403 of the Federal Rules of Evidence, such speculation is inadmissible. Thus, the State Parties object to the following paragraphs of the declarations in which Plaintiffs speculate that they will be forced to perform costly and disruptive testing of their products for glyphosate residue:

- Brinkmeyer Decl., ¶ 13;
- Heering ¶¶ 40, 44, 55-59;
- Hurst Decl., ¶¶ 12-13;
- Inman Decl., ¶¶ 12-13;
- Jackson Decl., ¶ 18;
- Kessel Decl., ¶ 9;
- McCarty Decl., ¶ 11;
- Mehan Decl., ¶ 10;
- Pinel Decl., ¶ 16;

- 1 • Stoner Decl., ¶¶ 12-13;
- 2 • Wogsland Decl., ¶¶ 13-14.

3 These paragraphs should be excluded, or, at a minimum, disregarded by the Court in its  
4 consideration of Monsanto’s motion for a preliminary injunction.

5 **E. The declarants speculate that the Proposition 65 warning requirement will**  
6 **subject the plaintiffs to a risk of unwarranted litigation.**

7 Additionally, the declarations in support of Monsanto’s preliminary-injunction motion  
8 contain speculation that the plaintiffs will have to choose between applying the “false”  
9 Proposition 65 warning to their products or face the prospect of costly litigation. See, e.g.,  
10 Jackson Decl., ¶ 14; McCarty Decl., ¶ 7; Mehan Decl., ¶ 8; Pinel Decl., ¶ 15; Wogsland Decl., ¶  
11 11. In other words, the declarants speculate that they will be subject to a warning requirement,  
12 and that a decision not to provide the warning would inevitably result in enforcement actions  
13 against the plaintiffs or their members, including so-called “private strike suits brought by bounty  
14 hunters.” Heering Decl., ¶¶ 40-44, 49, 55-59.

15 But the assertion that costly litigation will flow from a decision not to warn requires several  
16 layers of speculation. First, as discussed above, an assumption must be made that any of the  
17 plaintiffs’ or their members’ products will contain detectable amounts of glyphosate at levels that  
18 will subject them to a warning requirement. Second, even if they are subject to a warning  
19 requirement, an assumption must be made that they will choose not to warn. Third, other entities  
20 must decide to sue the plaintiffs for Proposition 65 violations. Fourth, as discussed in the  
21 Opposition, Proposition 65 requires that any would-be private litigant provide the Attorney  
22 General with a certificate of merit evaluating their claims, and any time the Attorney General  
23 determines that the claims are without merit, that determination is made public. See Opp’n at 10-  
24 11. Thus, an assumption must be made that would-be litigants overcome this hurdle to bring  
25 suit against the plaintiffs or their members.

26 The State Parties object to such speculation under Rules 602 and 403 of the Federal Rules  
27 of Evidence, and therefore object to the following paragraphs of the declarations in which the  
28

1 declarants speculate that, if they choose not to provide a Proposition 65 warning, they will face  
2 the risk of costly litigation:

- 3 • Heering ¶¶ 35, 40-44, 49, 55-59;
- 4 • Jackson Decl., ¶ 14;
- 5 • McCarty Decl., ¶ 7;
- 6 • Mehan Decl., ¶¶ 8, 10;
- 7 • Pinel Decl., ¶ 15;
- 8 • Wogsland Decl., ¶ 11.

9 These paragraphs should be excluded, or, at a minimum, disregarded by the Court in its  
10 consideration of Plaintiffs' motion for a preliminary injunction.

## 11 **II. OBJECTIONS TO HEARSAY EVIDENCE**

12 Some of the declarants attempt to relay the out-of-court statements or assertions of other  
13 entities, offered for the truth of the matter asserted therein, without any additional substantiation.  
14 Under Rule 802 of the Federal Rules of Evidence—the rule against hearsay—these assertions are  
15 inadmissible.

16 The hearsay statements are as follows:

- 17 • “[M]ultiple major retailers of Monsanto’s glyphosate products in California have  
18 determined that they will not sell glyphosate-based products unless those products  
19 contain a Proposition 65 warning on the products’ labels.” Heering Decl., ¶ 35.
- 20 • “[S]everal major retailers have already indicated that they will nonetheless require a  
21 warning[.]” Id. at ¶ 36.
- 22 • “Major retailers have informed Monsanto that because of interstate distribution and  
23 logistics limitations, stores in States surrounding California may also receive  
24 glyphosate-based products that contain a Proposition 65 warning.” Id. at ¶ 37.
- 25 • “[A] number of food manufacturers have already made inquiries of Monsanto  
26 concerning the Proposition 65 listing[.]” Id. at ¶ 49.
- 27 • “Monsanto is already aware from many sources of consumers reacting negatively to the  
28 Proposition 65 listing[.]” Id. at ¶ 53.

- 1 • “Millers have made it known that they are going to start requiring the collection of data
- 2 and testing of crops for glyphosate.” Inman Decl., ¶ 12.
- 3 • “Pasta companies have informed me that they are very scared about the labeling
- 4 requirement.” Martinson Decl., ¶ 15.
- 5 • “Millers have already informed us of their concerns with the labeling regime that will
- 6 be passed along to us.” Stoner Decl., ¶ 12.

7 Because the foregoing statements plainly violate Rule 802 of the Federal Rules of  
8 Evidence, they should be excluded, or, at a minimum, disregarded by the Court in its  
9 consideration of Monsanto’s motion for a preliminary injunction.

### 10 CONCLUSION

11 For all of the foregoing reasons, the State Parties respectfully request that the Court enter an  
12 order sustaining their objections to the identified portions of the declarations in submitted support  
13 of Monsanto’s motion for a preliminary injunction.

14 Dated: January 22, 2018

Respectfully Submitted,

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