

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT
GROWERS; NATIONAL CORN
GROWERS ASSOCIATION; UNITED
STATES DURUM GROWERS
ASSOCIATION; WESTERN PLANT
HEALTH ASSOCIATION; IOWA
SOYBEAN ASSOCIATION; SOUTH
DAKOTA AGRI-BUSINESS
ASSOCIATION; NORTH DAKOTA
GRAIN GROWERS ASSOCIATION;
MISSOURI CHAMBER OF COMMERCE
AND INDUSTRY; MONSANTO
COMPANY; ASSOCIATED
INDUSTRIES OF MISSOURI;
AGRIBUSINESS ASSOCIATION OF
IOWA; CROPLIFE AMERICA; AND
AGRICULTURAL RETAILERS
ASSOCIATION,

Plaintiffs,

v.

LAUREN ZEISE, IN HER OFFICIAL
CAPACITY AS DIRECTOR OF THE
OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT; and
XAVIER BECERRA, in his
official capacity as Attorney
General of the State of
California,

Defendants.

CIV. NO. 2:17-2401 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
TO ALTER OR AMEND PRELIMINARY
INJUNCTION ORDER

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Before the court is defendant Xavier Becerra's Motion to Alter or Amend the Court's Order Granting Preliminary Injunction (Docket No. 81). The court held a hearing on the motion on June 11, 2018.

I. Legal Standard

A motion to reconsider a preliminary injunction is governed by Federal Rule of Civil Procedure 59(e).¹ See Credit Suisse 1st Boston Corp. v. Grunwald, 400 F.3d 1119, 11-2324 (9th Cir. 2005). A district court may reconsider its decision if it "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Smith v. Clark Cty. Sch. Dist., 727 F.3d 950, 955 (9th Cir. 2013) (citation omitted).

Motions for reconsideration "are directed to the sound discretion of the court." Riley v. Giguere, 631 F. Supp. 2d 1295, 1310 (E.D. Cal. 2009) (Karlton, J.); see also McDowell v. Calderon, 197 F.3d 1253, 1256 (9th Cir. 1999). However, reconsideration is an "extraordinary remedy" that should be used "sparingly in the interests of finality and [the] conservation of judicial resources." Kona Enters. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). A party may not use a motion to reconsider "to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the

¹ Although defendant's motion is styled as a "motion to alter or amend" the court's prior order, the parties agree that this motion is governed by Rule 59(e).

litigation.” Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (citing Kona Enters., 229 F.3d at 890).

II. Discussion

As discussed in the court’s February 26, 2018 order, this case concerns California’s Proposition 65, which, among other things, requires warning labels for products containing chemicals known to the state of California to cause cancer, as determined by certain outside entities. The court preliminarily enjoined the Attorney General from enforcing as against plaintiffs, plaintiffs’ members, and all persons represented by plaintiffs California Health & Safety Code § 25249.6’s requirement that any person in the course of doing business provide a clear and reasonable warning before exposing any individual to glyphosate.² (Docket No. 75.) In doing so, the court found that such a warning for glyphosate, as prescribed by § 25249.6 and the implementing regulations, was not purely factual and uncontroversial under the First Amendment, as required by Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985), and CTIA-The Wireless Association v. City of Berkeley, 854 F.3d 1105, 1117-18 (9th Cir. 2017).

The Attorney General now claims that reconsideration is warranted in light of new evidence and because the court

² Lauren Zeise, director of the Office of Environmental Health Hazard Assessment, was initially included in the court’s injunction, though per the parties’ stipulation, she was dismissed from the case and the injunction was amended to refer specifically to the Attorney General. (Docket No. 93.)

1 purportedly committed clear error by determining there is no
2 possible warning that can comply with Proposition 65 and not
3 violate plaintiffs' First Amendment rights. However, for the
4 following reasons, the court finds that neither ground warrants
5 the extraordinary remedy of reconsideration.

6 First, the court's order granting the preliminary
7 injunction speaks for itself. The Attorney General has not shown
8 that the court clearly erred in reaching its conclusions or that
9 the injunction is manifestly unjust. See Smith, 727 F.3d at 955.

10 Second, the Attorney General's "new evidence" does not
11 warrant reconsideration. Only some of the evidence could not
12 have been presented to the court previously -- the newly-adopted
13 no significant risk level (or "safe harbor level") for glyphosate
14 and corresponding Statement of Reasons, the decision in Monsanto
15 Co. v. Office of Environmental Health Hazard Assessment, 22 Cal.
16 App. 5th 534 (5th Dist. 2018), and the additional information
17 posted on the Office of Environmental Health Hazard Assessment
18 ("OEHHA") website.³ However, this new evidence does not change
19 the court's conclusion that the required Proposition 65 warning
20 for glyphosate is not purely factual and uncontroversial. The
21 safe harbor level for glyphosate, information on the OEHHA
22 website regarding the debate as to glyphosate's carcinogenicity,
23 and a decision by the California Court of Appeal regarding the
24 listing of glyphosate as a carcinogen -- but which did not

25
26 ³ Because plaintiffs do not oppose the Attorney General's
27 Request for Judicial Notice (Docket No. 88) and the court finds
28 the materials in the Request are properly subject to judicial
notice, the court hereby GRANTS the Request.

1 address the First Amendment -- have no relevance to the question
2 of whether the warnings required by Proposition 65 and the
3 corresponding regulations comply with Zauderer and CTIA.

4 The Attorney General also includes new citations to
5 sources either supporting the IARC's determination that
6 glyphosate is a probable carcinogen or criticizing agencies that
7 found it was not. Even assuming these citations constituted new
8 evidence under Rule 59,⁴ additional support for the IARC
9 determination does not change the fact that the overwhelming
10 majority of agencies that have examined glyphosate have
11 determined it is not a cancer risk. Once again, the court's
12 analysis here is not whether the IARC's determination is
13 persuasive or supported by competent evidence, but rather whether
14 a warning conveying the message that glyphosate causes cancer is
15 factual and uncontroversial.

16 The court next turns to the Attorney General's newly
17 proposed alternative warnings. Neither of these warnings
18 constitute new evidence warranting reconsideration under Rule 59.
19 The Attorney General's first proposed warning states: "WARNING:
20 This product can expose you to glyphosate, a chemical listed as
21 causing cancer pursuant to the requirements of California law.
22 For more information go to www.P65Warnings.ca.gov." (Mot. 10
23 (Docket No. 81-1)). This warning is not significantly different
24 from the existing safe harbor warning already rejected by this

25 ⁴ It appears that these sources could have been provided
26 in the Attorney General's opposition to the Motion for
27 Preliminary Injunction. See Marlyn, 571 F.3d at 880 (party may
28 not use a motion to reconsider to raise arguments or present
evidence that could reasonably have been raised earlier in the
litigation).

1 court, which states that glyphosate is a chemical known to the
2 state of California to cause cancer. Stating that a chemical is
3 listed as causing cancer "pursuant the requirements of California
4 law" conveys essentially the same message to consumers as stating
5 that a chemical is known to the state of California to cause
6 cancer. As the court previously stated, "[o]rdinary consumers do
7 not interpret warnings in accordance with a complex web of
8 statutes, regulations, and court decisions, and the most obvious
9 reading" of this alternate warning is that exposure to glyphosate
10 in fact causes cancer in humans. (See Prelim. Inj. Order 14.)

11 Further, California cannot remedy this warning by
12 simply pointing consumers to a website discussing the debate. It
13 would seem likely that few, if any, consumers will actually visit
14 the www.P65warnings.ca.gov website, meaning that as a practical
15 matter this website will not provide the necessary context that
16 might render this warning factual and uncontroversial. Even if
17 consumers were likely to visit this website, the Attorney General
18 conceded at oral argument that whether a warning is factual and
19 uncontroversial is determined by looking at the warning standing
20 alone. A warning that is deficient under the First Amendment may
21 not be cured by reference to an outside source.⁵

22
23 ⁵ Similarly, the court rejects the Attorney General's
24 suggestion that the warning does not violate the First Amendment
25 because plaintiffs may provide their own additional information
26 regarding glyphosate's carcinogenicity separate from the warning.
27 Accord Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n,
28 No. 16-111, 2018 WL 2465172, at *27 (June 4, 2018) (Thomas, J.
concurring) ("Because the government cannot compel speech, it
also cannot 'require speakers to affirm in one breath that which
they deny in the next.'" (quoting Pac. Gas & Elec. Co. v. Pub.
Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986))).

1 The Attorney General's second proposed warning does
2 provide additional context regarding the debate as to
3 glyphosate's carcinogenicity, stating:

4 WARNING: This product can expose you to
5 glyphosate, a chemical listed as causing cancer
6 pursuant to the requirements of California law.
7 The listing is based on a determination by the
8 United Nations International Agency for Research
9 on Cancer that glyphosate presents a cancer
10 hazard. The U.S. Environmental Protection Agency
11 has tentatively concluded in a draft document
12 that glyphosate does not present a cancer hazard.
13 For more information go to
14 www.P65warnings.ca.gov.

15 (Mot. 12.) However, this warning is not new evidence
16 under Rule 59(e) because there is no reason the Attorney General
17 could not have proposed such a warning in response to plaintiffs'
18 request for a preliminary injunction. See Marlyn, 571 F.3d at
19 880 (on motion to reconsider, party may not raise arguments or
20 present evidence that could have been raised earlier in the
21 litigation). The Attorney General argues that he could not have
22 offered such a proposed warning until he knew how the court would
23 rule on the preliminary injunction, but such contention is not
24 plausible. During oral argument on plaintiffs' Motion for a
25 Preliminary Injunction, the court proposed multiple iterations of
26 warnings providing more context regarding the debate on
27 glyphosate's carcinogenicity, none of which were acceptable to
28 the Attorney General. Indeed, the Attorney General specifically
rejected the court's proposal of a warning that would state that
glyphosate was a carcinogen as "determined by one of the agencies
but not by the others" because such language would "dilute" the

1 warning.⁶ (Hr'g Tr. at 51 (Docket No. 72).) In other words, the
2 Attorney General could have proposed his second alternative
3 warning, or agreed to a similar warning, before the court granted
4 a preliminary injunction, but he chose not to. To the contrary,
5 the Attorney General essentially took the position that the
6 warning he now advocates was insufficient.

7 Even assuming the second alternative warning could not
8 have been presented before and was binding on private enforcers
9 of Proposition 65, this warning does not warrant reconsideration
10 of the court's injunction. The court agrees that it is "an
11 impossible task" to disclose "everything on each side on the
12 scientific debate," see CTIA-The Wireless Association v. City of
13 Berkeley, 139 F. Supp. 3d 1048, 1071-72 (N.D. Cal. 2015), aff'd,
14 854 F.3d 1105 (9th Cir. 2017), and the law does not require a
15 warning label to disclose the details of the debate in the
16 scientific community regarding glyphosate's carcinogenicity -- to
17 do so would turn a warning label into an essay. However, it is
18 not clear that even a lengthy discussion regarding the
19 conflicting agency findings as to glyphosate's cancer risk would
20 comply with the First Amendment. Given the evidence in the
21 record, the court questions whether California has shown that
22 requiring a Proposition 65 warning for glyphosate directly
23 advances the law's stated interest in informing Californians
24 about exposures to chemicals that cause cancer. See Central

25 ⁶ Notably, the Attorney General continues to argue that
26 language providing more context is unnecessary and reserves the
27 right to raise this argument on appeal. (See Mot. 3 n.3.) This
28 reservation of a right to appeal even if the court grants
reconsideration tends to weigh against granting the Attorney
General's motion.

1 Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S.
2 557, 566 (1980); Cal. Chamber of Commerce v. Brown, 196 Cal. App.
3 4th 233, 258 (1st Dist. 2011).⁷

4 The Attorney General's second alternative warning is
5 also deficient because it conveys the message that there is equal
6 weight of authority for and against the proposition that
7 glyphosate causes cancer, or that there is more evidence that it
8 does, given the language stating that the EPA's findings were
9 only tentative, when the heavy weight of evidence in the record
10 is that glyphosate is not known to cause cancer.⁸ Accordingly,
11 neither of the Attorney General's alternative warnings, nor any
12 purported clear error by the court, weigh in favor of
13 reconsideration.

14 IT IS THEREFORE ORDERED that defendant's Motion to
15 Alter or Amend Court's Order Granting Preliminary Injunction

16
17 ⁷ It also appears that a warning properly characterizing
18 the debate as to glyphosate's carcinogenicity would not comply
19 with Proposition 65 and the applicable regulations and thus would
20 not advance a substantial state interest. See Central Hudson,
21 447 U.S. at 566. The Attorney General's own Settlement
22 Guidelines state that certain words or phrases are per se not
23 clear and reasonable, "such as (1) use of the adverb 'may' to
24 modify whether the chemical causes cancer . . . (as distinguished
25 from use of "may" to modify whether the product itself causes
26 cancer . . .); [and] (2) additional words or phrases that
27 contradict or obfuscate otherwise acceptable warning language."
28 Cal. Code Regs. tit. 11 § 3202(b). The Attorney General's second
alternate warning, by discussing the EPA's contrary finding that
glyphosate does not cause cancer, appears to "contradict or
obfuscate otherwise acceptable warning language" in violation of
this regulation.

26 ⁸ Once again, the court expresses no opinion as to
27 whether a statement that a chemical causes cancer is factual and
28 uncontroversial where there is stronger evidence in support of
the chemical's carcinogenicity.

(Docket No. 81) be, and the same hereby is, DENIED.

Dated: June 12, 2018

A handwritten signature in blue ink, reading "William B. Shubb", is written over a horizontal line.

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE