Court's Ruling

CIVSB2104801
DONNETTA STEPHENS

v.

MONSANTO COMPANY, et al.

Motion: **MSJ/MSA**
Movant: Defendants Monsanto Company
Respondent: Plaintiff Donnetta Stephens

Court's Prior Tentative

As the parties are aware, the Court has issued a tentative on July 9th. After considerable thought, the Court has decided to accept each parties excessively long filed memorandum of points and authorities in violation of the CRC. The document entitled "Errata" filed by the defense is the functional equivalent of a sur reply and will not be considered. As a result, the Court has changed its tentative as discussed below:

Judicial Notice

Defendants request judicial notice of the following 34 documents:

- The United States Environmental Protection Agency's (EPA) Pesticide Registration Notice (PRN) 98-10 (10/22/98) [Exh. 1];
- EPA's *Reregistration Eligibility Decision (RED) for Glyphosate* (9/93) [Exh. 2];
- Excerpts of Glyphosate, Pesticide Tolerance, 62 Fed. Reg. 17,723, 17,724, and 17,728 [Exh. 3];
- Excerpts of Glyphosate, Pesticide Tolerances, 67 Fed Reg. 60,934, 60,935, 60,936, and 60,943 (9/02) [Exh. 4];
- Excerpts of Glyphosate, Pesticide Tolerances, 69 Fed Reg. 65,081 and 65,086 (11/10/04) [Exh. 5];
- Excerpts of Glyphosate, Pesticide Tolerances, 73 Fed Reg. 73,586 and 73,589 (12/3/08) [Exh. 6];
- Excerpts of Glyphosate, Pesticide Tolerances, 78 Fed Reg. 25,396 and 25398 (5/1/13) [Exh. 7];
- The October 1, 2015 Report of the EPA's Cancer Assessment Review Committee (CARC), Health Effects Division, Office of Pesticide Programs' *Cancer Assessment Document-Evaluation of the Carcinogenic Potential of Glyphosate* [Exh. 8];

- The September 12, 2016 Report of the EPA's Office of Pesticide Programs' *Glyphosate Issue Paper: Evaluation of Carcinogenic Potential* [Exh. 9];
- The December 12, 2017 Report of the EPA's Office of Pesticide Programs' *Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential* [Exh. 10];
- The January 5, 2010 EPA approval letter with approved Monsanto GBH product labeling [Exh. 11];
- The July 1, 2009 EPA approval letter with approved Monsanto GBH product labeling [Exh. 12];
- The March 10, 2016 EPA approval letter with approved Monsanto GBH product labeling [Exh. 13];
- The October 18, 2016 EPA approval letter with approved Monsanto GBH product labeling [Exh. 14];
- The February 22, 2018 EPA approval letter with approved Monsanto GBH product labeling [Exh. 15];
- EPA's *Glyphosate-Proposed Interim Registration Review Decision,* case no. 0178 (4/23/19) (PID) [Exh. 16];
- Letter from Michael L. Goodi, Director, EPA OPP Registration Division, to Registrants (8/7/19) [Exh. 17];
- EPA's *Pesticide Registration* [Exh. 18];
- EPA's *Guidelines for Carcinogen Risk Assessment* at 1-11 (3/05) [Exh. 19];
- EPA's *Glyphosate Interim Registration Review Decision,* case no. 0178 (1/22/20) [Exh. 20];
- Brief of United States as Amicus Curiae in support of Monsanto, *Hardeman v. Monsanto Co.,* no. 19-16636 (9th Cir.) [Exh. 21];
- Brief of EPA, *Nat'l Res. Def. Council v. U.S. Env't Prot. Agency,* Dkt. No. 80, case nos. 20-70787 and 20-7081 (9th Cir., 5/18/21) [Exh. 22];
- Motion for Partial Remand without Vacatur, *Nat'l Res. Def. Council v. U.S. Env't Prot. Agency,* Dkt. No. 80, case nos. 20-70787 and 20-7081 (9th Cir., 5/18/21) [Exh. 23];
- IARC Monograph 112 and Preamble [Exh. 24];
- EFSA's *Conclusion on the Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate,* 13 EFSA J. 11:4302, at 2 (10/15) [Exh. 25];
- JMPR's *Pesticide Residues in Food-2016,* Special Session of the Joint FAO/WHO Meeting on Pesticide Residues, at 24 (5/16) [Exh. 26];
- New Zealand Environmental Protection Authority's glyphosate report, at 16 (8/16) [Exh. 27];
- Australia's Pesticides and Veterinary Medicines Authority, *Final Regulatory Positions: Consideration of the Evidence for a Formal Reconsideration of Glyphosate,* at 38 (3/17) [Exh. 28];
- ECHA, *Opinion Proposing Harmonised Classification and Labelling at EU Level of glyphosate (ISO); N-(phosphonomethyl) glycine* at 31 (3/15/17) [Exh. 29];
- Health Canada, PRMA, *Glyphosate Re-Evaluation Decision, RVD2017-01,* at 1, 24 (4/28/17) [Exh. 30];
- Reuters, W.H.O. Report links ingredient in Roundup to Cancer, New York Times (3/20/15) [Exh. 31];

- Ariana Eunjung Cha, WHO adds one of the world's most popular weedkillers to list linked to cancer, Washington Post (6/23/15) [Exh. 32];
- Bara Vaida, Does This Common Pesticide Cause Cancer?, WebMD (4/7/15) [Exh. 33];
- Cary Gillam, U.S. lawsuits build against Monsanto over alleged Roundup cancer link, Reuters (10/15/15) [Exh. 34].

Plaintiff objected to judicially noticing each document.

The Court grants judicial notice of Exhibits 1-2 and 8-20 per Evidence Code section 452, subdivision (c) [official acts]; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518 ("Official acts include records, reports and orders of administrative agencies."); and *Stevens v. Superior Court (API Insurance Services, Inc.)* (1999) 75 Cal.App.4th 594, 608 (allowing judicial notice of letters issued by a department approving an insurance program). The Court grants judicial notice of Exhibits 3-7 per Evidence Code section 451, subdivision (b) and 44 U.S.C. §1507(2). The Court grants judicial notice of Exhibits 21-23 per Evidence Code section 452, subdivision (d) [court records].

But the Court denies judicial notice of Exhibits 24-30. Although Evidence Code section 452, subdivision (f) allows for judicial notice of the law in a foreign nation, the documents in these exhibits are of findings and conclusions of EPA's equivalent in different foreign countries. They are not documents of the law in those foreign countries. And also denies judicial notice of Exhibits 31-34. Although Evidence Code section 452, subdivision (g) permits judicial notice of facts subject to common knowledge and subdivision (h) permits judicial notice of matters not reasonably subject to dispute and capable of immediate and accurate determination, it cannot be said a newspaper article is a matter subject to common knowledge and something reasonably undisputed.

Discussion

1. Statute of Limitations

Defendants Monsanto and Crown argue each cause of action is barred by Code of Civil Procedure section 340.8's statute of limitation (11th affirmative defense).

Code of Civil Procedure section 340.8, subdivision (a) imposes a 2-year limitation for a civil action for the injury or illness based upon exposure to a hazardous material or toxic substance.

Generally, products liability and negligence (1st-3rd) are governed by a 2-year limitation period. (Code Civ. Proc., §335.1; *Kensinger v. Abbott Labs* (1985) 171 Cal.App.3d 376, 381.) A fraud cause of action (4th) is subject to a 3-year limitation period. (Code Civ. Proc., §338, subd. (d).) And breaches of warranty claims (5th-6th) are subject to 4-years. (Comm. Code, §2725; *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 134.)

Nevertheless, the statute of limitation applicable to a cause of action is governed by the gravamen of the complaint, not the cause of action pled. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 967-68.) "It is the substance of the action, rather than the form of the pleading or the labels employed, that governs." (*Id.* at p. 968.)

Here, each cause of action concerns Stephens' exposure to Roundup, manufactured, designed, distributed, and/or sold by Monsanto and Crown, and suffering an injury due to that exposure. Thus, the gravamen of the cause of action is Stephens' suffered an injury/illness due to her exposure to a hazardous material or toxic substance thereby the 2-year period under Code of Civil Procedure section 340.8 applies. (*See, e.g., Rivas v. Safety-Kleen Corp.* 92002) 98 Cal.App.4th 218, 229-30.)

Under Code of Civil Procedure section 340.8, subdivision (a), the 2-year limitation commences either from the date of injury or from the date the plaintiff becomes aware of or reasonably should have become aware of (i) an injury, (2) the physical cause of the injury, and

(iii) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another. Whichever ever period is later governs. (Code Civ. Proc., §340.8, subd. (a).)

The accrual of a toxic tort claim essentially adopts the delayed discovery rule. That is, the discovery rule will delay accrual of the statute of limitation until the plaintiff has or should have inquiry notice. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 ["*Fox*"]; *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-11 ["*Jolly*"] [[T]he limitation period beings once the plaintiff 'has notice or information of circumstances to put a reasonable person *on inquiry*…'."].) Inquiry notice is triggered by suspicion, i.e. the plaintiff has reason to suspect an injury and some wrongful cause unless the plaintiff can prove that a reasonable investigation would not have revealed the factual basis for the particular cause of action. (*Fox, supra,* 35 Cal.4th at p. 803; *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319 ["*E-Fab*"].)

A plaintiff need not be aware of the specific facts to establish a claim for the statute of limitation to commence; rather once suspicion of wrongdoing exists, establishing an incentive to sue, the plaintiff must decide whether to file a lawsuit or sit on his rights. (*Jolly, supra,* 44 Cal.3d at p. 1111; *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897 ["[W]hen the patient's 'reasonably founded suspicions [have been aroused],' and she has actually 'become alerted to the necessity for investigation and pursuit of her remedies,' the [2-year] period for suit begins."]; *Kleefeld v. Superior Court (Cunningham)* (1994) 25 Cal.App.4th 1680, 1684 ["Once a plaintiff actually has the requisite suspicion, the statute of limitations commences to run."].) The fact that the plaintiff is ignorant of the legal significance of the known facts or of the identity of the

wrongdoer will not delay the running of the statute of limitations. (*Jolly, supra,* 44 Cal.3d at p. 1112, fn. 8.)

A plaintiff under the discovery rule is presumptively charged with knowledge of an injury if he has information of circumstances to put him on inquiry or if he has the opportunity to obtain knowledge from sources open to his investigation. (*Fox, supra,* 35 Cal.4th at pp. 807-08.) Additionally, since a plaintiff is to pursue his claims diligently when he has discovered or should have discovered his injury had a wrongful cause, the plaintiff will be charged with presumptive knowledge of the wrongful cause of his injury. (*Id.* at p. 808.) Yet these presumptions and/or the necessary suspicion to trigger the commencement of the statute of limitation are only when the plaintiff has a reason to investigate, i.e. "plaintiffs have *reason* to at least suspect that a type of wrongdoing has injured them." (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206.)

It is the plaintiff's burden to show the time and manner of his discovery of the facts and his inability to have made earlier discovery despite reasonable diligence. (*Czajkowski v. Hasekell & White, LLP* (2012) 208 Cal.App.4th 166, 175.) Nonetheless, whether a statute of limitations has run is a question of fact unless the evidence can support only one reasonable conclusion. (*Jolly, supra,* 44 Cal.3d at pp. 1109-10; *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552.)

With the above law in mind, Defendants present the following undisputed facts. Plaintiff Stephens used Roundup at some point before 2017. Defendants' Separate Statement of Undisputed Facts (UF) #1 (undisputed). Stephens began experiencing symptoms of non-Hodgkin's lymphoma in September 2017. UF #2 (undisputed). She was diagnosed with non-Hodgkin's lymphoma in December 2017. UF #3 (undisputed).

After noticing the lumps that her doctors informed her were cancer, she stopped using Roundup. She thought it might have caused her cancer. UF #4-6. Plaintiff does not dispute such was her testimony, but she adds she also testified she stopped doing all yard work when she got sick because she could no longer do it. She further made clear in her depositions that she did not connect the use of Roundup and her cancer until 2018 after seeing an advertisement for legal services on TV. *See also* Plaintiff's Additional Facts (AF) #51-52. After she saw the advertisement, she called the next day, i.e., August 28, 2018. AF #53.

Stephens' husband, Larry, testified he stopped purchasing Roundup in 2017 after Stephens was diagnosed with cancer because she believed it was connected to her cancer. UF #7-8. Plaintiff dispute because Larry also testified he did not know when Stephens first suspected Roundup might have caused her cancer. Additionally, Larry purchased the Roundup because Stephens asked him to do so. *See* also AF #54-56.

Stephens never asked her doctors if a connection existed between glyphosate or Roundup and her cancer. In 2019, she did ask a physician's assistant if a connection existed, but the assistant did not respond. UF #9-10. Plaintiff disputes to add that she wanted to ask her doctor in 2019 if Roundup was a cause of her cancer, but after her doctor left the exam room, she did not return. So she asked the physician's assistant, who ran out of the room.

Plaintiff Stephens filed her case on August 4, 2020. UF #11 (undisputed).

Without the discovery rule, Stephens' claims are time-barred, as more than 2-years transpired from her diagnosis of cancer in December 2017. The question becomes did she reasonably discover the potential cause of her cancer was her use of Roundup sometime on or after August 5, 2018. Defendants' claim Stephens' testimony is that she connected her cancer to the use of Roundup in and around September-December 2017, which is more than 2-years before

she filed her Complaint. But that is in dispute in light of Stephens also testified she stopped using Roundup in late 2017 because she got sick and she connected the two after seeing a legal advertisement around August 27, 2018, which is less than 2-years before she filed her Complaint. Similarly, discrepancies exist in Larry's testimony on when Stephens connected her cancer to her use of Roundup. Because of the discrepancies, the Court cannot say as a matter of law that the statute of limitation began running in September-December 2017, versus in and around August 27, 2018.

2. Preemption

Defendants Monsanto and Crown argue the claims predicated upon a failure to warn assertion are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§136 et al. (6th-7th affirmative defenses).

In its Motion, Defendants argue the causes of action are primarily based on the theory Monsanto had a state-law duty to warn that Roundup causes cancer. Although she nominally also pleads design claims, she is unable to present evidence of alternative glyphosate-based formulations that would have reduced her risk of cancer, which would be needed to support her theory Monsanto needed to re-design Roundup to be safer.

The 1st, 3rd, 5th, and 6th causes of action contain a mixed claim associated with failure to warn and Roundup designed in an unreasonably dangerous manner. (Complaint at ¶¶119, 121-24, 164-65, 169-70, 172, 190, 192-96, 209, 213, and 216.) Only the 2nd and 4th causes of action are solely predicated upon a theory of failure to warn. (Complaint at ¶¶141, 145, 151, and 178-79.)

The problem with Defendants' presented argument is two-fold. First, it does not move for summary judgment/adjudication of any design-based claim because Stephens will not be able

to prove one or more elements therein. Thus, this means the design-based claims remain for adjudication.

Second, Defendants offer no argument or analysis of the Court can split the mixed claims with adjudicating the failure to warn theory under the preemption argument while allowing the design defect-based theories to remain. Generally, summary adjudication exists to an entire cause of action. (Code Civ. Proc., §437c, subd. (f)(1); *Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096, 1102.) One cannot seek to adjudicate an issue within a cause of action. (*Belio v. Panorama Optics, supra,* 33 Cal.App.4th at p. 1102.) However, summary adjudication may lie to a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action. (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1188; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-55.) But, here, the failure to warn and the design of Roundup are different theories supporting the same underlying wrongful act, i.e., defective product, negligence, or breach of warranty. This is not a case of separate and distinct wrongs pled within the same cause of action.

Based on the foregoing, the preemption argument is relevant only to the 2nd and 4th causes of action.

Under the Supremacy Clause of the Constitution, federal legislation may preempt state law. (*Kurns v. R.R. Friction Prods. Corp.* (2012) 565 U.S. 625, 630; *Peatros v. Bank of America* (2000) 22 Cal.4th 147, 157 ["*Peatros*"].) The fundamental question in preemption is whether Congress had intended preemption, but the starting presumption is that it has not. (*Peatros, supra,* 22 Cal.4th at p. 157.) State law is either expressly or impliedly preempted. Express preemption is Congress explicitly stated that its enactment preempts state law. (*Id.* at pp. 157-58.) Implied preemption is either by (1) field preemption, that is, the state law is preempted

because it regulates conduct in a field that Congress intended for the Federal Government to occupy exclusively, or (2) conflict preemption, that is, the state law is preempted to the extent it actually conflicts with federal law. (*Id.* at p. 158; *see also Merck Sharp & Dohme Corp. v. Albrecht* (2019) 139 S.Ct. 1668, 1672 ["[F]ederal preemption … takes place when it is 'impossible for a private party to comply with both state and federal requirements."].)

FIFRA is a comprehensive regulatory statute on the use, sale, and labeling of pesticide products. (*Bates v. Dow Agrosciences L.L.C.* (2005) 544 U.S. 431, 437 ["*Bates*"].) In particular, FIFRA provides:

> [A] manufacturer seeking to register a pesticide must submit a proposed label to EPA as well as certain supporting data. 7 U.S.C. §§136a(c)(1)(C), (F). The agency will register the pesticide if it determines that the pesticide is efficacious (with the caveat discussed below), §136a(c)(5)(A); that it will not cause unreasonable adverse effects on humans and the environment, §§136a(c)(5)(C), (D); §136(bb); and that its label complies with the statute's prohibition on misbranding, §136a(c)(5)(B); 40 C.F.R. §152.112(f) (2004). A pesticide is "misbranded" if its label contains a statement that is "false or misleading in any particular," including a false or misleading statement concerning the efficacy of the pesticide. 7 U.S.C. §136(q)(1)(A); 40 C.F.R. §156.10(a)(5)(ii). A pesticide is also misbranded if its label does not contain adequate instructions for use, or if its label omits necessary warnings or cautionary statements. 7 U.S.C. §§136(q)(1)(F), (G).

(*Id.* at p. 438.) Because it is unlawful to misbrand a pesticide, a manufacturer has a continuing obligation to adhere to FIFRA's labeling requirements, which includes amending the registration to reflect any labeling or formulation changes. (7 U.S.C. §§136a(c)(9), 136a(f)(1), 136j(a)(1)(E); *Bates, supra,* 544 U.S. at pp. 438-39.)

Under FIFRA, a state may continue to regulate the sale and use of any federally registered pesticide to the extent the regulation does not permit any sale or use prohibited by the FIFRA. (7 U.S.C. §136v(a).) As for labeling or packaging, a state shall not impose or continue to impose any requirement that is "in addition to or different from" those required by the FIFRA.

(7 U.S.C. §136v(b).) Yet if the state law's labeling requirement is equivalent to or fully consistent with the FIFRA's misbranding provisions, then no preemption exists. (*Bates, supra,* 544 U.S. at p. 447.)

With the above law in mind, the relevant undisputed facts are as follows. The EPA first approved glyphosate-based herbicides ("GBH") for sale in 1974. UF #16 (undisputed). Since 1974, Monsanto has manufactured and sold a variety of GBHs, including under the brand name Roundup, for use on farms, public spaces, and residential gardens. UF #17 (undisputed).

On June 26, 1991, the EPA classified glyphosate as a non-carcinogenic for humans based on a lack of convincing evidence of carcinogenicity. UF #21. Plaintiff disputes the fact because she contends EPA's regulatory findings were based on insufficient data and the result of Monsanto's efforts to influence the EPA. In 1993, glyphosate was registered again with the EPA concluding there was no evidence of non-carcinogenicity in humans. So it was classified as non-carcinogenic for humans based on lack of evidence of carcinogenicity. UF #22. Plaintiff disputes because the EPA initially concluded that glyphosate was oncogenic in male mice in a dose-related manner and classified glyphosate as a Class C possible human carcinogen. Also, she disputes on the same ground disputed UF #21.

In 2015, after International Agency for Research on Cancer (IARC) released its classification of glyphosate as a likely carcinogen, as part of its ongoing re-registration review, an interdisciplinary team of thirteen EPA scientists known as the Cancer Assessment Review Committee (CARC) unanimously classified glyphosate as "Not Likely to be Carcinogenic to Humans." UF #25. Plaintiff disputes the fact. The Scientific Advisory Panel (SAP) concluded the Office of Pesticide Program failed to follow its own guidelines. The Office of Research and Development Branch of the EPA indicated if a formal discussion were made of glyphosate

classification, it would be split between likely to be carcinogenic and suggestive evidence. Additionally, the head of CARC and other members are under investigation by the Office of Inspector General based on allegations that one of the scientists colluded with Monsanto to conduct a biased review of glyphosate. The investigation is based on Jess Rowland (head of the CARC) reached his conclusion on glyphosate before reviewing all the data.

In 2016, EPA's Office of Pesticide Program (OPP), the division responsible for pesticides, released a comprehensive issue paper on glyphosate that included and expanded on CARC's conclusions and discussed reviews by European agencies. UF #26. The OPP concluded that the strongest support is not likely to be carcinogenic to humans at doses relevant to human health risk assessment. UF #27. Plaintiff disputes these facts because the OPP's assessment documents do not reflect a formal classification of glyphosate. The OPP's 2015 draft assessment proposed a classification of glyphosate in isolation, not as a formulated product, as not likely to be carcinogenic to humans. It concluded their evaluation focused on studies on the active ingredient glyphosate and that additional research could be performed to determine whether formulation components, such as surfactants, influence the toxicity of glyphosate formulations. The OPP's evaluation was the subject of political pressure issued by Monsanto. Some of the members of the SAP found there was sufficient data to conclude glyphosate is a rodent carcinogen and other members found suggestive evidence of carcinogenic potential in humans for glyphosate.

"Not likely to be carcinogenic to humans" is EPA's lowest risk classification level for cancer. UF #28 (undisputed).

In December 2017, EPA convened an SAP to evaluate the agency's issue paper regarding the human carcinogenic potential for glyphosate. UF #29 (undisputed). The SAP is a team of

scientists providing independent advice to the EPA on health and safety issues related to pesticides. UF #30 (undisputed). SAP published a report in March 2017, which the EPA incorporated into its December 2017 comprehensive analysis of the human carcinogenic potential for the active ingredient glyphosate. UF #31 (undisputed). In the EPA's December 2017 review, the EPA concluded the strongest support is for not likely to be carcinogenic to humans. UF #33. Plaintiff disputes because the OPP's revised issue paper did not reflect the conclusions of the EPA. The OPP's evaluation was subject to political pressures by Monsanto. The SAP concluded the OPP did not appear to follow the EPA cancer guidelines. Some members found sufficient data to conclude glyphosate is a rodent carcinogen and other members found there was suggestive evidence of carcinogenic potential. As of February 2019, three scientists from the SAP panel published a journal manuscript indicating evidence from experimental animals and mechanistic studies suggest a compelling link between exposure to GBHs and increase risk of non-Hodgkin lymphoma.

The EPA stated in its *Revised Glyphosate Issue Paper* that it did not agree with IARC that the data provided strong or clear evidence for either genotoxicity or induction of oxidative stress given protocol deficiencies that could produce questionable results. UF #35. Plaintiff disputes in the same manner she disputed the other facts above.

In April 2019, the EPA published a Proposed Interim Registration Review Decision concerning glyphosate. After a thorough weight-of-the-evidence review, it determined that glyphosate is not likely to be carcinogenic to humans, and it did not identify any human health risks from exposure to any use of glyphosate. UF #37-39. Plaintiff disputes these facts because the publication was a proposed decision; it was not a final decision. Thus, it does not reflect an EPA decision. This proposed decision included measures on label consistency and update labels

to modern standards but did not include any changes to the label related to carcinogenicity. UF #40. Plaintiff disputes in the same manner disputed UF #37-39.

On August 7, 2019, the EPA sent a letter to all registrants of glyphosate stating it disagrees with the IARC's assessment. After an independent evaluation by its scientist, it concluded glyphosate is not likely to be carcinogenic to humans. Therefore, glyphosate products with a label that includes a warning regarding glyphosate's carcinogenicity are misbranded because such a warning constitutes a false and misleading statement. The letter stated the "EPA will no longer approve labeling that includes the Proposition 65 warning statement for glyphosate-containing products," and ordered registrants to remove cancer warnings. UF #41-42. Plaintiff only disputes the facts as phrased, i.e., the EPA letter stated, "for any pesticide product that currently contains Proposition 65 warning language exclusively on the basis that it contains glyphosate, EPA requests the submission of draft amended labeling that removes such language within ninety (90) days of the date of this letter."

In 2020, the EPA completed its formal, statutorily managed "Glyphosate Registration Review," and confirmed it thoroughly evaluated potential human health risks and determined there are no risks to human health from registered uses of glyphosate and it is not likely to be carcinogenic to humans. UF #44. Plaintiff disputes this fact in the same manner disputed the other facts, i.e., EPA pressured by Monsanto, the SAP found the evaluation process did not follow cancer guidelines, some believe there is sufficient data to conclude glyphosate is a rodent carcinogen, others believe there was suggestive evidence of carcinogenic potential, and three members published a manuscript finding studies suggest a compelling link between GBHs and increased risk of non-Hodgkin's lymphoma.

In May 2021, EPA completed an Executive Order review of the agency's latest regulatory action on glyphosate and defended the agency's conclusion that glyphosate is not likely to be a human carcinogen and poses no human health risks of concern. UF #45. Plaintiff disputes in the same manner disputed UF #44, and others.

The EPA has repeatedly approved Monsanto's glyphosate label that does not include a cancer warning. UF #46. Plaintiff disputes the fact to note the manufacturer is responsible for drafting the labels, requesting pesticides be classified for general or restrictive use or both, and submitting supporting data.

In the 1997, 2002, 2004, 2008, and 2013 final rules, the EPA concluded no evidence that glyphosate is carcinogenic for humans; it poses no cancer risk to humans. UF #47-51. Plaintiff disputes these facts because the EPA never made such a conclusive finding. It initially found oncogenic in male mice in a dose-related manner and classified glyphosate as a Class C possible human carcinogen. It recognized studies showed an increased risk of non-Hodgkin lymphoma but the epidemiology did not establish a definite link to cancer.

When considering all the facts, they come down to one thing – the EPA holds to the belief glyphosate is not likely to be a human carcinogen and poses no human health risk. Because of that, the labels for glyphosate products do not need to include any warning that use could cause cancer. Now Plaintiff disputes the facts but her dispute is predicated upon she believes the EPA decision is flawed. And it may very well be flawed, but that does not alter the issue here is preemption, *not whether the determination by the EPA is correct.*

Now, the FIFRA is clear a state law cannot add to or impose different standards for labels as those required by the FIFRA. Under Plaintiff's failure to warn causes of action (and arguably theories, even though not subject to summary adjudication), California cannot by any statute or

under a tort claim mandate Monsanto include any label or packaging warning that use of glyphosate may cause cancer, as the EPA, based on its authority under the FIFRA, has found glyphosate does not pose such danger to support a warning that its use may cause cancer. Similarly, under implied preemption, Monsanto and/or Crown cannot independently issue any warning on the claim glyphosate may cause cancer because such would conflict with the EPAs finding that no such warning is required under the FIFRA whereby to include such a warning would be misbranding the product.

This is not a case where the failure to warn products liability and fraudulent concealment tort claims are providing a remedy to a violation of the FIFRA's misbranding requirements where preemption does not arise. (*Bates, supra,* 544 U.S. at pp. 447-52.) This is also not a case where Stephens' failure to warn claims are asking the manufacturer to issue warnings or disclose known facts to a matter not addressed by the EPA under the FIFRA misbranding provisions. (*See, e.g., Id.* at pp. 447-48 and 452 ["[Section 136v(b)] pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations."].) Rather Stephens is asking to impose warnings on Roundup because she takes issue with the EPA's conclusion, but to order warnings that the EPA has expressly rejected as necessary for glyphosate products, i.e., Roundup, would be creating an additional or different requirement than the FIFRA and/or creating a conflict of Monsanto choosing between compliance with federal law and state law. (*Id.* at p. 453 ["State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards. For example, a failure-to-warn claim alleging that a given pesticide's label should have stated 'DANGER' instead of the more subdued 'CAUTION' would be pre-empted because it is inconsistent with 40 C.F.R. §156.64 (2004), which specifically

assigns these warnings to particular classes of pesticides based on their toxicity."].) Therefore, preemption exists. So the Court grants summary adjudication of the 2nd and 4th causes of action.

3. 4th cause of action: Fraud

The elements for fraudulent concealment are (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose the fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted in the same way knowing of the concealed or suppressed fact, (5) causation, and (6) the plaintiff sustained damages. (*Blickman Turkus, L.P. v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.)

Defendant Monsanto argues the fraudulent concealment cause of action cannot survive because it owed no duty to disclose to Plaintiff Stephens.

A duty to disclose material facts arise in four situations: (1) the defendant is under statutory or other prescriptive legal obligation, (2) the defendant voluntarily assumed the duty due to a contractual undertaking, (3) a relationship exists between the defendant and the plaintiff, and (4) the defendant engaged in other conduct making it wrongful to remain silent. (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 864; *Blickman Turkus v. MF Downtown Sunnyvale, supra,* 162 Cal.App.4th at p. 867.) The relationship necessary to impose a duty to disclose is described as transactional:

> In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 311 ["*Bigler-Engler*"].)

The transaction must arise from dealings between the defendant and the plaintiff, and not between the defendant and the public at large. (*Id.* at p. 312.)

The challenge to no duty to disclose rests upon two facts. Larry was the sole purchaser of Roundup in the household, and he stopped purchasing it in 2017 right after Stephens was diagnosed with cancer. UF #62. Plaintiff disputes the fact because it is incomplete. Stephens testified that she wanted to buy Roundup after seeing an advertisement for it. Larry also testified it was Stephens' idea to purchase Roundup. She would frequently ask him to buy it while they were in the hardware store together.

Larry purchased the Roundup only from Ace Hardware and Home Depot. UF #63. Plaintiff disputes to state the fact is incomplete as such concerns only the purchases between 2003 and 2017.

Taking the facts along with the disputes, Stephens never directly purchased Roundup. But she asked her husband to purchase it for her after seeing an advertisement. He would purchase the Roundup at local stores, i.e., never directly from Monsanto. Based on the factual circumstances, the only communication from Monsanto, outside the Roundup container information, is a TV advertisement disseminated to the public at large. It was not directed toward Stephens. Thus, no transactional relationship existed between Monsanto and Stephens to give rise to a duty to disclose. Similarly, although Larry purchased the product, no transactional relationship arose between Monsanto and Larry since no communication was directed to Larry.

Now, the disclosure of half-truths will give to a duty to provide the full truth. (*Bigler-Engler, supra,* 7 Cal.App.5th at pp. 311 and 312 ["One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud."].) However, even the duty to tell the whole truth only arises after a sufficient relationship or

transaction between the parties. (*Id.* at p. 312 ["Where, as here, a sufficient relationship or transaction does not exist, no duty to disclose arises even when the defendant speaks."].)

Plaintiff Stephens cited to *Cohen v. Citizens Nat'l Trust & Sav. Bank* (1956) 143 Cal.App.480. In *Cohen,* the Court of Appeal held Civil Code section 1711's language provided for fraudulent misrepresentation claim through an advertisement or communication by mass media that the plaintiff relied upon to purchase the product. (*Id.* at p. 486 ["In other words, statements which the speaker or writer intends to reach a considerable number of persons and cause reliance by a class or the public.... [I]n all such situations, the fraudulent party actually intended to induce reliance in those who relied although he may have been ignorant of their identity at the time of making the actionable statements."].) All this case holds is a fraudulent misrepresentation may arise from a mass media advertisement or communication. It does not stand for the conclusion a fraudulent concealment cause of action exists if the advertisement states only partial information or half-truths. The *Cohen* decision does not alter the *Bigler-Engler* requirement that the duty to disclose the whole truth only arises upon the creation of the transactional relationship.

Here, the facts do not support the creation of a transactional relationship to give rise to Monsanto owing Stephens a duty to disclose. Therefore, the Court grants summary adjudication of the 4th cause of action.

Rulings

(1) The Court denies Defendants Monsanto Motion for Summary Judgment/ Adjudication of each cause of action on the grounds each cause of action is time-barred because triable issues exist on when Plaintiff Stephens knew or should have known her cancer was

potentially caused by her use of Roundup [UF #1-11, responses thereto; AF #51-56; and cited evidence: Stephens and Larry's depositions; Defendant's Exh. D; and Plaintiff's Exh. 32];

(2) The Court denies Defendants Monsanto Motion for Summary Adjudication of the 1st, 3rd, 5th, and 6th causes of action on the grounds the theory of failure to warn is preempted since these causes of action plead theories of design defect and failure to warn and summary adjudication is not permitted to a theory pled within a cause of action [Code Civ. Proc., §437c, subd. (f)(1); *Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096, 1102];

(3) The Court grants Defendant Monsanto Motion for Summary Adjudication of the 2nd and 4th causes of action on the grounds the failure to warn or concealment of glyphosate's link to cancer is expressly and/or impliedly preempted by the FIFRA [UF #21-22, 25-31, 33, 35, 37-42, and 44-51, responses thereto, and cited evidence: RJN, Exhs. 2-17, 19-20, and 22];

(4) The Court grants Defendant Monsanto's Motion for Summary Adjudication of the 4th cause of action on the separate ground that it owed no duty to disclose as no transactional relationship existed between it and Plaintiff Stephens [UF #62-63, responses thereto, and cited evidence: Stephens and Larry's Depositions]; and

(5) The Court grants Defendants Monsanto request for judicial notice of Exhibits 1-23, but denies Defendants Monsanto request for judicial notice of Exhibits 24-34.

Movant to give Notice and prepare Order.

Dated- JUL 19 2021

GILBERT G. OCHOA
Judge