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Case No. N15C-10-118 VLM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JOSELIN BARRERA, et al.,	)	
	)	
Plaintiffs,	)	C.A. No. N15C-10-118 VLM
v.	)	
	)	
MONSANTO COMPANY	)	
	)	
Defendant.	)	

MONSANTO COMPANY'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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I. INTRODUCTION

The three out-of-state plaintiffs, Elias De La Garza, Judi Fitzgerald, and Joselin Barrera, each allege that exposure to defendant Monsanto Company's Roundup® caused them to develop cancer. Mr. de la Garza alleges that agricultural exposure to Roundup® as a farm worker in Washington and Oregon, and later as a landscaper in Texas caused him to develop non-Hodgkin's lymphoma ("NHL") in 2008. Ms. Fitzgerald alleges that second-hand exposure to Roundup® as an employee of a horticultural products company in New York caused her to develop chronic lymphocytic leukemia ("CLL") in 2012. Ms. Barrera alleges that childhood exposure to Roundup® through her parents' agricultural work in Michigan caused her to develop NHL in 2006. Roundup®'s active ingredient, glyphosate, is the most widely-used weed killer in the United States. Since its introduction in 1974, the U.S. Environmental Protection Agency ("EPA") repeatedly has concluded, including as recently as last month, that exposure to Roundup® does not cause cancer. *See infra* at 22-23.

None of the plaintiff's claims have any connection to Delaware. The complaint accordingly should be dismissed on the basis of *forum non conveniens*, so that they can be refiled in the states of plaintiffs' exposures, cancer diagnosis, and treatment, and where all of the parties have the best chance to secure testimony of key third-party witnesses and documents relating to plaintiffs' alleged cancer

and claimed damages. The separate legal deficiencies in the plaintiffs' claims can be best addressed by courts in the appropriate forums and need not be addressed by this Court if Monsanto's *forum non conveniens* motion is granted. However, each of the plaintiffs' claims also fail for the following reasons:

- Plaintiffs' warnings-based claims are preempted under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq*.
- Plaintiffs' non-warnings-based design defect claims are barred under applicable state laws because they have not pled a safer alternative design of glyphosate or Roundup®.
- Ms. Barrera's claims are also barred because they are untimely under Michigan's statute of limitations.

For these reasons, as set forth more fully herein, plaintiffs' complaint should be dismissed in its entirety.

II. BACKGROUND

The ability to feed the world's growing population while the amount of available farmland continues to dwindle is key to preventing a global humanitarian, agricultural, and economic crisis. Weeds reduce essential crop yield by displacing and contaminating crops, or rendering crops inedible. Critically, the use of herbicides can prevent over 70% of potential crop yield losses due to weeds.[1]

[1] E-C. Oerke, *Crop Losses to Pests*, 144 J. Agric. Sci. 31, 38 (2006). In economic terms, the average estimated annual monetary loss – including losses in field crops, damage to farming equipment, and increased crop production costs – caused by weeds would exceed $15 billion in the United States alone in the absence of herbicides. *See* Dwight D. Lingenfelter, *Introduction to*

Glyphosate is "the most important herbicide" developed in the post-World War II era.[2] Glyphosate-based herbicides first became commercially available in 1974 when, after four years of testing by its research scientists, Monsanto introduced Roundup®, a mixture of glyphosate and surfactants (chemical compounds commonly found in products such as soaps that allow glyphosate to travel on the surface of the weed to growing areas).[3] Farmers apply Roundup® before crops are planted or, where glyphosate resistant seed is used, during the growing process.

Glyphosate works by inhibiting an enzyme that is specific to plants. Glyphosate is non-selective, meaning that it is intended to and will eradicate any exposed plant. However, as documented in numerous scientific analyses, glyphosate is not toxic to human or animals.[4] EPA, which has broad authority to

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Weeds: What are Weeds and Why Do We Care?, Pennsylvania Integrated Pest Management, http://extension.psu.edu/pests/ipm/schools-childcare/schools/educators/curriculum/weeds/introweeds ("In 1991, the estimated average annual monetary loss caused by weeds with current control strategies in the 46 crops grown in the United States was $4.1 billion. If herbicides were not used, this loss was estimated to be $19.6 billion. Losses in field crops accounted for 82% of this total (Bridges; WSSA, 1992).")

[2] Stephen O. Duke & Stephen B. Powles, *Glyphosate: A Once-In-Century Herbicide*, 64 Pest Mgmt. Sci. 319, 319 (2008).

[3] *See* W.S. Curran, et al., *Adjuvants for Enhancing Herbicide Performance*, Weed Management, http://extension.psu.edu/pests/weeds/control/adjuvants-for-enhancing-herbicide-performance.

[4] *See* Keith R. Solomon, et al., *Human Health and Environmental Risks from the Use of Glyphosate Formulations to Control the Production of Coca in Colombia: Overview and Conclusions*, 72 J. of Toxicolology and Envtl. Health Part A 914, 919 (2009); Keith R. Solomon, et al., *Coca and Poppy Eradication in Colombia: Environmental and Human Health Assessment of Aerially Applied Glyphosate*, 190 Revs. of Envtl. Contamination and Toxicology 43, 106 (2007); Gary M. Williams, et al., *Safety Evaluation and Risk Assessment of the Herbicide*

regulate all herbicides under FIFRA, has for decades found glyphosate to be "one of the most safely-used pesticides in the U.S."[5] and repeatedly has concluded that glyphosate exposure does not cause cancer. As recently as October 21, 2015, Dr. William Jordan, Deputy Director of EPA's Office of Pesticide Programs, testified before a Senate Committee that EPA's current safety evaluation of glyphosate, internally reported in April 2015, confirms that scientific literature "does not provide evidence to show that [g]lyphosate causes cancer and does not warrant any change in EPA's cancer classification for [g]lyphosate."[6] The one court to consider allegations regarding the carcinogenicity of glyphosate in a personal injury suit rejected those allegations as lacking reliable scientific support. *See Arias v. DynCorp*, 928 F. Supp. 2d 10, 24-25 (D.D.C. 2013) (excluding as unreliable expert's causation opinion that glyphosate-based herbicides have carcinogenic effects).

Roundup and Its Active Ingredient, Glyphosate, for Humans, 31 Reg. Toxicology and Pharmacology 117, 129 (2000) (reviewing over 188 documents either in published scientific literature or submitted to regulatory agencies assessing the safety of glyphosate, and concluding that glyphosate "is considered to be practically nontoxic by all these routes of exposure").

[5] Letter from EPA Assistant Administrator Stephen L. Johnson to Secretary of State Colin Powell, dated Aug. 19, 2002, http://www.state.gov/j/inl/rls/rpt/aeicc/13237.htm.

[6] *See Agriculture Biotechnology: A Look at Federal Regulation and Stakeholder Perspectives: Hearing Before the S. Comm. on Agr., Nutrition, & Forestry*, 114th Cong. (2015) (statement of Dr. William Jordan, Deputy Director of EPA's Office of Pesticide Programs), http://www.ag.senate.gov/templates/watch.cfm?id=74793e67-5056-a055-64af-0e55900753b4, at time stamp 55:05 – 56:20 (2015) ("EPA 2015 Desk Statement").

Plaintiffs ignore this record of safety and instead rely on the International Agency for Research on Cancer's ("IARC") recent "cancer hazard" listing of glyphosate as a "probable carcinogen." IARC is not a regulatory agency, and none of its determinations are binding on any country. IARC does not take into account levels of exposure, methods of exposure, or other factors central to a determination of whether a substance is a carcinogen.[7] Thus, IARC "may identify cancer hazards even when risks are very low with known patterns of use or exposure." *See IARC Monographs Questions and Answers*, 3 (2015), http://www.iarc.fr/en/media-centre/iarcnews/pdf/Monographs-Q&A.pdf. Based on this same methodology, IARC has classified a wide variety of commonly-used substances and exposures as "probable" or "known" carcinogens, including bacon, hot dogs, and red meat[8]; alcoholic beverages[9]; salted fish[10]; shiftwork[11]; frying food[12]; and dry cleaning[13].

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[7] *See* IARC, *IARC Monographs on the Evaluation of Carcinogenic Risk to Humans Preamble*, 2 (Jan. 2006), http://monographs.iarc.fr/ENG/Preamble/currenta2objective0706.php; *see also Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 997 (9th Cir. 1997) (excluding expert testimony where plaintiff's "exposure was neither long enough nor intense enough to fall within the ranges described in the studies [the expert] relied upon"), *abrogated in non-relevant part by Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

[8] IARC, *IARC Monographs Evaluate Consumption of Red Meat and Processed Meat* (Oct. 26, 2015), https://www.iarc.fr/en/media-centre/pr/2015/pdfs/pr240_E.pdf.

[9] IARC, *Consumption of Alcoholic Beverages*, Vol. 100E (2012), http://monographs.iarc.fr/ENG/Monographs/vol100E/mono100E-11.pdf.

[10] IARC, *Chinese-style Salted Fish*, Vol. 100E (2012), http://monographs.iarc.fr/ENG/Monographs/vol100E/mono100E-12.pdf.

[11] IARC, *Shiftwork*, Vol. 98 (2010), http://monographs.iarc.fr/ENG/Monographs/vol98/mono98-8.pdf.

Mr. de la Garza alleges injuries stemming from exposure to Roundup® prior to 1990 while working as a migrant farm worker in Washington and Oregon, and from 1990-2008, while working as a landscaper in Texas. *See* Compl. ¶¶ 72-73, D.I. 1 (Trans. ID 58016137). In 2008, while residing in Texas and either during or subsequent to his final exposures to Roundup®, Mr. de la Garza was diagnosed with NHL and received medical treatment and care. *Id*. ¶ 74. He continues to reside in Texas. *Id.* ¶ 14.

Ms. Fitzgerald alleges injuries stemming from second-hand exposure to Roundup® in New York from 1994 through 1998, while working at a horticultural products company. *Id.* ¶ 69. She was diagnosed with CLL in October 2012. *Id.* ¶ 71. Ms. Fitzgerald originally filed a complaint against Monsanto in federal court in the Eastern District of New York, but voluntarily dismissed that complaint prior to refiling her claim in this Court.[14] Although not alleged in the current complaint, Ms. Fitzgerald alleged in her prior complaint that doctors diagnosed her cancer in New York in 2012. *See* Fitzgerald EDNY Compl. ¶¶ 66-69 (Ex. 1). At some point thereafter, Ms. Fitzgerald moved to Virginia, where she now resides. Compl. ¶ 13.

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[12] IARC, *High-temperature Frying*, Vol. 95 (2010), http://monographs.iarc.fr/ENG/Monographs/vol95/mono95-7.pdf.

[13] IARC, *Dry Cleaning*, Vol. 63 (1995), http://monographs.iarc.fr/ENG/Monographs/vol63/mono63-5.pdf.

[14] *See Fitzgerald v. Monsanto Company*, No. 2:15-cv-5494 (E.D.N.Y. Sept. 22, 2015) D.I. 1 ("Fitzgerald EDNY Compl.") (attached as Ex. 1).

Ms. Barrera alleges injuries from being in the vicinity of and being sprayed with Roundup® as a child from 1994 through 1998 while her parents worked as migrant farm workers in Michigan. *Id.* ¶ 67. She was diagnosed with NHL in an unknown state in November 2006. *Id.* ¶ 68. Ms. Barrera currently resides in Texas. *Id.* ¶ 12.

The facts related to plaintiffs' cancer diagnoses and their doctors' associated differential assessments of the cause of their cancers, as well as the facts related to their alleged exposures (including but not limited to their alleged exposures to Roundup®), plainly are key to a fair resolution of the case. Those critical facts are in Texas and to a lesser extent Oregon and Washington for Mr. de la Garza, New York for Ms. Fitzgerald, and Michigan and potentially Texas for Ms. Barrera, but they are not in Delaware for any plaintiff.

III. QUESTIONS PRESENTED

A. IS DELAWARE AN APPROPRIATE FORUM FOR CLAIMS ARISING WHOLLY IN OTHER STATES, WHERE ALL OF THE KEY WITNESSES AND DOCUMENTS ARE LOCATED?

B. HAVE PLAINTIFFS ASSERTED SUFFICIENT FACTS THAT, IF PROVEN, WOULD ENTITLE THEM TO RELIEF?

IV. GOVERNING LEGAL STANDARDS

A. ***Forum Non Conveniens***

The doctrine of *forum non conveniens* "empowers the [c]ourt to decline jurisdiction" when "litigating in the plaintiff's chosen forum would be

inconvenient, expensive, or otherwise inappropriate." *Martinez v. E. I. DuPont de Nemours & Co.*, 82 A.3d 1, 26 (Del. Super. Ct. 2012) ("*Martinez I*"), *aff'd*, 86 A.3d 1102 (Del. 2014) ("*Martinez II*"). Although Delaware courts historically had imposed an exceedingly high burden on defendants seeking dismissal based on *forum non conveniens*, the Delaware Supreme Court recently provided new guidance on circumstances in which *forum non conveniens* dismissals should be granted:

> [W]e conclude, based on the evolution of our case law and insights gleaned from that experience, that some prior decisions gave inadequate weight to the discretionary power of the trial courts to recognize . . . the importance of the right of all parties (not only plaintiffs) to have important, uncertain questions of law decided by the courts whose law is at stake; and to the reality that plaintiffs who are not residents of Delaware, whose injuries did not take place in Delaware, and whose claims are not governed by Delaware law have a less substantial interest in having their claims adjudicated in Delaware.

Martinez II, 86 A.3d at 1111. The Supreme Court further held:

> If a court determines that it would be extraordinarily expensive and cumbersome for a defendant to litigate a case in Delaware, that may constitute not only [a] serious hardship to the defendant, but also concomitant, serious, and practical problems that would make it . . . not easy, expeditious and inexpensive for the Delaware court to retain jurisdiction.

Id. at 1113 (internal quotation omitted); *see also Hupan v. Alliance One Int'l, Inc.*, 2015 WL 7776659, at *4 (Del. Super. Ct.) (citing *Martinez II*).

Where, as here, there is no issue of prior pendency of the same action in another jurisdiction, a Delaware court is required to apply six factors – commonly known as the *Cryo-Maid* factors – in determining whether dismissal under *forum non conveniens* is appropriate:

1) the relative ease of access to proof;

2) the availability of compulsory process for witnesses;

3) the possibility of the view of the premises;

4) whether the controversy is dependent upon the application of Delaware law which the courts of this [s]tate more properly should decide than those of another jurisdiction;

5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and

6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.

Martinez II, 86 A.3d at 1104 (citing *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964)). As set forth below, an analysis of the *Cryo-Maid* factors favors dismissal of this action.

B. Superior Court Civil Rule 12(b)(6)

Pursuant to Superior Court Civil Rule 12(b)(6), the court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. Del. Super. Ct. Civ. R. P. 12(b)(6). Such motion should be granted where the plaintiff, with the benefit of all reasonable inferences, "could not recover under any reasonably conceivable set of

circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). The court, however, will not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). Moreover, failure to plead an element of a claim precludes entitlement to relief and is grounds to dismiss that claim. *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000).

V. ARGUMENT

A. Plaintiffs' Complaint Should Be Dismissed On The Basis Of *Forum Non Conveniens*.

Each of plaintiffs' claims depends upon: (1) third-party witnesses and documents located wholly in other states beyond the subpoena power of this Court, (2) the analysis of a foreign state's substantive laws, and (3) the public interest concerns of other states with respect to non-Delaware plaintiffs and non-Delaware alleged misconduct and injury. The complaint should be dismissed on the basis of *forum non conveniens*.

1. The Relative Inaccessibility of Evidence Favors Dismissal.

When the "majority of evidence and proof necessary to litigate [p]laintiffs' claims" are located outside of Delaware, and none is located in Delaware, that factor weighs in favor of dismissal. *See Abrahamsen v. ConocoPhillips Co.*, 2014

WL 2884870, at *2-3 (Del. Super. Ct.); *Martinez I*, 82 A.3d at 31 (same); *Aveta, Inc. v. Colon*, 942 A.2d 603, 611-13 (Del. Ch. 2008) (same). Here, plaintiffs' claims turn on evidence and proof located outside Delaware related to their claimed exposures and injuries.

Particularly in products liability cases, medical causation is a "critical" issue that "will rest upon testimony and . . . evidence from . . . [p]laintiff's treating physicians." *In re Consolidated Parlodel Litig.*, 22 F. Supp. 2d 320, 324 (D.N.J. 1998); *see also Martinez I*, 82 A.3d at 30-31 (noting importance of testimony of diagnosing physicians in cases alleging cancer from claimed toxic exposures). In this case, the Texas-based testimony of the diagnosing and treating physicians of Mr. de la Garza, the New York-based testimony of the diagnosing and initial treating physicians of Ms. Fitzgerald, and the Michigan or Texas-based testimony of the diagnosing and treating physicians of Ms. Barrera regarding the nature of the respective plaintiff's cancers, medical condition, and alternative risk factors will be central to the "critical" issue of causation. Likewise, the medical records of these key physician witnesses will be located in other states.

In addition, none of the evidence relevant to the plaintiffs' alleged exposure to glyphosate is located in Delaware. Instead, evidence related to each plaintiff's alleged exposures (as well as any other potentially injurious workplace or environmental exposures), including third party witnesses, employment records,

and business records related to the use of Roundup® or other substances, will be located in either Texas, Oregon and Washington (for Mr. de la Garza), New York (for Ms. Fitzgerald) or Michigan (for Ms. Barrera). *See Hupan*, 2015 WL 7776659, at *6 ("Injury cases, like the instant case, requires evidence to be submitted through witnesses, such as Plaintiffs' medical providers, employers or co-workers, lifestyle witnesses, record custodians, and others to provide factual bases for their claims.").

The relative inaccessibility in Delaware of any relevant evidence favors dismissal.

2. The Lack of Compulsory Process for Witnesses Favors Dismissal.

This Court does not have authority to compel the testimony at trial of any of the key third party witnesses with knowledge regarding the three plaintiffs' medical diagnoses and treatment or alleged exposures, including diagnosing and treating physicians, prior employers, prior co-workers and other fact witnesses. *See* Del. Const., art. IV, § 16 (discussing bounds of process in Delaware); *see also Sumner Sports, Inc. v. Remington Arms Co.*, 1993 WL 67202, at *4-5 (Del. Ch.) (granting *forum non conveniens* dismissal where the court could not compel appearance of key witnesses at trial); *Texas Instruments, Inc. v. Cyrix Corp.*, 1994

WL 96983, at *5 (Del. Ch.) (same).[15] This Court likewise does not have the authority to compel production of third-party documents located in other states, such as medical, employment and employer business records, but rather may only issue a commission authorizing a party to seek such relief from the appropriate state court. *See Frank v. Engle*, 1998 WL 155553, at *1 (Del. Ch.) ("[T]he Court can compel production only from those persons over whom the Court can assert personal jurisdiction."); *In re Inergy L.P. Unitholder Litig.*, 2010 WL 4919379, at *1 (Del. Ch.) (granting motion for commission to request the State of Maryland to issue a subpoena to compel the production of documents in the possession of a third party in Maryland).

The lack of compulsory process for witnesses and documents favors dismissal.

3. The Lack of Access To and Familiarity With the Premises Favors Dismissal.

The key premises in this case are the locations of the plaintiffs' alleged exposures, including farms in Washington and Oregon (for Mr. de la Garza) and in Michigan (for Ms. Barrera), landscape properties in Texas (for Mr. de la Garza),

[15] Plaintiffs may argue that videotaped deposition testimony largely serves the same purpose as live trial testimony, but Delaware courts have clearly outlined the preference for live testimony. *See Sumner Sports*, 1993 WL 67202, at *4-5 ("Deposition testimony, videotaped or otherwise, is a poor substitute for live testimony."); *Am. Home Prods. Corp. v. Adriatic Ins. Co.*, 1991 WL 236915, at *4 (Del. Super. Ct.) (noting that while depositions and videotaped deposition testimony "are viable answers to the problems faced when litigating a case involving witnesses spread across the nation, they are not preferable to live testimony").

and a horticultural center in New York (for Ms. Fitzgerald). While Monsanto does not presently anticipate that it will need to inspect any of these properties for purposes of its defense, a Delaware jury is likely to be less familiar with such properties than jurors in the states where the properties are located. *See Hupan*, 2015 WL 7776659, at *6 ("[t]he physical characteristics of the farms at issue may have a legitimate bearing on the allegations" of personal injury from exposure to glyphosate-based herbicides); *Am. Home Prods.*, 1991 WL 236915, at *4 (concluding in environmental exposure litigation that this factor weighed in favor of *forum non conveniens* dismissal).

The lack of familiarity with the alleged locations of exposure favors dismissal.

4. The Applicability of Other States' Laws Favors Dismissal.

Based upon the relevant contacts, it is clear that none of the plaintiffs' claims will be governed by the laws of Delaware. Rather, as set forth below, *see infra* at V(C)(1)(a)-(c), Mr. de la Garza's claims will be governed by Texas law, Ms. Fitzgerald's claim will be governed by New York law, and Ms. Barrera's claims will be governed by Michigan law.

As the Supreme Court explained in *Martinez II*:

> [J]ust as our cases have recognized the plaintiff's substantial interest in having important open questions of Delaware law decided by our courts, a principled application of that reasoning must give reciprocal weight

> to a defendant's interest in having important issues of foreign law decided by the courts whose law governs the case.

Martinez II, 86 A.3d at 1110.

Resolution of the plaintiffs' claims will require the Court to speak to a number of likely disputed issues of foreign state law, including (1) whether the foreign state would interpret plaintiffs' state law claims to parallel EPA labeling decisions so as to avoid federal preemption, *see Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 453 (2005) (state failure to warn claims preempted by EPA approval of labeling unless parallel to federal requirements); and (2) whether and how the foreign state law requires plaintiffs to establish an alternative safer design for glyphosate. Other state-specific issues of law will be raised as well, including, *e.g.*, the operative statute of limitations, the scope of the duty to warn, proximate causation, the sophisticated user doctrine, and the applicability of punitive damages.

Asking this Court to apply other states' laws to plaintiffs' claims is an inefficient use of judicial resources. The guidance of the Delaware Supreme Court requires that this Court respect principles of comity and allow its sister courts to first answer important questions under their states' laws. *See Martinez II*, 86 A.3d at 1110; *see also Williams Gas Supply Co. v. Apache Corp.*, 1991 WL 18091, at *3 (Del. Super. Ct.), *aff'd,* 594 A.2d 34 (Del. 1991) ("While it is not unusual for

courts of this State to deal with questions arising under the law of other jurisdictions, the fact that Delaware law will likely not apply does weigh in favor of [transfer].").

The applicability of other states' laws favors dismissal.

5. The Lack of Any Currently Pending Action in Another Jurisdiction is Irrelevant.

The parties are not currently litigating any case with the same operative facts in any other jurisdiction. Thus, there is no risk of overlapping proceedings if the motion is denied. However, when a case is at an early stage (like this one) and no discovery has taken place, Delaware courts have found no undue burden on plaintiffs if they are required to re-file their case in the appropriate forum. *See, e.g., IM2 Merchandising & Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *11 (Del. Ch.); *see also Logan v. Wells Fargo Bank, N.A.*, 2015 WL 5456694, at *1 (Del. Ch.) ("The fact that an action in a sister jurisdiction has not yet been filed is not dispositive. This court can defer to a court in South Carolina if a court there is able to hear the claims at issue in this matter."); *Hupan*, 2015 WL 7776659, at *8, 10 (dismissing on *forum non conveniens* grounds notwithstanding lack of pending action in another jurisdiction).

Thus, this factor does not weigh heavily in the *forum non conveniens* analysis.

6. Other Practical Problems Related to the Easy, Expeditious, and Inexpensive Resolution of this Case Favor Dismissal.

In addition to myriad evidentiary and legal problems that will arise if this case proceeds in this Court, this case should be dismissed because it would require the Court and potentially a Delaware jury to expend time and resources on a dispute that has no meaningful connection with this state. *See Am. Home Prods.*, 1991 WL 236915, at *8 ("The imposition of jury duty on the people of Delaware for a trial which they have no interest in is unfair . . ."); *see also Ward v. Tishman Hotel & Realty, L.P.*, 2010 WL 5313549, at *7 (Del. Super. Ct.) ("[L]itigating this case in Delaware would impose an unfair burden on the citizens of Delaware."). None of the plaintiffs reside in Delaware. *See Abrahamsen*, 2014 WL 2884870, at *4 (presumption in favor of plaintiff's choice of forum '"not as strong"' for an out-of-state plaintiff). Rather, the only connection between this forum and the case at bar is that Monsanto is incorporated here. That, by itself, "is not a sufficient contact to choose [Delaware] as a forum." *Williams*, 1991 WL 18091, at *3. When proceeding with litigation in Delaware rather than the jurisdiction whose law will apply "will result in the imposition of significant and undue costs on the defendant[] . . . . [who is] being subjected to this inconvenience solely because [it is] a Delaware corporation even though that fact has little, if any, importance to the plaintiff's claims," then plaintiffs' claims should be dismissed. *IM2 Merchandising*, 2000 WL 1664168, at *11; *see also Martinez II,* 86 A.3d at 1108-

09 ("The Superior Court also properly recognized that no countervailing local interest exists in this case because 'the Plaintiff is not a resident of Delaware, was not injured in Delaware, and … the Defendant's state of incorporation has no rational connection to the cause of action."); *Ward*, 2010 WL 5313549, at *7 ("Delaware has no interest in this litigation. There is no local interest in protecting the rights of [an out-of-state resident injured out-of-state] . . . . Plaintiff's claims have nothing to do with [defendant's] status as a business incorporated in Delaware.").

Plaintiffs' claims accordingly should be dismissed on the basis of *forum non conveniens.* If the Court grants this motion, it need not reach the separate legal deficiencies in plaintiffs' claims set forth below, which can be best addressed by courts in the appropriate fora.

B. Plaintiffs' Failure To Warn Claims Are Preempted Under FIFRA.

Plaintiffs' claims for failure to warn, whether brought under strict liability or negligence theories, are preempted by FIFRA – the pervasive federal regulatory scheme implemented by EPA – and by EPA's repeated determination that glyphosate does not cause cancer. *See Bates*, 544 U.S. at 453 ("[A] failure-to-warn claim alleging that a . . . pesticide's label should have stated 'DANGER' instead of . . . 'CAUTION' would be pre-empted because it is inconsistent with [EPA regulations], which specifically assigns these warnings to particular classes of

pesticides based on their toxicity.").[16] "The question of preemption is one of federal law, arising under the supremacy clause of the United States constitution . . ." *Delaware Valley Field Servs. v. Ramirez*, 105 A.3d 396, 405 (Del. Super. Ct. 2012), *aff'd*, 61 A.3d 617 (Del. 2013). The question here is one of express preemption. "Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted to some degree from a certain field . . . " *Id.*

Under FIFRA, "a manufacturer seeking to register a pesticide must submit a proposed label to EPA as well as certain supporting data." *Bates*, 544 U.S. at 438 (citing 7 U.S.C. §§ 136a(c)(1)(C), (F)). Registration of a herbicide constitutes "prima facie evidence that the [herbicide], its labeling and packaging comply with [FIFRA's] registration provisions . . ." 7 U.S.C. § 136a(f)(2). "In evaluating a [herbicide] registration application, [EPA] assess[es] a wide variety of potential human health and environmental effects associated with use of the product . . . . [Including] [p]otential human risk[] … [of] cancer . . ."[17] EPA "evaluate[s] and approve[s] the language that appears on each [herbicide] label to ensure the

[16] *See also Wilgus v. Hartz Mountain Corp.*, 2013 WL 653707, at *6-7 (N.D. Ind.) (citing *Bates* and holding that where plaintiffs' complaint directly challenged the labeling of the product and alleged that the defendants failed to adequately warn of potential dangers associated with it, plaintiffs' claims were preempted by FIFRA); *Smith v. Hartz Mountain Corp.*, 2012 WL 5451726, at *2-3 (N.D. Ohio) (same).

[17] *See* EPA, *About Pesticide Registration*, http://www2.epa.gov/pesticide-registration/about-pesticide-registration.

directions for use and safety measures are appropriate to any potential risk." *Id.*; *see also* 40 C.F.R. §156.10(i)(1)(i); 40 C.F.R. §156.60.

Notably, unlike with claims of efficacy such as those that were at issue in *Bates*, EPA may not waive an Applicant's data requirements pertaining to the human safety of a herbicide.[18] As *Bates* explains, EPA's decision to stop evaluating pesticides for efficacy was specifically based upon its need to devote its resources to assessing potential environmental and health risks. *See Bates*, 544 U.S. at 440. EPA cannot register a herbicide or approve its labeling unless EPA concludes that the herbicide "will perform its intended function without unreasonable adverse effects on the environment," *i.e.,* unreasonable risk to man or the environment. 7 U.S.C. § 136a(c)(5)(C); 7 U.S.C. § 136(bb) (defining "unreasonable adverse effects on the environment").

In order to ensure the exclusivity of EPA's comprehensive regulatory scheme over product labeling, section 136v(b) of FIFRA contains an express preemption clause, which limits the role of states in regulating warnings for pesticides and herbicides. Section 136v(b) provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The Supreme Court

[18] *See* 7 U.S.C. § 136a(c)(5) ("the Administrator may waive data requirements pertaining to efficacy"); *cf. Bates*, 544 U.S. at 440 (basing decision not to preempt claims based upon alleged

explained that the term "requirements" as used in section 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties. *Bates*, 544 U.S. at 443; *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (same). Thus, section 136v(b) preempts any statutory or common-law rule that would impose a warning requirement that diverges from EPA's labeling decisions under FIFRA.[19] *Cf. Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, 617 F.3d 207, 224 (3d Cir. 2010) (finding failure to warn claims not preempted by FIFRA where EPA required defendant to change label to add warning sought by plaintiff).

Here, plaintiffs allege under various legal theories that because Monsanto failed to warn of the "hazardous and carcinogenic nature of glyphosate", they suffered injuries. *See* Compl. ¶ 131; *see also id.* ¶ 110 ("Defendant has failed to adequately and accurately warn of the true risks of [p]laintiffs' injuries associated with the use of and exposure to Roundup® and its active ingredient glyphosate, a probable carcinogen."); ¶ 126(g) ("Defendant's negligence included . . . . Failing to disclose to Plaintiffs . . . that the use of and exposure to Roundup® presented severe

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inefficacy of herbicide on fact that EPA "had stopped evaluating pesticide efficacy for routine label approvals almost two decades ago . . .").

[19] The U.S. Supreme Court has twice confirmed this interpretation of section 136v(b). First, in *Riegel*, the Court explained that FIFRA's "provision pre-empting state 'requirements' pre-empted common-law duties." 552 U.S. at 324 (citing *Bates*). Then, in *Mutual Pharmaceutical Co. v. Bartlett*, the Court reiterated that under *Bates*, a state common-law claim imposes a "pre-emptable 'requirement.'" 133 S. Ct. 2466, 2479-80 (2013).

risks of cancer and other grave illnesses."). However denominated, these claims challenge the Roundup® label and are preempted. *See Scanlon v. Medtronic Sofamar Danek USA, Inc.*, 61 F. Supp. 3d 403, 411-12 (D. Del. 2014) (negligent misrepresentation claim expressly preempted under analogous provision in federal Medical Device Act because it was contrary to FDA labeling determination).

Plaintiffs' allegations are directly contradicted not only by EPA's prior express approval of the product and product label but also by EPA's consistent findings that glyphosate is *not* carcinogenic to humans. Specific findings of safety include:

- "In June 1991, EPA classified glyphosate as a Group E [carcinogen]—one that shows evidence of non-carcinogenicity for humans—based on the lack of convincing evidence of carcinogenicity in adequate studies." EPA, *Glyphosate: Reregistration Eligibility Decision (RED) Fact Sheet*, 2 (September 1993), http://archive.epa.gov/pesticides/reregistration/web/pdf/0178fact.pdf.
- "No evidence of carcinogenicity." Glyphosate; Pesticide Tolerances, 67 Fed. Reg. 60,934, 60,943 (Sept. 27, 2002) (to be codified at 40 C.F.R. pt. 180).
- "Glyphosate has no carcinogenic potential." Glyphosate; Pesticide Tolerance, 69 Fed. Reg. 65,081, 65,086 (Nov. 10, 2004) (to be codified at 40 C.F.R. pt. 180).
- "There is [an] extensive database available on glyphosate, which indicate[s] that glyphosate is not mutagenic, not a carcinogen, and not a developmental or reproductive toxicant." Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008) (to be codified at 40 C.F.R. pt. 180).

- "EPA has concluded that glyphosate does not pose a cancer risk to humans." 78 Fed. Reg. 25396, 25398 (May 1, 2013) (to be codified at 40 C.F.R. pt. 180).

- "In 2014, EPA reviewed over 55 epidemiological studies conducted on the possible cancer and non-cancer effects of [g]lyphosate. Our review concluded that this body of research does not provide evidence to show that [g]lyphosate causes cancer and does not warrant any change in the EPA's cancer classification for [g]lyphosate." EPA 2015 Desk Statement.

Plaintiffs' failure to warn claims seek to impose "requirements for labeling or packaging in addition to or different from" these consistent findings of EPA. Accordingly, these claims are preempted by FIFRA and must be dismissed.

C. Plaintiffs' Non-Warnings Claims Fail Because They Do Not Allege An Alternative Safer Design.

The plaintiffs' claims are governed respectively by Texas, Michigan, and New York law. Under the law in each of these three states, plaintiffs cannot proceed with their non-warnings design defect claims without alleging facts demonstrating an alternative safer design. Plaintiffs have failed to do so and their non-warnings claims accordingly should be dismissed.

1. Under Delaware Choice of Law Rules, Plaintiffs' Claims Are Governed Respectively By Texas, New York, and Michigan Law.

Because Delaware is the forum state, this Court applies Delaware's choice of law rules to determine which states' laws apply to plaintiffs' claims. *See VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1116 (Del. 2005). Delaware has adopted the '"most significant relationship' test" set forth in

the Restatement (Second) of Conflict of Law § 145(1) for tort claims. *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991). Under this test, "the laws of the jurisdiction which had the most significant relationship to the transaction and parties would control the substantive legal questions." *See New Zealand Kiwifruit Mktg. Bd. v. City of Wilmington*, 825 F. Supp. 1180, 1185 (D. Del. 1993) (internal citation omitted). Additionally, section 145(2) of the Restatement lists several factors the court must examine "when evaluating which state has the most significant relationship to the case: (1) 'where the injury occurred', (2) 'where the conduct causing the injury occurred', (3) the parties' 'domicile, residence, nationality, place of incorporation and place of business', and (4) where the parties' relationship is centered." *See Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 987 (Del. 2013) (citing § 145(2)).

There is a strong presumption in Delaware that the law of the place where the injury occurred governs related personal injury litigation. *See Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1053 (Del. 2015) (citing Restatement (Second) of Conflict of Laws § 146 (1971)); *see also Alten v. Ellin & Tucker, Chartered*, 854 F. Supp. 283, 287 (D. Del. 1994) ("[T]he Delaware Supreme Court has directed Delaware courts to apply the law of the state where the injury occurred unless another state has a more significant relationship to the occurrence and the parties."). By contrast, Delaware courts place relatively little weight on a

defendant's state of incorporation. *See, e.g.*, *Lee ex rel. Lee v. Choice Hotels Int'l Inc.*, 2006 WL 1148737, at *2 (Del. Super. Ct.) (holding that presumption in favor of applying the law of the place where the injury occurred "should not be disturbed where place of incorporation is the only factor favoring the forum") (internal citation omitted); *Smith v. Daimlerchrysler Corp.*, 2002 WL 31814534, at *1 (Del. Super. Ct.) (fact that defendant was a Maryland corporation and plaintiff purchased the allegedly defective car from the defendant in Maryland was "not sufficient to overcome the presumption that the law of the state where the injury occurred will govern the case.").

a. Mr. de la Garza's claims are governed by Texas law.

The complaint identifies three jurisdictions that are potentially relevant to Mr. de la Garza's claims: Washington, Oregon, and Texas. *See* Compl. ¶¶ 14, 73 Although plaintiff alleges exposure to Roundup® in Washington and Oregon prior to 1990, the majority of the events related to his claim took place in Texas including his last alleged eighteen years of exposure to Roundup®, his cancer diagnosis, and his treatment. *See id.* ¶¶ 73-74. Texas is also plaintiff's current state of residence, and has been his residence for the past 25 years. *See id.* ¶¶ 14, 73. Thus, Texas is the state with the most significant relationship to plaintiff's claims. *See* Restatement (Second) of Conflict of Laws §§ 145(2)(a), 146; *see also Meyers v. Intel Corp.*, 2013 WL 5803998, at *4 (Del. Super. Ct.) (applying

Colorado law where plaintiffs' alleged exposure to toxic substances occurred in both Oregon and Colorado, but last alleged exposure and diagnosis occurred in Colorado).

b. Ms. Fitzgerald's claims are governed by New York law.

New York is the sole state of Ms. Fitzgerald's alleged exposure to Roundup® and the state of her alleged cancer diagnosis. Compl. ¶ 69; *see also* Fitzgerald EDNY Compl. (Ex. 1). New York was also plaintiff's state of residence until at least 2012. *See* Fitzgerald EDNY Compl. ¶¶ 66-69 (Ex. 1). Thus, New York is the state with the most significant relationship to plaintiff's claims. *See* Restatement (Second) of Conflict of Laws §§ 145(2)(a), 146.

c. Ms. Barrera's claims are governed by Michigan law.

Ms. Barrera alleges exposure solely in Michigan. She does not allege where she was diagnosed with NHL, but she currently resides in Texas, making it the only state other than Michigan with any potential connection to the facts giving rise to her claim. Given the alleged facts, her claim would be governed by Michigan law.[20] *See Meyers*, 2013 WL 5803998, at *4 (holding that Colorado, where plaintiff's alleged exposure through parents' employment at manufacturing facility occurred, had most significant relationship to personal injury case, not

[20] Under Michigan law, only "two theories of recovery are recognized in product liability cases; negligence and implied warranty. Strict liability has not been recognized as a third theory of recovery." *Tice v. Zimmer Holdings, Inc.*, 2015 WL 6619143, at *2 (W.D. Mich.) (quoting

plaintiff's current state of residence or defendant's states of incorporation or headquarters).

2. Under Each Applicable State Law, Plaintiffs Fail to Meet Their Burden of Alleging Alternative Safer Design.

Texas, New York, and Michigan each require a plaintiff alleging design defect to plead an alternative safer design.[21] In each state, a failure to plead a safer design alternative will result in the dismissal of the claim.[22]

Plaintiffs anticipate this state law requirement, but their *ipse dixit* regarding the existence of a safer alternative design does not suffice. Plaintiffs offer bare allegations that a safer alternative design exists, *see* Compl. ¶ 83(h) ("Defendant could have employed safer alternative designs and formulations."); ¶ 87 ("Defendant's Roundup® products were and are more dangerous than alternative products and Defendant could have designed its Roundup® products to make them

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Johnson v. Chrysler Corp., 254 N.W.2d 569, 571 (Mich. Ct. App. 1977)). Thus, for this reason as well, Ms. Barrera's strict liability claim must be dismissed.

[21] *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 (Tex. 1999) (recognizing that "the availability of a safer alternative design" is a "requisite element [to] a cause of action for defective design"); *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 646 (S.D.N.Y. 2007) (plaintiff must establish the existence of a feasible design alternative that would make the product safer) (citing *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983)); *Rodger v. Ford Motor Co.*, 2008 WL 4646140, at *3 (Mich. Ct. App.) (plaintiff to show that "a feasible, alternative design was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to its users.") (internal citations omitted).

[22] *See Rodriguez v. Gilead Scis., Inc.*, 2015 WL 236621, at *3 (S.D. Tex.) (granting defendant's motion to dismiss "all claims, under any theory, related to design defects" for failure to plead a safer alternative design); *Cavanagh v. Ford Motor Co.*, 2014 WL 2048571, at *2-3 (E.D.N.Y.) (same); *Montney v. Gen. Motors Corp.*, 1996 WL 33359831, at *1 (Mich. Ct. App.) (same).

less dangerous."); ¶ 88 ("At the time Roundup® products left Defendant's control, there was a practical, technically feasible, and safer alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function . . ."), but the plaintiffs fail to plead any facts to support an alternative design for glyphosate or Roundup®.[23]

Monsanto does not have the burden to disprove plaintiffs' allegations; however, plaintiffs cannot and did not plead a feasible alternative to glyphosate because one does not exist. As detailed above, glyphosate is unique in its high specificity towards an enzyme that is essential to plant growth but that is not present in animals or humans. *See Glyphosate: A Once-In-A-Century Herbicide* at 319. No other chemical classes or analogs are capable of targeting the enzyme this way. *Id.* Glyphosate's unique mode of action also is active on a wide range of plant species. *Id.* Any supposed substitute to glyphosate would need to carry this same extraordinary and broad utility to qualify as a true, viable alternative. *See*, *e.g.*, *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995) ("Texas law does not require a manufacturer to destroy the utility of his product in order to

[23] Plaintiffs' bald allegations that Roundup® products are "inherently dangerous" or "unreasonably dangerous," *see, e.g.*, Compl. ¶¶ 77, 78, 80, 82, 83(c), 90, do not salvage their design defect claims. *See Short v. Ford Motor Co.*, 21 F.3d 1107, 1994 WL 171416, at *8 (5th Cir.) (Texas law) (holding that plaintiffs failed to establish a design defect where they "assert[ed] the bald conclusion that the design of the [product was] unreasonably dangerous" but provided "nothing by way of specific support for that conclusion beyond their own opinions and beliefs."); *Prohaska v. Sofamor, S.N.C.*, 138 F. Supp. 2d 422, 443 (W.D.N.Y. 2001) ("[A] design defect claim cannot be established simply on the basis of a product's inherent risks.").

make it safe.") (quoting *Hagans v. Oliver Mach. Co.*, 576 F. 2d 97, 101 (5th Cir. 1978)).

Plaintiffs' "conclusory allegations" regarding the existence of a feasible alternative design are "unsupported by specific facts" and their non-warnings design defect claims should be dismissed. *See Price*, 26 A.3d at 166.

D. Plaintiff Barrera's Claims Are Also Barred By Michigan's Statute Of Limitations.

Where, as here, a non-resident plaintiff files an action in Delaware for claims arising outside of Delaware, the statute of limitations is determined by Delaware's borrowing statute. *TL of Florida, Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 326 (D. Del. 2014); *see also Pallano v. AES Corp.*, 2011 WL 2803365, at *3 (Del. Super. Ct.) ("Delaware's borrowing statute is designed to prevent plaintiffs from forum shopping."). The statute states:

> Where a cause of action arises outside of [Delaware], an action cannot be brought [here] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state . . . where the cause of action arose, for bringing an action upon such cause of action.

10 *Del. C.* § 8121.

In determining the shorter of the two limitations periods, the Court also considers the accrual and tolling rules of the applicable state. *Huffington v. T.C. Grp., LLC*, 2012 WL 1415930, at *4 (Del. Super. Ct.).

Delaware courts determine where a plaintiff's claim arose by application of the most significant relationship test, which, as noted above, points here to Michigan. *TrustCo Bank v. Mathews*, 2015 WL 295373, at *9 (Del. Ch.). Accordingly, Ms. Barrera's claims are governed either by the Michigan or Delaware limitations period, whichever is shorter.

Under Michigan law, the relevant statute of limitations is three years, while under Delaware law, the statute of limitations is two years. *Compare* Mich. Comp. Laws § 600.5805(13) *with* 10 *Del. C.* § 8119. However, Delaware has a discovery rule that tolls the limitations period until the plaintiff is on notice "that the injury may be tortiously[sic] caused by the defendant's product." *Brown v. E.I. duPont de Nemours & Co.*, 820 A.2d 362, 368 (Del. 2003). In contrast, Michigan has no discovery rule. *See Trentadue v. Gorton*, 738 N.W.2d 664, 672 (Mich. 2007) (holding that unless the discovery rule is provided by statute, courts may not "toll[] or delay[] the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period . . ."). Thus, even if Ms. Barrera could allege "discovery" facts that would toll the statute of limitations in Delaware, her claims would need to be timely under Michigan's 3-year statute.

They are not timely. Ms. Barrera's claim accrued in November 2006, when she was diagnosed with NHL. *See* Compl. ¶ 68. Because she was a minor at that time, Michigan law extends her limitations period until one year after her

eighteenth birthday, that is, until April 2010. *See* Mich. Comp. Laws § 600.5851; *see also* Compl. ¶ 67 ("Plaintiff Joselin Barrera was born in April 1991."). Ms. Barrera did not bring this action until October 2015, more than six years after her eighteenth birthday. As a result, her cause of action is untimely.

Ms. Barrera may not rely on Michigan's "narrowly appl[ied]" fraudulent concealment exception, Mich. Comp. Laws § 600.5855,[24] to toll this limitations period because she has not alleged facts sufficient to meet her heightened Rule 9(b) pleading burden.[25] To be entitled to tolling under § 600.5855, a plaintiff must show "that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. Mere silence is insufficient." *Sills v. Oakland Gen. Hosp.,* 559 N.W.2d 348, 352 (Mich. Ct. App. 1996). "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit*, 692 N.W.2d 398, 405 (Mich. Ct. App. 2004) (internal citation omitted). Further,

[24] *Riverside Auto Sales, Inc. v. GE Capital Warranty Corp.*, 2004 WL 2106638, at *5 (W.D. Mich.) ("Courts are to strictly construe and narrowly apply the [Michigan statutory] fraudulent concealment exception") (internal citations omitted).

[25] Because fraudulent concealment is a species of fraud under Superior Court Civil Rule 9(b), Delaware courts require plaintiff to plead with particularity the circumstances of time, place, and contents of the false representations, the identity of the person making the representation, and what was gained. *See Sills v. Smith & Wesson Corp.*, 2000 WL 33113806, at *6 (Del. Super. Ct.).

because "[i]t is quite clear that only actions after the alleged injury could have concealed plaintiff's cause of action . . .", *id.* at 404, Ms. Barrera must allege such affirmative acts after her NHL diagnosis in November 2006.

Ms. Barrera does not allege that Monsanto fraudulently concealed the existence of her claim, and she does not allege any facts that could support such a finding. Ms. Barrera's allegations regarding purported scientific fraud in the 1970s and 1980s and false marketing in the 1990s all predate her NHL diagnosis and are accordingly inapposite. Ms. Barrera's more general allegation that Monsanto "concealed information concerning the dangerous nature of Roundup®," *see*, e.*g.*, Compl. ¶ 103, merely restates her claim of inadequate warning. "There is no authority for the proposition that a party that defends its product and, based on its investigation, denies that its product caused the harm is thereby concealing a claim." *Ciborowski v. Pella Window & Door Co.*, 2005 WL 3478159, at *4 (Mich. Ct. App.); *see also Irrer v. Milacron, Inc.*, 2006 WL 2669197, at *7-9 (E.D. Mich.) (defendant's alleged failure to disclose health risks of metal working fluids insufficient to toll statute of limitations based on fraudulent concealment).

Further, Ms. Barrera alleges that there has been public scientific research purportedly associating glyphosate with cancer dating back to the 1980s. *See* Compl. ¶¶ 28, 52-58, 60. Although this is the same research that EPA repeatedly has concluded does not support a finding that glyphosate causes cancer, *see supra*

at V(B), this research was available to the plaintiff and further precludes any tolling argument based upon fraudulent concealment. *See Irrer*, 2006 WL 2669197, at *9 (noting that any claim of fraudulent concealment tolling was contradicted by allegation that metal working fluids had been "the focus of extensive scientific studies over the past fifteen to twenty years").

VI. CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed in its entirety.

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