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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

PILLIOD, et al.

Plaintiffs,

vs.

MONSANTO COMPANY,

Defendant.

Case No. RG17862702

ASSIGNED FOR ALL PURPOSES TO
JUDGE WINIFRED SMITH
DEPARTMENT 21

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MONSANTO COMPANY'S MOTION FOR NEW TRIAL

Hearing Date: July 19, 2019
Time: 11:00 a.m.
Department: 21
Reservation No. R-2087954

Trial Date: March 18, 2019

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INTRODUCTION

This case compels close judicial scrutiny. The multi-*billion* dollar sum awarded in punitive damages is more than ***36 times*** greater than the largest punitive award ever upheld on appeal in California, dwarfs the already excessive compensatory awards, and is astronomically greater than awards California courts routinely vacate or reduce.

The jury imposed this astounding award despite the undisputed fact that Monsanto's determination regarding the safety of Roundup conformed with the conclusions of independent regulators and scientists throughout the world. The verdicts do not reflect the evidence presented in the case; they reflect deep passion and prejudice borne from Plaintiffs' counsel's improper argument rested on inflammatory, fabricated, and irrelevant evidence that should have been excluded. This prejudicial presentation—including a determined focus on IBT and Proposition 65—overshadowed the scientific evidence and overwhelmed the true causation questions for the jury. The resulting trial focused not on ascertaining the truth regarding the state of the science, causation, and compliance with legal duties, but instead on vilifying Monsanto in the abstract.

Monsanto "is entitled to two decisions on the evidence, one by the jury and the other by the court on a motion for a new trial." *People v. Robarge*, 41 Cal. 2d 628, 633 (1953). The exceptional verdicts here require particularly close scrutiny. For at least three separate reasons, the verdicts should be vacated and a new trial granted:

First, numerous irregularities in the trial prejudiced Monsanto and denied it a fair trial, including the joinder of Plaintiffs' claims in a single trial, intense local pre-trial publicity, and repeated misconduct by Plaintiffs' counsel. This prejudice was compounded by evidentiary errors, including the admission of evidence regarding IBT and Proposition 65. Plaintiffs made this irrelevant and prejudicial evidence the centerpiece of their case, resulting in a trial untethered to the critical scientific questions that should have been the focus. Additionally, instructional error on design defect and punitive damages requires a new trial.

Second, the verdicts are against the weight of the evidence. An independent assessment of the evidence leads to the unmistakable conclusion that the verdicts for both liability and punitive damages must be set aside in their entirety. The scientific and regulatory consensus supports Monsanto's good

faith belief that glyphosate-based herbicides (hereinafter "Roundup") are not carcinogenic and do not pose a risk in real world conditions. The epidemiology confirms that there is not an elevated risk from the use of Roundup sufficient to overcome the California requirement of evidence showing a doubling of the risk. And the inability of Plaintiffs' experts to rule out alternative and idiopathic causes renders their causation opinions inherently unreliable.

Third, the compensatory and punitive awards are unsupported, duplicative, and excessive. The award for future economic damages to Mrs. Pilliod for the "list price" of her medication lacks the required evidentiary support and cannot stand under settled California law. The awards for noneconomic loss far exceed the evidence presented and indicate a punitive element. Finally, the $2 billion awarded in punitive damages shocks the conscience and does not comport with due process. If the verdicts are not vacated, both awards must be substantially reduced.

This Court can and should order a new trial on all issues.

ARGUMENT[1]

I. IRREGULARITIES IN THE PROCEEDING REQUIRE A NEW TRIAL.

Multiple irregularities each independently warrant a new trial. Code Civ. Proc. §657(1).

A. Plaintiffs' Counsel Repeatedly Engaged in Prejudicial Misconduct.

Prejudicial attorney misconduct is an "irregularity" that requires a new trial. *See Russell v. Dopp*, 36 Cal. App. 4th 765, 772 (1995); *Garcia v. ConMed Corp.*, 204 Cal. App. 4th 144, 148 (2012). To demonstrate that misconduct was prejudicial, the moving party need only demonstrate a probability that it would have achieved a "result more favorable," absent the misconduct. *See Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 800 (2004); *Garcia*, 204 Cal. App. 4th at 149. That bar is not particularly high: California courts have "made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." *Id.* A single flagrant misstatement can sustain a new trial motion. *Id.* at 803.

Counsel here engaged in misconduct throughout trial, culminating in an over-the-top closing statement littered with precisely the type of misconduct that California law flatly prohibits—a

[1] Monsanto hereby incorporates by reference its Motion for Judgment Notwithstanding the Verdict ("JNOV Motion"), filed contemporaneously herewith.

performance that capped a trial in which counsel routinely ignored the Court's rulings and sought to invoke fear in jurors. Any of this conduct on its own could be grounds for a new trial; combined, it compels one.

1. Misconduct During Closing Statement Requires a New Trial.

During closing statement, Plaintiffs' counsel made a series of calculated and improper statements designed solely to inflame the prejudice and passion of the jury. There can be no doubt this misconduct was intentional. The day before, counsel said that he had "every intention of getting this jury angry at [Monsanto], getting them very angry at Monsanto." Declaration of Eugene Brown ("Brown Decl.") at Ex. A, Trial Transcript ("Tr.") 5430:8-9. And that is precisely what counsel set out to do. His statements ignored the Court's warning to not engage in improper closing argument. *See* Tr. 5428:21-5429:22. Counsel's conduct was so outrageous that the Court had to take the extraordinary step of admonishing him *sua sponte.* Tr. 5709:23.

Perhaps the most egregious form of attorney misconduct during trial is misleading the jury by false statement of law or fact. *See* Cal. Prof. Rules of Conduct 5-200(B); *People v. Bell*, 49 Cal. 3d 502, 538 (1989). Similarly, "[t]here can be no doubt that to argue facts not justified by the record, and to suggest that the jury could speculate, [is] misconduct." *Malkasian v. Irwin*, 61 Cal. 2d 738, 747 (1964). Counsel made several arguments that were downright false and/or not supported by any evidence. For example:

- He falsely claimed that the statements on the label are "[Monsanto's] choice and their choice alone" and implied that EPA plays no role in the warnings. Tr. 5532:2-5. This is simply not true: Monsanto cannot change the Roundup label without EPA's review, agreement, and approval. Tr. 3617:13-14.
- He invited wild speculation that Mr. Pilliod's compromised immune system may have been caused by Roundup, despite no evidence to support such claim.[2]
- He argued that the dose of exposure was 8 to 12 milligrams under the POEM exposure model, although no expert gave that dose calculation. He earlier attempted to introduce that same dose calculation during cross-examination, and an objection was sustained. *See* Tr. 5710:22-5711:21; 4682-4683.
- He claimed, without any evidence, that Mrs. Pilliod may have to pay out of pocket for her medication in the future. *See* Tr. 5598:14-19.

[2] *See* Tr. 5590:1-23 ("No one ever asked was [Mr. Pilliod's compromised immune system] caused by the Roundup? . . . studies suggest that glyphosate alters the gut microbiome . . . [and] could impact the immune system . . . So there's a possibility that the Roundup was itself causing the alleged immunosuppression.").

Plaintiffs' counsel also flagrantly and intentionally violated multiple stipulations and orders *in limine* in a blatant attempt to elicit fear. For example, counsel:

- Violated the Court's Order on MIL 14 by arguing that glyphosate is "in the food. It's all over the place." Tr. 5557:21-22.[3]
- Violated the Court's Order on MIL 23 by arguing that Roundup may have affected Mr. Pilliod's gut bacteria and led to his compromised immune system. This violation was especially egregious because Plaintiffs *stipulated* to Monsanto's MIL on this issue.
- Violated the Court's Order on MIL 24 by referring to a "magic" tumor in rebuttal, *see* Tr. 5717:3-5718:4—a term the Court repeatedly made clear was not to be used.

Moreover, counsel's use of incendiary language went far beyond the bounds of professionalism and encouraged the jury to decide the case based on passion and prejudice. For example, he argued that the EPA and EFSA would have "blood on their hands," Tr. 5569:15-23—implying that the jury, too, would have blood on its hands if it reached the same conclusion as EPA and EFSA. This suggestion was clearly improper. *See People v. Bandhauer*, 66 Cal. 2d 524, 529 (1967) (attorney "cannot overreach by stating his personal belief based on facts not in evidence."); *Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1227 (2006). Although the Court sustained Monsanto's objection, Tr. 5569:17-23, counsel nevertheless proceeded with similarly improper argument: "EPA has a bad track record . . . How many things have been cancer causers that it took a lawsuit to find the truth of?" Tr. 5572:20-5573:3. These arguments were prejudicial and require a new trial. *See Simmons v. S. Pac. Transp. Co.*, 62 Cal. App. 3d 341, 356 (1976) ("[A]n attempt to rectify repeated and resounding misconduct by admonition is . . . like trying to unring a bell.").

Finally, Plaintiffs' counsel misstated the law—and worse, instructed the jury to disregard the law—when he argued that punitive damages have "nothing to do with the Pilliods" and asked them to punish Monsanto based on its conduct during the entire time that Roundup has been on the market through today (45 years)—conduct that indisputably does not relate to Plaintiffs' alleged harm. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) (punitive damages may only punish "for the conduct that harmed the plaintiff, not for being an unsavory individual or business.")

[3] This not only violated the *in limine* order and repeated admonitions to not insinuate that glyphosate is everywhere, but it was also improper because (1) there was no evidence to support it; (2) it was wholly irrelevant given that Plaintiffs claim injury from dermal exposure; and (3) it was a tactic to scare the jury. *See Regalado v. Callaghan*, 3 Cal. App. 5th 582, 599 (2016)

2. The Prejudice to Monsanto From Plaintiffs' Improper Closing Statement Was Compounded by Misconduct Throughout Trial.

The multiple improper arguments during closing statement were enough to warrant a new trial. But the prejudice to Monsanto is all the more because of the pervasiveness of counsel misconduct throughout trial. Before the jury was even sworn, the Court admonished Plaintiffs for asking improper questions meant to precondition the jurors during *voir dire*. Tr. 867:23-24. Counsel's misconduct then continued into opening statements, when he improperly referred to the case as a "historic fight." Tr. 1309:16. *See, e.g.*, *Loth v. Truck-A-Way Corp*., 60 Cal. App. 4th 757, 765 (1998) (arguments that ask "each juror to become a personal partisan advocate" are improper because they "tend[] to denigrate the jurors' oath.").

Plaintiffs' counsel also made an elaborate show by twice putting on gloves to handle a Roundup bottle that contained only water. This dramatic demonstration served no purpose other than a sideshow scare tactic; in fact, the Court had to instruct the jury that the bottle contained water. There can be no doubt that this show grabbed the jurors' attention and, even after the Court's instruction, caused confusion. *See* Brown Decl. Ex. J, 4/18/19 Juror Question No. 12 ("Why the Lawyer put on gloves if only Water in the Roundup container?").

Taken together with misconduct in closing argument, these pervasive and repeated episodes rise to the level of prejudice. *See Martinez v. Dept. of Transp.*, 238 Cal. App 4th 559, 568 (2015) ("[T]he overwhelming cumulative effect of the misconduct . . . requires reversal."); *Garden Grove Sch. Dist. of Orange Cty. v. Hendler*, 63 Cal. 2d 141, 143 (1965).

B. Joining Plaintiffs' Separate Claims in a Single Trial Was Prejudicial and Erroneous.

A new trial on each Plaintiff's separate case is required because combining their claims in a single trial caused significant prejudice that would not have occurred in individual trials.

In other cases, this Court correctly ruled that plaintiffs' cases should be severed and tried separately.[4] Here, though, Plaintiffs' cases were presented to the jury as a single unit simply because they are married. The prejudice to Monsanto that resulted from a combined trial of Plaintiffs' cases

[4] *See* Brown Decl. at Ex. K, 7/14/17 Order, *Billings v. Monsanto Co.*, Case No. RG17852375; Brown Decl. at Ex. L, 7/26/17 Order, *Woodbury v. Monsanto Co.*, Case No. RG17855094.

cannot be overstated. Instead of delineating Plaintiffs' cases to ensure that they were afforded separate consideration, Plaintiffs' counsel capitalized on their joinder at every turn, using it throughout trial to bolster weaknesses in Plaintiffs' individual cases, and by making arguments and offering evidence that indisputably would not have been admissible if the cases had been tried separately. Below are just a few of the many and pervasive ways that joinder improperly prevented Monsanto from obtaining a fair trial on each Plaintiff's case:

- ***Bolstering of evidence through aggregation and repetition*.** Combining Plaintiffs' cases in a single trial inflated the strengths and obscured the weaknesses of their individual claims. By aggregating their evidence, Plaintiffs were able to bolster each other's cases merely by presenting them together. Although Plaintiffs co-owned properties where they used Roundup, the factual similarities between their cases end there. They were exposed to significantly different amounts of Roundup, with Mr. Pilliod spraying at least three times as much as Mrs. Pilliod. Tr. 2765:22-2766:2. They had different types of Non-Hodgkin Lymphoma ("NHL"), different risk factors, different treatments and prognoses, and were diagnosed years apart. As one California federal court noted in severing the claims of two plaintiffs who alleged that Roundup caused their cancers:

> Consolidating the two claims may give rise to the easy, potentially prejudicial inference that if Roundup caused Rubio's cancer it caused Mendoza's as well, or vice versa." **In other words, by trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case**.

Rubio v. Monsanto, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016). That is precisely what occurred here. Similarly, the introduction of cumulative expert testimony that arose from joinder also prejudiced Monsanto. Plaintiffs presented two specific causation experts who both offered opinions about both Plaintiffs. Thus, not only did the jury hear causation evidence for each Plaintiff's case that bolstered the other's, but they heard that evidence multiple times.

- ***Argument regarding the "odds" that spouses would both get NHL*.** The fact that Plaintiffs are husband and wife heightened the prejudice of combining their cases in a single trial. Although Plaintiffs' cases involved numerous differences as detailed above, it would be difficult for any jury to refrain from jumping to the assumption that Roundup caused both their cancers simply because of the coincidental fact that two elderly spouses who had used Roundup both contracted NHL subtypes.

Indeed, from opening statement to closing statement and at numerous points in between, Plaintiffs' counsel openly *encouraged* the jury to jump to that same baseless assumption. *See* Tr. 1314:10-1315:7 (Opening statement: "if you do the probability of both of them getting it just by chance… it's 1 in 20,000"; "this is so unlikely, it must be an environmental exposure, a chemical, Roundup"); Tr. 3883 (Dr. Nabhan testifying that "it's just common sense" that Roundup was the cause since both spouses had NHL); Tr. 3888; Tr. 5580:11-21 (Closing argument: it is "very rare" "for two genetically unrelated people to get the same" type of cancer).

- ***Admission of evidence related to failure-to-warn and punitive damages that would have otherwise been inadmissible.*** The factual questions of (1) whether Monsanto failed to adequately warn consumers, and (2) whether Monsanto's conduct rose to the extreme level of malice required for punitive damages, are closely tied to the time period at issue in a given individual case. *See* CACI 1205 (Jury Instruction No. 21) (plaintiff must prove that the product's risks were "known or knowable" in light of the generally accepted science "**at the time of manufacture, distribution and sale**") (emphasis added); CACI 3945 (Jury Instruction No. 32) (punitive damages must be based on conduct that caused plaintiff's harm). As explained in section II.C., *infra*, the relevant time periods for Mr. and Mrs. Pilliod are different in critical ways. By combining their two cases in one trial, however, Plaintiffs were able to introduce evidence that otherwise would not have been admissible in a single-plaintiff trial.[5]

- ***Same jury deciding punitive damages twice.*** Joining Plaintiffs' claims also left the same jury to decide the issue and amount of punitive damages twice based on the evidence presented in a single trial, resulting in double punishment to Monsanto for the exact same sales of the same products, as described further in section I.E., *infra*.

The prejudice that resulted from a joint trial could not be cured—and was not cured—through jury instructions. Although the jury was told to consider each Plaintiff's claims separately and to consider only the evidence applicable to each Plaintiff's claims, that proved an impossible and

[5] By way of example, Mrs. Pilliod stopped using Roundup in early 2015, *see* Tr. 3740:6-14, yet Plaintiffs introduced significant evidence regarding the state of the science and Monsanto's conduct after that time period, including evidence of Monsanto's alleged efforts to "ghostwrite" the 2016 Intertek papers. *See* Brown Decl. Ex. B, Reeves Dep. at 458:15-19, 460:3-466:13.

unmanageable admonition to follow. The numerous differences between each Plaintiff's particular medical histories, risk factors, conditions, and treatments presented an overwhelming task for jurors to understand the large volume of medical and other evidence without becoming confused about which evidence related to which Plaintiff. It is not realistic to ask a jury to un-hear or ignore evidence for one Plaintiff or to parse through and compartmentalize complex causation evidence, particularly when Plaintiffs' counsel made every effort to conflate their cases and present them as a single indivisible unit. *See, e.g.*, *People v. Hamilton*, 55 Cal. 2d 881, 896, 900 (1961) (limiting instruction requiring "mental maneuvers" was insufficient where neither lay or trained minds could have obeyed it). The jury's identical punitive damage awards for each Plaintiff demonstrate that they were not afforded separate consideration.

C. Local Pretrial Publicity Prevented Monsanto from Obtaining a Fair Trial.

A new trial is required because extensive local pretrial publicity prevented Monsanto from having the case heard by a fair and impartial jury. *See, e.g.*, *Paesano v. Super. Ct.*, 204 Cal. App. 3d 17, 20 (1988); *Williams v. Super. Ct.*, 34 Cal. 3d 584, 587-95 (1983). Since the first Roundup verdict came out of San Francisco last August (*Johnson*), the Bay Area has been inundated with local media reporting about Roundup cases, on top of numerous anti-Roundup advertisements that Plaintiffs' counsel has specifically targeted at the Bay Area. *See* Ex. O, Monsanto's Opp. to Pls.' Request for TRO. Then, during *voir dire* in this case, a San Francisco jury rendered a verdict against Monsanto in *Hardeman*, which was heavily covered in local media at the very time this court was attempting to secure an impartial jury. The timing of the *Hardeman* verdict tainted the jury pool and foreclosed Monsanto's ability to receive a fair trial. *See* Tr. 1306:24-1307:16.

The threat of a biased jury from prejudicial media exposure was not simply theoretical. The first set of juror questionnaires (received before the *Hardeman* verdict) showed that more than half knew about the *Johnson* verdict, and nearly half also said they could not be fair and impartial. One juror who was selected for the jury over Monsanto's objection openly admitted that he was already biased against Monsanto. Tr. 1025:6-10 (juror Olsen stating that he knows Monsanto has been a "bad actor" in the past and that he has a "pretty negative impression of Monsanto."); Tr. 1048:22 (Monsanto moving to strike Olsen for cause). While the Court's denial of Monsanto's motion to strike this biased

juror for cause independently warrants a new trial, *see, e.g.*, *People v. Szymanski*, 109 Cal. App. 4th 1126, 1133 (2003), the juror's comments also illustrate the biased nature of the jury and the jury pool as a whole.

D. Evidence Was Erroneously Admitted or Excluded.

Prejudicial evidentiary errors require a new trial. Code Civ. Proc. § 657(1), (7); *Hernandez v. Cty. of Los Angeles*, 226 Cal. App. 4th 1599, 1616 (2014). That is especially so here, where Plaintiffs capitalized on the admission of highly prejudicial evidence, including improper expert testimony and testimony regarding IBT and Proposition 65.

1. Expert Testimony Should Have Been Excluded Under *Sargon*.

On a motion for new trial, this Court can reconsider evidentiary rulings under *Sargon.* *See* Code Civ. Proc. § 657(1); *Sandco Am., Inc. v. Notrica*, 216 Cal. App. 3d 1495 (1990). Having now had the benefit of seeing the testimony at trial, this Court should grant a new trial based on numerous instances of improper testimony offered by Plaintiffs' experts.[6]

Dr. Benbrook. This Court excluded the majority of Dr. Benbrook's proffered opinions, specifying the limited testimony that Dr. Benbrook would be permitted to offer. *See* Brown Decl. Ex. P, 3/18/19 Order at 5–7; *see also* Tr. 3479:25-3480:12; 4/16/19 Bench Brief Regarding Testimony Dr. Benbrook May Not Offer. Prior to Dr. Benbrook's direct examination, the Court expressed frustration when Plaintiffs explained the extensive breadth in which they were planning to question Dr. Benbrook. The Court stated that it felt like it had been "blindsided," believing that Dr. Benbrook was only "going to touch on a fairly narrow subject." Tr. 3487:8-3489:1; 3493:1-5. Instead of offering testimony "on a fairly narrow subject," Dr. Benbrook improperly served as the mouthpiece of Plaintiffs' attorneys, narrating Monsanto company documents to ascribe unsupported negative motives, intentions, and conduct to Monsanto. Monsanto objected throughout Dr. Benbrook's testimony. *See, e.g.*, Tr. 3529:4-8; 3530:13, 23-25; 3546:11-14; 3549:2-3; 3567:2-3, 21-22; 3587:17; 3591:20; 3592:20; 3635:14; 3636:9-10. But the damage of Dr. Benbrook's irrelevant and prejudicial testimony was done.

Dr. Sawyer. Dr. Sawyer—who is not a medical doctor or epidemiologist—should not have been permitted to offer testimony on causation. Tr. 3288:19-3289:18; *See also Sargon* Motion to

[6] Monsanto incorporates by reference its *Sargon* briefing.

Exclude Sawyer. Dr. Sawyer provided no reliable methodology or basis for his opinions on general causation. As to specific causation, he openly admitted that he did not consider either Plaintiff's medical history or any other possible alternative causes for their NHLs, instead electing to "defer that to other experts in this case." Tr. 3259:5-3260:3. Nevertheless, Dr. Sawyer was permitted to offer his baseless conclusions that Roundup is "something that can cause non-Hodgkin's lymphoma" and that it was a "substantial factor" in causing the Plaintiffs' cancers specifically. Tr. 3123:9-19. Dr. Sawyer also offered the unsupported and speculative opinion that Roundup is a cancer promoter, citing the George study, which has been rejected by regulators around the world including IARC. Tr. 2035:8-2038:5; 3242:13-3245:9; 3285:17-21. He also testified about irrelevant and inflammatory topics such as Sarin gas, European bans of the surfactant POEA, and trace contaminants. *See* Tr. 3125:18-25; Tr. 3162:16-17; Tr. 3128:2-3133:11. *See also* Section I.D.2, *infra*. Because Dr. Sawyer had no relevant expertise or case-specific knowledge to offer these opinions, and because the opinions were not based on any reliable methodology, they should have been excluded.

Dr. Nabhan and Dr. Weisenburger. Dr. Nabhan's and Dr. Weisenburger's so-called "differential etiology" testimony should have been excluded. Dr. Nabhan and Dr. Weisenburger professed to "rule in" all possible causes of Plaintiffs' NHLs and then "rule out" everything except Roundup. But neither expert employed a reliable methodology in doing so. Both experts ignored (and thus failed to reliably "rule in") a range of Plaintiffs' conditions and characteristics with statistically significant links to NHL, then summarily ruled out Plaintiffs' other risk factors and idiopathic causes without a reasoned explanation, despite agreeing that the vast majority of NHL cases have no known cause. Tr. 2791:9-20; 4160:19-22. They also admitted that Plaintiffs could have developed the exact same NHLs if they had never been exposed to Roundup. Tr. 2788:4-11; 4168:11-23. *See also* § II.A., *infra*. This results-oriented, courtroom-driven testimony lacked the "intellectual rigor" and coherence required for admission at trial. *See Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 772 (2012); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674-75 (6th Cir. 2010) (differential diagnosis erroneously admitted where idiopathic cause "currently accounts for the vast majority of Parkinson's Disease cases, making it impossible to ignore and difficult to rule out."); *Bland v. Verizon Wireless, (VAW) LLC*, 538 F.3d 893, 897-98 (8th Cir. 2008).

2. Other Prominent Evidence Was Improperly Admitted or Excluded.

Proposition 65. The Court initially granted Monsanto's motion to exclude evidence related to Proposition 65, finding that: "[t]he standards for addition to the Prop 65 list are significantly different from the standards for causation in this case" (Ex. S, 3/19/19 Order at 4); admission of evidence related to Prop 65 would create a "black hole"; "the potential for misleading the jury . . . would be a major concern" (Tr. 170:24-171:21); and unlike the deliberative decisions about glyphosate made by EPA and the foreign regulators, California's decision to include glyphosate on Prop 65 was automatic and ministerial in nature. Tr. 1223:6-20. But after pressure from Plaintiffs' counsel and over Monsanto's objections, the Court eventually permitted Plaintiffs to offer evidence on Prop 65.[7]

Plaintiffs then made Prop 65 and the related ministerial and misleading conclusion that glyphosate is "known to the State of California to cause cancer" a centerpiece of their case, offering an expert witness who had previously been excluded (Dr. Pease) to discuss Prop 65 in detail, and highlighting Prop 65 during opening statement, closing statement, and their questioning of nearly every expert who testified.[8] As the Court initially determined, however, the ministerial Prop 65 process is not akin to the substantive and deliberative decision-making process undertaken by EPA and foreign regulators. Nor was Monsanto allowed to introduce evidence that any warning requirements had been stayed by a federal court because providing a warning would be false and misleading to consumers. *See Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 853 (E.D. Cal. 2018). The jury was therefore left with the impression that a warning is required, and Monsanto has simply not provided one. In effect, Plaintiffs used Prop 65 to circumvent any need to prove causation or duty to warn, presenting the case as if California had already determined those issues, thus misleading and influencing the jury, as evidenced by a specific juror question about it during closing argument. *See* Ex. T, Jury Question No. 18 (5/8/19).

IBT. The Court ordered that Plaintiffs could discuss the history of the scientific fraud that

[7] In so doing, the Court offered Monsanto an ultimatum: it could "choose" to keep Prop 65 out of the case *if* it also agreed to withdraw its RJN of certain foreign regulatory documents. Tr. 1282:13-1284:4. Monsanto did not accept this ultimatum, which would have required it to withdraw its proper RJN and agree to the exclusion of admissible evidence, but Monsanto expressly reserved its objection to the Court's admission of evidence related to Prop 65 under any circumstance. Tr. 1284:23-1285:6.

[8] *See* Tr. 1312, 1860, 2102-03; 2462:15-17; 2992:9-12; 3423-3425; 4967:6-18; 5219:15-5220:24; 5546:4-6.

occurred at Industrial Bio-Test ("IBT"), but could *not* suggest or imply that Monsanto was in any way involved. 3/19/19 Order at 6; Tr. 471:22-472:1. As Plaintiffs proved throughout trial, the line between permissible and impermissible references to IBT was either impossible to draw or one that Plaintiffs intentionally blurred. Each time Plaintiffs offered evidence or argument about IBT, they did so by discussing Dr. Wright (a former Monsanto employee) and his alleged role in the IBT fraud. *See, e.g.*, Tr. 1344:12-1346:21; 3531:21-3532:8; 3634:9-3635:22; 5500:21-5501:21. In so doing, Plaintiffs repeatedly offered testimony and argument insinuating that Monsanto (through Dr. Wright) actively defrauded the EPA. The most egregious example of this misleading and incendiary questioning occurred during Dr. Benbrook's redirect examination, when Plaintiffs repeatedly asked (over sustained objections) about Monsanto's alleged involvement in the IBT scandal. Tr. 3634:9-3635:22. During closing, Plaintiffs led with this improper theme, arguing that Roundup was "**literally born in fraud**." Tr. 5500:21-5501:21 (emphasis added).

This evidence was irrelevant and served only to distract and confuse the jury and to prejudice Monsanto. Monsanto, like the numerous other registrants whose data was invalidated when the fraud at IBT was discovered, had nothing to do with the fraud. Moreover, the invalidated studies were repeated by Monsanto and play no role in the current registration of Roundup. Nevertheless, as Monsanto predicted pretrial, Plaintiffs used this evidence to paint a false picture, inviting the jury to infer that Monsanto was actively involved in the fraud.[9]

EPA's 2019 Proposed Interim Registration Decision. On April 30, 2019, the EPA released a new report that "reflects the conclusions of EPA's most recent risk assessments" regarding glyphosate. *See* Brown Decl. Ex. U at 6. The report detailed that "[t]he EPA thoroughly assessed risks to humans from exposure to glyphosate from all uses and all routes of exposure and *did not identify any risks of concern*." *Id.* at 19 (emphasis added). Monsanto requested judicial notice of the EPA report the day after its release, but the Court denied tha request. Tr. 5068:24-5070:18. The April 2019 EPA report was directly probative of the "best scholarship" on glyphosate available and to show that Monsanto did not act with malice or oppression in marketing and selling Roundup. Judicial notice and admission of

[9] Additionally, courts have repeatedly determined that claims of "fraud-on-the-EPA" under state law are impliedly preempted by FIFRA. *See, e.g., Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199 (9th Cir. 2002); *Giglio v. Monsanto Co.*, 2016 WL 1722859, at *3 (S.D. Cal. April 29, 2016).

the report was also necessary to rebut Plaintiffs' repeated charges that EPA might change its mind on glyphosate at any time or even as a result of this trial. *See, e.g.*, Tr. 1404:6-16; 3571:22-3572:1. Thus, the jury was left with the inaccurate impression that the EPA had not made any recent pronouncements about glyphosate and could be on the cusp of finding that it is carcinogenic.[10]

Trace Contaminants and Impurities. In an effort to confuse the jury and prejudice Monsanto, Plaintiffs discussed several contaminants and impurities that appear in Roundup in trace amounts. During opening, Plaintiffs referenced formaldehyde, arsenic, and ethylene oxide, stating that these "contaminants" are known to cause cancer. Tr. 1329:24-1330. Dr. Sawyer later described formaldehyde as an "unwanted contaminant" and a "confirmed human carcinogen" that appears in Roundup at "extraordinarily high" levels. Tr. 3128:25-3130:6; *see also* Tr. 3131:4-3132:16 (describing ethylene oxide as an "extremely powerful sterilizing gas" that "kills every type of biological life on earth" and can be trapped in the head space of Roundup bottles).[11] Plaintiffs, however, offered no evidence about the amount of Plaintiffs' exposure, if any, to these alleged trace impurities, that any of them caused their NHLs, or that any impurity in Roundup exceeded the EPA-defined safe level. This testimony had no probative value and served only to prejudice Monsanto and provoke fear.

POEA. Plaintiffs also offered misleading and irrelevant evidence and testimony about POEA, a surfactant used in Roundup. Dr. Sawyer testified that POEA is approximately 40 times more genotoxic than glyphosate and is "banned basically everywhere except the US." Tr. 3160:17-19; 3162:16-17. And Dr. Weisenburger testified that glyphosate with a surfactant is approximately 200 times more genotoxic than glyphosate alone. Tr. 2764:2-10. But Plaintiffs offered no evidence comparing the genotoxicity of Roundup's POEA formulation to other glyphosate-based formulations, nor did they offer any evidence explaining how the increase in genotoxicity contributed to Plaintiffs' NHLs. As Plaintiffs' experts admitted, genotoxicity is not the same as carcinogenicity. Tr. 1982:23-

[10] Monsanto notes that the Court *permitted* Plaintiffs to introduce and question witnesses about a study that was released during trial, *e.g.*, Tr. 2302:7-2308:11, while at the same time precluding Monsanto from introducing the EPA determination that was released during trial.

[11] Dr. Sawyer also compared glyphosate to Sarin gas, which he described as a "war gas" that "can penetrate right through clothing" and is "lethal within a matter of a minute." Tr. 3125:18-25.

1983:4; 5129:10-24. This evidence was irrelevant, served no proper purpose, and was designed solely to prejudice the jury against Monsanto.

"List Price" of Revlimid. Plaintiffs presented evidence that Mrs. Pilliod currently takes the prescription medicine Revlimid and will continue to need that medication for the rest of her life. The Court erroneously permitted Plaintiffs to present the full "list price" for that medication, although there was no evidence that Mrs. Pilliod was reasonably certain to incur that amount. The error was compounded by the Court's refusal to permit cross-examination that the source of information for the "list price" expressly noted that it was not applicable to those, like Mrs. Pilliod, who have insurance. Tr. 4184:11-4189:11. This evidentiary error resulted in a nearly $3 million award for future economic damages that was not based on admissible evidence and was inconsistent with governing California law. *See* Section III.A., *infra*.

E. <u>There Were Prejudicial Instructional Errors.</u>

The following instructional errors warrant a new trial:

Consumer Expectation Instruction: The consumer expectation test was improper for this case, and therefore the consumer expectation instruction (CACI 1203) should not have been given. *See* JNOV Motion. Even if the test were applicable, the instruction given was erroneous because it failed to advise the jury that it must *first* determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations. *See* CACI 1203, Directions for Use. Thus, the instruction erroneously assumed a finding that was not made.

Punitive Damages Instructional Error: The punitive damages instructions were erroneous in at least two respects. ***First***, it was error to instruct the jury to determine and award punitive damages twice for the same conduct in a single case. Tr. 5437:11-15. There was no evidence Mr. Pilliod's and Mrs. Pilliod's purchase and use of Roundup were made separately based on separate conduct by Monsanto. In choosing to join their claims in a single trial, Plaintiffs chose to present one set of evidence regarding Monsanto's conduct and did not offer any distinction between how Monsanto's conduct impacted their respective decisions to use Roundup. Yet, the jury was asked to award punitive damages twice for that same conduct. There can be no doubt this error prejudiced Monsanto and led to jury confusion, as it resulted in the *doubling* of the already-excessive $1 billion punitive

damages award requested in Plaintiffs' closing statement. *See* Tr. 5606:7-16. ***Second***, the punitive damages instruction (No. 32) included "fraud," "trickery," and "deceit," despite no valid evidentiary support for such conduct. Plaintiffs impermissibly used the "fraud" language to claim that Monsanto engaged in fraud on the EPA—a claim that is preempted—and to misleadingly link Monsanto to scientific fraud committed by IBT. *See, e.g.*, Tr. 5500:14-5501:3.

II. THE VERDICTS ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

In ruling on a motion for new trial, the trial judge "sits as an independent trier of fact" who may "disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of" the jury. *Barrese v. Murray*, 198 Cal. App. 4th 494, 496 (2011) (citation omitted). After finding its own facts and re-weighing the evidence, the court "may grant a new trial even though there [is] sufficient evidence to sustain the jury's verdict on appeal, so long as the court determines the weight of the evidence is against the verdict." *Candido v. Huitt*, 151 Cal. App. 3d 918, 923 (1984). Such a re-weighing of the evidence is particularly important here in light of the numerous instances of misconduct that infected the jury.

A. <u>The Weight of the Evidence Does Not Support that Roundup Exposure Was a Substantial Factor in Causing Each Plaintiff's Non-Hodgkin Lymphoma.</u>

To prevail on any of their claims, Plaintiffs each were required to show to a reasonable medical probability that Monsanto's Roundup caused their NHL. *Jones v. Ortho. Pharm. Corp.*, 163 Cal. App. 3d 396, 403 (1985). To do this, they had to present sufficient evidence that Roundup is capable of causing NHL generally, *and* that it was a substantial factor in causing their NHLs specifically. *Cooper v. Takeda Pharms. Am., Inc.*, 239 Cal. App. 4th 555, 562-66 (2015). Plaintiffs were required to show that "but for" their exposure to Monsanto's Roundup, they would not have developed their diseases. *See* CACI 430 ("Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.").

Here, Plaintiffs failed to reliably exclude idiopathic causes of their NHLs and cannot demonstrate that they would not have developed NHL in the absence of their exposure to Roundup. As Plaintiffs' experts agreed at trial, idiopathic causes account for the vast majority of NHL

cases. Tr. 2791:15-20; 4160:19-22. Yet, Plaintiffs offered no evidence or explanation to establish that their cases fall outside this large majority even though they admitted that there is no pathology test or marker to identify NHL caused by Roundup as opposed to idiopathic causes. Tr. 2816:7-2820:3. Instead, Plaintiffs' experts purported to conduct a differential etiology to identify the likely cause of Plaintiffs' NHLs. But differential etiologies are "only valid" if "a substantial proportion of competing causes are known." Brown Decl. Ex. V, Federal Jud. Ctr., Ref. Manual on Scientific Evidence (3d ed. 2011) pp. 617-618, footnote omitted. Plaintiffs' experts' differential etiology testimony on NHL is fundamentally unreliable, and as a result, the jury's verdict that Roundup caused Plaintiffs' NHLs is against the weight of the evidence. *See, e.g.*, *Hall v. Conoco Inc.*, 886 F.3d 1308, 1314 (10th Cir. 2018) (finding that "because the evidence had pointed to idiopathic causes in most cases of acute myeloid leukemia," "the district court could reasonably view the failure to rule out idiopathic causes as fatal error tainting the differential diagnosis."); *See also* Section I.D.1., *supra.*

The evidence also showed that other factors have similar or greater associations with NHL than those alleged for Roundup, yet Plaintiffs' experts did not reliably rule out these either. An independent evaluation of the evidence, as this Court must undertake, leads to the unmistakable conclusion that the verdicts on causation are not supported by the weight of the evidence.

1. <u>Alva Pilliod's DLBCL</u>

The weight of the evidence does not support a finding that exposure to Roundup was a substantial factor in causing Alva Pilliod's DLBCL. Although Plaintiffs had the burden to demonstrate that Mr. Pilliod would not have developed DLBCL if he had not been exposed to Roundup, *see, e.g.*, CACI 430, his specific causation experts both admitted that he could have developed the exact same DLBCL at the same time even if he had never been exposed to Roundup. Tr. 2788:4-11; 4168:11-23. These admissions cannot be reconciled with the verdict.

And even if the most recent meta-analysis relied upon by Plaintiffs were reliable (it is not), it only showed a relative risk ratio of 1.4 for Roundup exposure and NHL. Tr. 2310:21-2311:1. Mr. Pilliod, however, had multiple other risk factors that carry greater NHL associations:

- <u>*History of Skin Cancer.*</u> Mr. Pilliod has developed skin cancer 22 different times, starting at the age of 28. Tr. 2871:12-18; 5140:2-3; 5142:16-5145:22. Dr. Levine testified that in nearly 50 years of practicing medicine, she has never seen a patient with a history of this

many different occurrences of skin cancer or with an immune system this compromised. Tr. 5144:22-5145:5; 5168:22-5169:24. The epidemiology data "confirm an increased risk of NHL in patients with recurrent skin cancer," showing risk ratios **between 2.0 and 3.0**. Tr. 2877:5-2879:3.

- *Ulcerative Colitis*: Mr. Pilliod also has ulcerative colitis, an incurable autoimmune disease that poses an overall, statistically-significant increased risk of **1.5** of developing NHL. Tr. 2857:13-15; 2864:10-13; 5163:5-5164:15.

- *HPV*: Mr. Pilliod also has HPV and has experienced recurrent episodes of genital warts for many years, which have been linked to statistically significant risk ratios for NHL of **3.0 to 3.1** in men. Tr. 2884:5-8, 2885:13-16; 2887:22-2888:3; 5164:16-5166:7.

Moreover, both parties' experts agreed that a weakened immune system is a major risk factor for NHL. *See* Tr. 2869:3-16; 4147:11-18; 5169:1-24. The evidence is clear that Mr. Pilliod has a weakened immune system, as evidenced by, among other things, his 22 bouts with skin cancer and five different episodes meningoencephalitis. Tr. 5154:5-5162:17. Mr. Pilliod also had numerous other risk factors that substantially increased his risk for NHL, including advanced age, body weight, a long history of smoking, and family history of cancer. Tr. 2829:8-2831:4.

Plaintiffs' experts failed to reliably rule out these more likely causes of Mr. Pilliod's NHL, and in some cases, did not even try. In fact, Dr. Weisenburger "didn't even know" Mr. Pilliod was diagnosed in 2006 with "inflammatory bowel most consistent with ulcerative colitis" until he was shown the pathology report during cross-examination. Tr. 2859:16-22; 2861:16-18. And neither Dr. Weisenburger nor Dr. Nabhan discussed Mr. Pilliod's recurrent genital warts on direct examination, let alone explained how they were able to exclude the corresponding statistically significant risk ratio of 3.0 to 3.1. Tr. 2884:5-8; 2885:13-16; 2887:22-2888:3. The jury's verdict is utterly unsupported by this fundamentally unreliable specific causation testimony.

2. Alberta Pilliod's PCNSL

The evidence presented also does not support a finding that Roundup caused Alberta Pilliod's PCNSL. According to Dr. Weisenburger's own research, because Mrs. Pilliod was negative for the t(14;18) chromosome translocation, her smoking history—*not* her exposure to Roundup—was the most likely cause of her NHL. Dr. Weisenburger flatly admitted that people like Mrs. Pilliod who were "exposed to herbicides for more than 17 years" but were t(14;18) negative had "no increased risk of NHL." Tr. 2803:1-6. Conversely, Dr. Weisenburger's research found that people like Mrs. Pilliod who were t(14;18) negative but smoked tobacco starting before age 20 had a statistically significant

doubling of the risk of NHL, Tr. 2815:3-18. Plaintiffs chose not to address this incredibly probative genetic evidence during the direct examinations of their specific-causation experts, and instead elected to bury it. Tr. 2807:1-4. This decision to ignore genetic testing guts any reliable basis for those causation opinions as they relate to Mrs. Pilliod.

The evidence also clearly showed that Mrs. Pilliod had numerous other risk factors that substantially increased her risk of developing PCNSL, including Hashimoto's disease, which has been linked to a statistically-significant *tripling* of the risk of developing NHL. Tr. 2855:15-18; 4385:19-4387:12. Mrs. Pilliod's personal history of bladder cancer, family history of cancer, age upon diagnosis, and elevated body weight also substantially increased her risk of developing NHL. Tr. 2829:8-2831:4. And as with Mr. Pilliod, Plaintiffs' experts offered no evidence or explanation to reliably rule out idiopathic causes. As discussed above, Plaintiffs had the burden to establish that Mrs. Pilliod would not have developed PCNSL had she never been exposed to Roundup. As they did with Mr. Pilliod, Plaintiffs' specific-causation experts Drs. Weisenburger and Nabhan specifically admitted the contrary—that Mrs. Pilliod could have developed the exact same PCNSL even if she had never used or been exposed to Roundup. Tr. 2788:4-11; 4168:11-23.

B. <u>The Evidence Does Not Support that Roundup's Design Was Defective.</u>

The weight of the evidence presented at trial does not support a finding that Roundup was defectively designed. Plaintiffs' theory of design defect is based on their claim that the combination of glyphosate and surfactants in Roundup renders it defective.[12] But Plaintiffs did not put forth any evidence that this specific combination caused their harm; in other words, they failed to demonstrate that they would not have contracted NHL if they had used a different glyphosate-based formulation or if Roundup used an alternative surfactant. *See O'Neil v. Crane Co.*, 53 Cal. 4th 335, 347 (2012); *see also Browne v. McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982); *Pooshs*, 904 F. Supp. 2d at 1025.

Neither Dr. Nabhan nor Dr. Weisenburger testified that the formulation, as opposed to glyphosate, caused Plaintiffs' NHL. Tr. 2891:12-15. And although Dr. Sawyer testified about the

[12] The formulation's use of glyphosate, a raw ingredient, cannot form the basis for liability under California law. *See* JNOV Motion at 6-8.

genotoxicity of POEA, his testimony was far from sufficient to establish that Plaintiffs' cancers were caused by Monsanto's use of POEA as opposed to a different surfactant. Genotoxicity is different than carcinogenicity, Tr. 1983:1-24, and Dr. Sawyer also did not testify that Plaintiffs would not have developed NHL had Monsanto used a different formulation. The weight of the evidence presented falls far short of establishing that a defective design caused Plaintiffs' injuries.

C. The Weight of the Evidence Does Not Support a Failure-to-Warn Because the Generally Accepted Science at the Time Roundup Was Manufactured, Sold, and Distributed Did Not Recognize a Risk of NHL.

A new trial on the failure-to-warn claims is required because the weight of the evidence does not support that Roundup's alleged risk of NHL was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge" at the time Monsanto distributed its Roundup that allegedly caused Plaintiffs' NHLs. *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1002 (1991); *see also* CACI 1205.

First, Plaintiffs presented no evidence that the alleged risk of NHL was the generally accepted or prevailing view at any time, much less prior to the IARC assessment in 2015.[13] Indeed, the evidence presented was all to the contrary, and even Plaintiffs' own expert witness on general causation, Dr. Christopher Portier, testified that he did not come to the opinion that glyphosate was a carcinogen at any time prior to 2015. Tr. 1902:6-9. On these facts, the weight of the evidence does not support that Roundup's alleged risk of NHL was the "prevailing best scientific" view at any time prior to Plaintiffs' NHL diagnoses in 2011 and 2015.

Even if post-2015 science were considered, the weight of the evidence showed that Plaintiffs' causation theory is not the prevailing or generally accepted view in the scientific community. At most, the evidence demonstrated that the IARC hazard assessment is a new, minority view that is not "generally accepted" and is still heavily debated in the scientific community.[14] After IARC published

[13] As detailed in Monsanto's JNOV Motion, the latest possible relevant time period for Mr. Pilliod is 2011 (when he was diagnosed with NHL and the last alleged use in the operative complaint), and neither Plaintiff presented evidence that any alleged exposure after 2012 was sufficient to cause or contribute to their injuries. *See* JNOV Motion at 5. Regardless of the time period, there is not sufficient evidence that the alleged risk of NHL from exposure to Roundup was the prevailing scientific view at any time.

[14] *See, e.g.*, Tr. 2247:15-19 (Dr. Jameson testifying that scientists at ECHA, EFSA, EPA, Health Canada, and Australia disagree with him); Tr. 1900:11-1901:1 (As of 2017, no pesticide regulatory authority considered glyphosate to be a carcinogenic risk to humans); Tr. 4072:24-4073:6. Plaintiffs may argue that IARC was a prevailing view because 94 scientists agreed with it, but 94 scientists does not make something a "prevailing"

its Monograph, numerous scientific and regulatory agencies worldwide re-assessed their views, rejected IARC's classification, and re-affirmed their prior conclusions that glyphosate is not likely to be a carcinogen.[15] As recently as two months ago, the EPA rejected IARC's conclusion regarding carcinogenicity. *See* Section I.D.2, *supra*. A minority view does *not* make a risk "known or knowable" in order to require a duty to warn. *See* CACI 1205, Directions for Use. A scientific debate should be decided by scientists, and a "generally accepted view" of the scientific community represents such a decision. It should not be decided by a jury with little scientific training that is simultaneously provoked by inflammatory and prejudicial argument and evidence.

D. <u>The Weight of the Evidence Does Not Support Punitive Damages.</u>

The weight of the evidence does not support punitive damages. *See* JNOV Motion at 8-11; *see also* Section III.C., *infra.*

Regulators around the world, including in the U.S., Canada, Australia, the EU, New Zealand, and Japan, have uniformly concluded that Roundup does not pose a cancer risk to humans. Tr. 1894:13-1901:2; Reeves Dep. at 846:2-852:25. Monsanto's reliance on this worldwide regulatory safety consensus was reasonable and nothing close to the "despicable" conduct required to support punitive damages. Indeed, Dr. Nabhan acknowledged that, even today, reasonable people can disagree about whether glyphosate should be classified as a carcinogen. Tr. 4072:20-4073:2. Accordingly, the record cannot possibly support a finding of *clear and convincing* evidence that Monsanto acted with *malice or oppression*—simply for selling a product that expert regulators believed, and still believe, is safe for human use. [16]

III. THE DAMAGES AWARDS ARE UNSUPPORTED, EXCESSIVE AND UNCONSTITUTIONAL.

The million-dollar-per-year compensatory awards and *billon* dollar punitive awards bear all the hallmarks of a runaway verdict based on passion and prejudice rather than the evidence and law. Both

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view in the scientific community in light of the overwhelming disagreement with IARC by the world's regulators; rather, that is the epitome of a minority view.

[15] *See*, *e.g.*, Tr. 1899:23-1900:1 (ECHA); 1900:3-10, 4082-83 (Australia); 1900; 4075:14-20 (Canada); 1929:-1930 (EFSA); 1953:7-15 (EFSA & ECHA); 1970:14-16 (EPA); 4081:11-4082:6 (New Zealand).

[16] Plaintiffs also did not present evidence of wrongdoing by Monsanto's officers, directors, or managing agents, as required to recover punitive damages. *See* Cal. Civ. Code § 3294(b); JNOV Motion at 11.

awards should be vacated or substantially remitted. *See* Code Civ. Proc. § 657(5).

A. The Award for Future Economic Damages to Mrs. Pilliod Lacked the Evidentiary Support Required Under Settled California Law.

The only future economic damages sought by Mrs. Pilliod were for the prescription medicine Revlimid, and thus the entirety of the jury's award for future economic damages is for that medication. This award was not supported by admissible evidence and was inconsistent with settled California law.[17]

Mrs. Pilliod does not currently pay the full list price for Revlimid. *See* Tr. 3747:16-21, 4033:12-15. *See also* Tr. 4035:10-4036:6. Under settled California law, an award of future medical expenses must be tied to the amount that is reasonably certain to *actually be paid* by the plaintiff or her insurer—not the "list price" or amount billed. *See Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011); *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308 (2013). Mrs. Pilliod, however, only presented the full list price for Revlimid.[18] She presented no evidence whatsoever that she or her insurer would be reasonably certain to pay that amount for the medicine in the future. Nevertheless, the jury awarded future economic damages based on the *full list price* of Revlimid—amounting to nearly $200,000 per year and a whopping ***$2.9 million*** over the course of her projected life for this single medication. *See* Tr. 4198:15-4199:5. Plaintiffs did not present evidence upon which a jury could determine the future medical expenses that Mrs. Pilliod would likely actually incur. The entirety of the future medical award must be vacated.

B. The Awards for Noneconomic Loss Are Excessive and Unsupported.

The jury's awards of $1 million per year to Mr. Pilliod and $2 million per year to Mrs. Pilliod in *both* past and future noneconomic damages (based on the life expectancies provided in Instruction No. 30) are not supported by the evidence presented.

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[17] *See also* Brown Decl. Ex. X, Monsanto's *Sargon* Mtn. to Exclude Testimony of James Mills and Ex. Y, Bench Brief Regarding Mrs. Pilliod's Future Economic Damages, both incorporated here by reference.

[18] Even the list price presented by Plaintiff lacked proper foundation. As this Court noted, three experts for Plaintiffs speculated as to three different "list prices," including simply pulling the list price for uninsured customers from the website drugs.com. *See, e.g.*, Tr. 4014:18-22 ("So whatever the number is that's been speculated now by three different witnesses, the highest of which is your expert, and your expert has based his opinion on that $21,000 number, that's not the number. I mean, that can't be the number…").

Mr. Pilliod's Noneconomic Damages. The award of $1 million per year for *both* past and future noneconomic loss are entirely untethered to the evidence presented and do not comport with the realities of Mr. Pilliod's diagnosis, treatment, and prognosis. At the least, the $10 million awarded to Mr. Pilliod for future noneconomic damages is wholly unsupported and cannot stand. To recover future noneconomic damages, Mr. Pilliod had to prove that he is "reasonably certain to suffer that harm." *See* Jury Instr. No. 28; *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 989 (2001). But the limited evidence introduced at trial established the contrary: Dr. Nabhan testified that, given the length of time Mr. Pilliod has been in remission, "it's extremely unlikely that [his] disease will recur." Tr. 3975:9-10. Dr. Raj agreed that Mr. Pilliod's prognosis is "very good." Ex. C, Raj. Dep. at 200:20-24. As this Court noted, Mr. Pilliod's future noneconomic damages "are constrained somewhat by th[e] evidence," "which has more to do with the outdoor sports and sailing and things he used to do." Tr. 4784:12-21. A 77-year-old man's inability to play sports or sail cannot justify $1 million per year in future noneconomic loss, particularly in light of the undisputed evidence that many of his activities were already limited by other medical conditions, unrelated to his NHL, including cognitive impairment resulting from his epilepsy. Tr. 2879:22-2883:4; 5290:20-5291:11.

The million-dollar-per-year award to Mr. Pilliod for past noneconomic damages also cannot be squared with the evidence. Mr. Pilliod was diagnosed with NHL in 2011, underwent a few months of treatment, and has been in complete remission for the past seven-plus years. Ex. C, Raj Dep. 152:22-153:1, 200:3-6; Tr. 2830:17-20. The recent decision in *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276 (2017) is instructive. There, the plaintiff (who at the time was a high school athlete) suffered serious injury after using a medical device, resulting in surgeries and procedures which "left a large open wound" and functional limitations. *Id.* at 288-89. The jury awarded $68,270 in economic damages and $5,127,950 in past and future noneconomic damages. *Id.* at 298, 302. Though recognizing that the plaintiff's serious injury had caused "persistent" and "substantial" pain, "extremely painful" additional procedures, a "disfiguring" scar, "highly compromised" daily activities, and "considerable emotional distress, anxiety, and embarrassment," the Court of Appeal reversed the jury's compensatory damages award as excessive and held that the trial court should have reduced the award or granted a new trial. *Id.* at 299, 302. The linchpin of that determination was the evidence that,

while plaintiff suffered a serious injury, her "condition improved steadily and dramatically;" yet, jurors appeared to have compensated her the same amount after her condition improved as when she was in extreme pain. *Id.* at 302. This "strongly suggest[ed] the jury was influenced by improper factors." *Id.* Here, similar to the plaintiff in *Bigler-Engler*, Mr. Pilliod underwent treatment for his NHL more than seven years ago; his condition improved after treatment; and he has been in remission for more than seven years. Yet, the jury awarded the exact same annual sum for both past and future noneconomic damages.

Finally, the $18 million in noneconomic damages awarded to Mr. Pilliod are plainly excessive. To determine whether a noneconomic award is excessive, California courts look to see if it bears a "reasonable relationship" to the economic award. *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1216 (2009); *see also Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 308 (2008). The noneconomic award for Mr. Pilliod is clearly disproportionate as it is ***380 times*** larger than his economic damages ($47,296.01).

Mrs. Pilliod's Noneconomic Damages. While Mrs. Pilliod underwent more intense treatment for her NHL and requires maintenance medication, she, too, is in remission and can perform normal daily activities like driving. Brown Decl. Ex. D, Rubenstein Dep. at 79:5-12. The jury's award of $2 million per year in *both* past and future noneconomic damages far exceeds the evidence presented for the same reasons stated above. Even including the entirely unsupported future economic damages award which must be vacated, *see* Section III.A., *supra*, Mrs. Pilliod's noneconomic damages award is nearly 11 times greater than her economic damages award. When the future economic award is excluded, the ratio is an even more disproportionate *169:1*.

C. The Punitive Damages Awards Are Excessive, Duplicative, and Unconstitutional

1. The Punitive Damages Awards Are Unconstitutional.

The $2 billion awarded in punitive damages is unconstitutionally excessive under both federal and state law and cannot stand. Because punitive damages "serve the same purposes as criminal penalties" but are awarded by juries without "the protections applicable in a criminal proceeding," S*tate Farm*, 538 U.S. at 417, due process "imposes certain limits, in respect . . . to amounts forbidden as 'grossly excessive'" as a safeguard against excessive penalties. *Philip Morris USA v. Williams*, 549

U.S. 346, 353 (2007). The court must consider three "guideposts" to determine whether a punitive award comports with due process: (1) the degree of reprehensibility of the defendant's actions; (2) the ratio between the compensatory award and the punitive award; and (3) a comparison between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418; *accord Roby v. McKesson Corp.*, 47 Cal. 4th 686, 712 (2009). When these guideposts are considered here, there can be no doubt that the award does not comport with due process and must be vacated or substantially reduced.

Reprehensibility: The reprehensibility guidepost reflects the view that some conduct—such as "intentional malice" and "threat[s] of violence"—is "more blameworthy." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996). "It should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.

The evidence presented here did not come close to establishing intentional malice or reprehensible conduct. Plaintiffs did not present any evidence that Monsanto believed Roundup to be carcinogenic yet chose to market it without a carcinogenicity warning anyway. To the contrary, the undisputed facts showed that Monsanto's determination that Roundup was not carcinogenic was in line with scientists and regulators around the globe. Plaintiffs and the jury disagreed with those decisions. But the fact that different people can have different views of the science does not make Monsanto's conduct reprehensible or malicious. Indeed, whether Roundup is carcinogenic remains a disputed question in the scientific community to this day and is one about which reasonable people can disagree. Tr. 4072:24-4073:6.

Ratios: The second "guidepost" focuses on the ratio between the compensatory and punitive awards. *Gore*, 517 U.S. at 580-81; *State Farm*, 538 U.S. at 425. Ratios that "exceed 9 or 10 to 1" are presumptively unconstitutional. *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1182 (2005); *see also State Farm*, 538 U.S. at 425. Due process permits ratios on the higher end of this scale—perhaps closer to the 9 to 1 ratio—"between punitive damages and a **small** compensatory award for **purely economic** damages." *Simon*, 35 Cal. 4th at 1189 (emphasis added). Because noneconomic

damages "may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent," due process requires smaller ratios—perhaps no greater than 1 to 1—between "punitive damages and a substantial compensatory award for [noneconomic damages]." *Id.* Thus, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. In *Roby*, the California Supreme Court held that, "[b]ased on the relatively low degree of reprehensibility and the substantial award of noneconomic damages" which "includ[ed] a punitive component," a 1 to 1 ratio was "the maximum punitive damages . . . in light of the constraints imposed by the federal constitution." 47 Cal. 4th at 718-20. Here, both the compensatory-to-punitive damages ratios and the economic-to-noneconomic damages ratios demonstrate that the punitive damages awards are excessive:

- Compensatory-to-Punitive Ratio: The jury awarded approximately $18 million in compensatory damages and $1 billion in punitive damages to Mr. Pilliod; and $37 million in compensatory damages and $1 billion in punitive damages to Mrs. Pilliod. This amounts to a *55 to 1* ratio for Mr. Pilliod and a *27 to 1* ratio for Mrs. Pilliod, even before any correction for the legal errors in the future economic damages award and the excessiveness of the noneconomic damages awards. Both greatly exceed the 1 to 1 ratio *Roby* held was the constitutional maximum where, like here, reprehensibility was low and the compensatory damage award contained substantial noneconomic damages reflecting a "punitive component." *Id.*; *see also Simon*, 35 Cal. 4th at 1182 ("Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.'").

- Economic-to-Noneconomic Ratio: The ratio of the the awards for economic damages compared to non-economic damages demonstrates that the compensatory awards here include a punitive component. Less than $50,000 of the jury's compensatory award to Mr. Pilliod was for economic damages, compared to $18 million in non-economic damages. This results in non-economic damages composing an extreme **99.7%** of the total compensatory award that dwarfs Mr. Pilliod's economic damages. For Mrs. Pilliod, even including the unsupportable award for future medical expenses, the non-economic damages awarded composed 85% of the total compensatory award. If the

future medical expenses are excluded, that ratio jumps to **99.4%**. By contrast, the compensatory award in *Roby*—which the California Supreme Court found contained a "punitive component" requiring a 1 to 1 ratio for punitive damages—consisted of only 68% noneconomic damages. *Roby*, 47 Cal. 4th at 718-19. No punitive award greater than a 1 to 1 ratio can possibly comport with due process here.

Comparisons to Other Cases and Civil Penalties: Allowing the jury's $2 billion in punitive damages to survive judicial scrutiny would be unprecedented. The two largest punitive damages awards to have survived judicial scrutiny in California of which Monsanto is aware are $55 and $50 million. *See Buell-Wilson*, 73 Cal. Rptr. 3d 277; *Boeken*, 127 Cal. App. 4th at 1691-1692, 1703. In *Johnson*, the Court reduced the $289 million punitive damages award to an amount equal to compensatory damages. *See Johnson v. Monsanto Co.*, 2018 WL 5246323, at *5 (Cal. Super. Oct. 22, 2018). At a minimum, a similar result is required here.[19]

The $2 billion awarded is also astronomical compared to civil penalties available for similar conduct. U.S. EPA may fine Monsanto up to $19,936 for selling Roundup with a label that "does not contain a warning or caution statement . . . adequate to protect public health." 7 U.S.C. § 136(q); 7 U.S.C. 136j(a)(1)(E); 40 C.F.R. § 19.4 (adjusting for inflation). California can levy up to a $2,500 penalty per day for misbranded herbicide labels. Cal. Health & Safety Code § 25249.7. Even a full year's worth of the maximum daily fine is approximately $912,000. The punitive awards here equal approximately *2,192 years* of such fines at the maximum amount.

2. <u>The Punitive Damages Awards Punish Monsanto Multiple Times for the Same Conduct and for Conduct Unrelated to Plaintiffs' Harm.</u>

Punitive damages are not intended to compensate a plaintiff, but instead to deter and punish the defendant. The punitive awards should be vacated or substantially reduced because they represent and risk multiple punishments for the same conduct. *See Delos v. Farmers Grp., Inc.*, 93 Cal. App. 3d 642, 667 (1979) ("judicial control in the form of a remittitur…is proper where there is the likelihood of several jury-imposed punitive damage awards . . . .").

[19] However, as discussed *infra*, an even greater reduction than that applied in *Johnson* is required here because the punitive awards result in multiple punishments for the same conduct.

Here, Monsanto was punished twice *in the same case* based on the same purchases of the same product and the same evidence regarding its alleged conduct. Moreover, the prospect of multiple jury-imposed punitive awards against Monsanto for Roundup cancer claims is not merely likely—it has already occurred. Prior punitive damages awards in Roundup cases currently total more than $114 million.[20] And in this large serial litigation, Monsanto could be punished again many times over for the same conduct concerning the sale of Roundup. *See Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1209 (2005) (rejecting punitive award due to multiple punishment problem); *Delos*, 93 Cal. App. 3d at 666-67.

Finally, the extreme sum of punitive damages awarded, combined with the fact that the same sum was awarded for each Plaintiff despite significant differences in the applicable time periods, leaves little doubt that the amount awarded impermissibly reflects punishment for conduct unrelated to each Plaintiff's harm. *See State Farm*, 538 U.S. at 422-23; *Medo*, 205 Cal. App. at 68. As explained in section I.A *supra*, Plaintiffs' counsel expressly encouraged the jury *not* to tether a punitive damages award to the specific conduct at issue for each Plaintiff's alleged harm, but rather to punish Monsanto "for 45 years of lying to the public…," which represents the entire time that Roundup has been on the market through today. *See* Tr. 5604:16-21.

CONCLUSION

The verdicts in this case do not reflect an impartial, considered evaluation of the evidence presented; they reflect the culmination of weeks of calculated effort by Plaintiffs' counsel to obscure the facts and engender deep passion and prejudice through the use of irrelevant evidence and inflammatory argument. The multi-billion dollar award is unhinged from the evidence and from due process. A new trial is required.

[20] The *Johnson* award is on appeal by both parties. Earlier this year, a federal jury in California awarded $75 million in punitive damages in *Hardeman*. Monsanto has moved to vacate or remit that award.

Although the evidence on punitive damages should be limited to the specific conduct that allegedly caused an individual Plaintiff's harm, Plaintiffs' counsel in all three cases (*Johnson*, *Hardeman*, and *Pilliod*) have presented essentially the same punitive damages case, arguing that Monsanto manipulated data and continues to sell Roundup despite knowing that it causes NHL. The result has been repeated punitive damages awards for the same alleged conduct.

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