A158228

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

ALVA AND ALBERTA PILLIOD,
Plaintiffs and Cross-Appellants,

v.

MONSANTO COMPANY,
Defendant and Appellant.

APPEAL FROM ALAMEDA COUNTY SUPERIOR COURT
WINIFRED SMITH, JUDGE • CASE NO. RG17862702

MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DEAN A. BOCHNER; [PROPOSED] ORDER

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FIRST APPELLATE DISTRICT, DIVISION TWO

ALVA AND ALBERTA PILLIOD,
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MONSANTO COMPANY,
Defendant and Appellant.

MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459, and California Rules of Court, rule 8.252, defendant and appellant Monsanto Company requests that this court take judicial notice of an amicus brief recently filed by the United States government in *Monsanto Company v. Edwin Hardeman*, United States Court of Appeals for the Ninth Circuit, No. 19-16636 (*Hardeman*). (See Declaration of Dean A. Bochner, exh. A.) This amicus brief sets forth the position of the United States government on whether federal law preempts state pesticide labeling requirements, and is therefore relevant to the preemption issues raised in this appeal. (See Cal. Rules of Court, rule 8.252(a)(2)(A).) The brief was not presented to the trial court in this case; it was filed after entry of the judgment that is the subject of the instant appeal. (See Cal. Rules of Court, rule 8.252(a)(2)(B),(D).) The brief is judicially

noticeable as part of the record of a United States court. (See Evid. Code, § 452, subd. (d)(2); Cal. Rules of Court, rule 8.252(a)(2)(C).)

Monsanto also requests that the court take judicial notice of excerpts of the reporter's transcript in *Johnson v. Monsanto Company* (A155940 & A156706, app. pending) (*Johnson*), which is currently pending in Division One of the First Appellate District. (See Bochner Decl., exh. C.) These transcript excerpts are relevant to the attorney misconduct argument raised in the appellant's opening brief that is being concurrently filed with this motion. (See Cal. Rules of Court, rule 8.252(a)(2)(A).) The transcript excerpts relate to proceedings that occurred before entry of the judgment that is the subject of this appeal, and were not presented to the trial court in this case. (See Cal. Rules of Court, rule 8.252(a)(2)(B), (D).) The transcript excerpts are judicially noticeable as part of the record of a California state court. (See Evid. Code, § 452, subd. (d)(1).)

Finally, Monsanto requests that the court take judicial notice of the judgments and other related documents filed in the *Johnson* and *Hardeman* cases. (See Bochner Decl., exhs. D, E, F, G, H.) These documents are relevant to the punitive damages arguments raised in the appellant's opening brief that is being concurrently filed with this motion. (See Cal. Rules of Court, rule 8.252(a)(2)(A).) These documents relate to proceedings that occurred both before and after entry of the judgment that is the subject of this appeal, and were not presented to the trial court in this case. (See Cal. Rules of Court, rule 8.252(a)(2)(B), (D).) They

are judicially noticeable as parts of the records of state and federal courts. (See Evid. Code, § 452, subd. (d).)

This motion is based upon the attached memorandum of points and authorities, the attached Declaration of Dean A. Bochner and exhibits, the attached proposed order, the concurrently filed appellant's opening brief, and the record on appeal.

February 7, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs Alva and Alberta Pilliod allege that their exposures to glyphosate-based herbicides manufactured by Monsanto caused them to develop non-Hodgkin's lymphoma. The jury awarded them more than $2 billion in compensatory and punitive damages, which were reduced to roughly $87 million on post-trial motions. Monsanto is appealing from the judgment.

In its appellant's opening brief, which is being filed concurrently with this motion, Monsanto contends that all of Plaintiffs' claims are preempted by federal law. (See AOB § I.) On December 20, 2019, the Environmental and Natural Resources Division of the U.S. Department of Justice and the Office of General Counsel for the U.S. Environmental Protection Agency (collectively, EPA) filed an amicus curiae brief in support of Monsanto's appeal in a separate action also alleging injury from glyphosate exposure—*Monsanto Company v. Edwin Hardeman*, United States Court of Appeals for the Ninth Circuit, No. 19-16636 (*Hardeman*). That brief sets forth EPA's position that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts the plaintiff's state law claims in that case. (See Declaration of Dean A. Bochner, exh. A.)

As we discuss below, the court should take judicial notice of this amicus brief because, among other things, (1) the brief addresses precisely the same preemption issue presented in this

case, (2) there are no meaningful factual differences between the *Hardeman* case and this case on the issue of preemption, and (3) Plaintiffs will suffer no prejudice. Indeed, perhaps for these same reasons, Division One of this District recently took judicial notice of the same amicus curiae brief in another glyphosate injury case—*Johnson v. Monsanto Company* (A155940 & A156706, app. pending) (*Johnson*). (See Bochner Decl., exh. B, p. 34.)

In its opening brief, Monsanto also contends that Plaintiffs' counsel engaged in pervasive and prejudicial misconduct throughout trial. (See AOB § V.) As one example, in his opening statement, Plaintiffs' counsel described this lawsuit as a "*historic* fight against Monsanto" and told the jury that their participation in "this *historic* case means everything to" his clients. (11 RT 1309:16, 1429:13, emphasis added; see AOB § V.A.) Plaintiffs' counsel knew these comments were improper at the time he made them because he was admonished for making virtually identical statements during the *Johnson* trial several months earlier. As we discuss below, this court should take judicial notice of certain excerpts from the reporter's transcript in *Johnson* that show Plaintiffs' counsel knew these statements were improper but made them anyway, even after the trial judge in *Johnson* had admonished him for doing so.

Finally, in its opening brief, Monsanto also argues that the nearly $70 million award of punitive damages in this case violates due process because it is the third punitive award levied against Monsanto for the same alleged misconduct. (See AOB § VII.B.) Indeed, Monsanto has already been ordered to pay almost $60

million in punitive damages in the first two Roundup cases that went to trial—*Johnson* and *Hardeman*. In *Johnson*, the jury awarded the plaintiff $250 million in punitive damages, which the trial court reduced to $39,253,209.35 as the constitutional maximum. (See Bochner Decl., exhs. D, E, pp. 50, 59-60.) In *Hardeman*, the jury awarded the plaintiff $75 million in punitive damages, which the trial court reduced to $20 million as the constitutional maximum. (See Bochner Decl., exhs. G, H, pp. 67, 69.) The punitive damages in all three cases were based on the same underlying conduct, and due process does not permit imposition of this type of serial punishment on Monsanto. Because the judgments and related documents from the *Johnson* and *Hardeman* cases are relevant to the punitive damages arguments asserted in this appeal, the court should take judicial notice of these documents.

LEGAL ARGUMENT

I. The court should take judicial notice of the amicus brief filed by EPA in the *Hardeman* appeal because that brief is relevant to the preemption issues presented in this appeal.

Under Evidence Code section 452, subdivision (d)(2), this court may take judicial notice of records of "any court of record of the United States." (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4 [taking judicial notice of a Ninth Circuit decision].) "This court may take judicial notice of court records outside the record on appeal, including unpublished orders and decisions in a related federal proceeding. However, a litigant must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters before this court." (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418, citations omitted; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1.)

Courts regularly take judicial notice of amicus curiae briefs where they are both relevant and helpful to resolving the issues before the court. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168, fn. 2 [taking judicial notice of an amicus brief filed in a related case raising relevant issues]; *People v. Sanchez* (1995) 12 Cal.4th 1, 85 [taking judicial notice of an amicus brief filed in an unrelated case where the People argued the brief was relevant to one of the arguments asserted by the defendant], disapproved on other grounds in *People v. Doolin*

(2009) 45 Cal.4th 390; *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 331 [in a writ proceeding, taking judicial notice of amicus briefs filed in direct appeal under Evidence Code section 452, subdivision (d)(1)]; *Inland Counties Regional Center, Inc. v. Superior Court* (2017) 10 Cal.App.5th 820, 827 [taking judicial notice of an amicus brief filed by a state agency in another action].)

Here, EPA's amicus brief in the *Hardeman* case is relevant and helpful in resolving the issues before this court. Edwin Hardeman filed a complaint asserting allegations that are similar to Plaintiffs' allegations here. (See Bochner Decl., exh. A, pp. 16-17.) EPA's amicus brief addresses a legal issue that is central to both the *Hardeman* case and the case before this court: whether FIFRA preempts state pesticide labeling requirements. EPA's position is: it does. (See, e.g., Bochner Decl., exh. A, pp. 19, 25 ["Through FIFRA, Congress determined that EPA should make these scientific judgments for the nation as a whole"].)

Monsanto argues in this appeal that it could not add a cancer warning label without EPA approval. (See AOB § I.) EPA's position set forth in the *Hardeman* amicus brief, as the official position of the United States on this issue, is thus directly relevant to whether Plaintiffs' claims are expressly preempted by FIFRA. It is therefore appropriate for this court to take judicial notice of EPA's amicus brief in the *Hardeman* case. (See *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1263, fn. 7 [taking judicial notice of opening brief in prior similar litigation]); *In re J.W.* (2015) 236 Cal.App.4th 663, 666, fn. 2 [judicially noticing appellate brief filed in another

nearly identical case]; *McAdory v. Rodgers* (1989) 215 Cal.App.3d 1273, 1275 [taking judicial notice of briefs filed in another case].)

Indeed, such a general statement of the United States' position on the preemption issue may also be a "legislative fact" subject to judicial notice. (*United States v. Gould* (8th Cir. 1976) 536 F.2d 216, 220 [courts may judicially notice "established . . . pronouncements that do not change from case to case" and "do not relate specifically to the . . . litigants"]; *Korematsu v. United States* (N.D.Cal. 1984) 584 F.Supp. 1406, 1414 [trial court took judicial notice of the purpose and general nature and substance of the conclusions of the Report of the Commission on Wartime Relocation and Internment of Civilians as legislative facts]; see also *Nebraska v. E.P.A.* (D.C. Cir. 2003) 331 F.3d 995, 998, fn. 3 [judicial notice of EPA pronouncements].)

Moreover, no unfairness or prejudice will result if the court takes judicial notice of EPA's amicus brief in the *Hardeman* appeal. Monsanto could not have sought judicial notice of that amicus brief in the trial court here because the brief was just filed on December 20, 2019, long after the trial proceedings in this case had concluded. And Plaintiffs have ample opportunity to respond to EPA's arguments in their briefing in this appeal. For all these reasons, the court should take judicial notice of the amicus curiae brief filed by EPA in the *Hardeman* appeal. Indeed, as noted above, Division One recently took judicial notice of the same amicus brief in the *Johnson* appeal. (See Bochner Decl., exh. B, p. 34.)

II. The court should take judicial notice of transcript excerpts from the *Johnson* case because those excerpts are relevant to the attorney misconduct issue presented in this appeal.

Under Evidence Code section 452, subdivision (d)(1), this court may take judicial notice of "[r]ecords of . . . any court of this state." (See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 483 [taking judicial notice of pleadings in an unrelated case pending in Los Angeles Superior Court].) This provision authorizes courts to take judicial notice of transcripts of proceedings in California's superior courts. (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 210, fn. 3 (*Bailey*) [transcript of superior court proceeding is "a proper subject of judicial notice" under Evidence Code section 452, subdivision (d)(1)].)

Appellate courts routinely take judicial notice of transcripts of proceedings in other cases where those transcripts are relevant to the issues presented on appeal. (See *People v. Sanchez* (2017) 18 Cal.App.5th 727, 737, fn. 6; *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 65 (*Kumaraperu*); *Bailey*, *supra*, 199 Cal.App.4th at p. 210, fn. 3; *Citizens for Responsible Open Space v. San Mateo County Local Agency Formation Com.* (2008) 159 Cal.App.4th 717, 726, fn. 4; *In re James H.* (2007) 154 Cal.App.4th 1078, 1082, fn. 3; *Satten v. Webb* (2002) 99 Cal.App.4th 365, 373-374 & fn. 7; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 154 & fn. 11, rejected on other grounds in *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85; *People v. Soto* (1985) 166 Cal.App.3d 770, 773 & fn. 2.)

Here, judicial notice is appropriate because the transcript excerpts are relevant to the attorney misconduct argument presented in this appeal. Specifically, as we explain in the opening brief (see AOB § V.A), Plaintiffs' counsel committed misconduct in his opening statement by characterizing this lawsuit as a "*historic* fight against Monsanto" and by telling the jury that their participation in "this *historic* case means everything to" his clients (11 RT 1309:16, 1429:13, emphasis added). Although the trial court overruled Monsanto's objections to these comments (see 11 RT 1430:5-13, 1436:24-1438:18), by the end of trial, the judge had changed her mind: outside the jury's presence, she instructed Plaintiffs' counsel not to use the term "historical" in closing argument "because this [case] is about the Pilliods" and to "enlist them in some sort of movement" would be "prejudicial" (31 RT 5432:8-20).

Plaintiffs' counsel knew these comments were improper before he made them in opening statement because he was previously admonished for making virtually identical statements in *Johnson,* another glyphosate injury action tried in San Francisco Superior Court. There, in opening statement, the same lawyer told a different jury: "You . . . are actually part of something really important. . . . [E]ach one of you, whether or not you want to be . . . , are actually *part of history*. And the world's watching because what you do here has really important consequences." (Bochner Decl., exh. C, p. 37:17-24, emphasis added.) In closing argument, counsel repeated the point, asking the jury to return a verdict that "changes the world" and adding,

"I told you all at the beginning of this trial that you were *part of history*, and you really are." (Bochner Decl., exh. C, p. 38:1-5, emphasis added.)

The trial court in *Johnson* expressly admonished Plaintiffs' counsel for making these comments: "[T]he one [statement] that I think was *really inappropriate* and the one that I'm most concerned about . . . were the arguments about changing the world, *being a part of history*, et cetera, with regard to punitive damages." (Bochner Decl., exh. C, pp. 39:22-40:1, emphasis added.) Consequently, the court gave the jury a detailed curative instruction. (Bochner Decl., exh. C, p. 41:6-23.)

The transcript excerpts cited above establish that Plaintiffs' counsel knew these statements were improper when he made them in this case because he was previously admonished for making virtually identical comments in *Johnson*. He made the statements anyway, knowing they would be an effective rhetorical device to inflame the jury's passions and inflate his clients' damages. Because these transcript excerpts are relevant to the attorney misconduct argument asserted in this appeal, the court should take judicial notice of the transcript excerpts.[1]

[1] Monsanto is not asking the court to take judicial notice of the *truth* of any statements contained in the transcripts—e.g., whether or not the jurors were in fact "part of history," as plaintiff's counsel contended. (Bochner Decl., exh. C, pp. 37:21-22, 38:3-4; see *Kumaraperu*, *supra*, 237 Cal.App.4th at p. 65 [court should not take judicial notice of the truth of statements contained in transcripts].)

III. The court should take judicial notice of the judgments and related documents filed in the *Johnson* and *Hardeman* cases because those documents are relevant to the punitive damages arguments presented in this appeal.

This court may also take judicial notice of judgments and related documents filed in other cases as "[r]ecords" of a federal or state court. (Evid. Code, § 452, subd. (d).) Indeed, appellate courts routinely take judicial notice of judgments and related documents filed in other cases if the documents are relevant to the issues presented on appeal. (See *Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 184-185 [taking judicial notice of judgments entered in other actions]; *Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 457, fn. 2 [taking judicial notice of special verdict and judgment in another case]; *Children's Hospital v. Sedgwick* (1996) 45 Cal.App.4th 1780, 1784, fn. 1 [same]; see also *People v. Purata* (1996) 42 Cal.App.4th 489, 495; *Inmates of Sybil Brand Institute for Women v. County of Los Angeles* (1982) 130 Cal.App.3d 89, 110.)

Here, the court should take judicial notice of judgments, orders, and related documents filed in the *Johnson* and *Hardeman* cases because those documents are relevant to the punitive damages arguments presented in this appeal. Specifically, as we explain in the opening brief, the nearly $70 million award of punitive damages in this case violates due process because it is the third punitive award levied against Monsanto for the same alleged

misconduct. (See AOB § VII.B.) Monsanto has already been ordered to pay almost $60 million in punitive damages in the first two Roundup cases that went to trial—*Johnson* and *Hardeman*. In *Johnson*, the jury awarded the plaintiff $250 million in punitive damages, which the trial court reduced to $39,253,209.35 as the constitutional maximum. (See Bochner Decl., exhs. D, E, F, pp. 50, 59-60, 62-63.) In *Hardeman*, the jury awarded the plaintiff $75 million in punitive damages, which the trial court reduced to $20 million as the constitutional maximum. (See Bochner Decl., exhs. G, H, pp. 67, 69; *In re Roundup Products Liability Litigation* (N.D.Cal. 2019) 385 F.Supp.3d 1042, 1046-1048.) The punitive damages in all three cases were based on the same underlying conduct, and due process does not permit imposition of this type of serial punishment on Monsanto. Because the judgments and orders referenced herein are relevant to the punitive damages arguments asserted in this appeal, the court should take judicial notice of these documents.

CONCLUSION

For the foregoing reasons, the court should take judicial notice of (1) the amicus curiae brief filed by EPA in the *Hardeman* appeal, a copy of which is attached as exhibit A to the Bochner Declaration; (2) relevant transcript excerpts from the *Johnson* trial, copies of which are attached as exhibit C to the Bochner Declaration; (3) the notice of entry of judgment, the order resolving the post-trial motions, and plaintiff's notice of acceptance of

remittitur filed in the *Johnson* case, copies of which are attached as exhibits D, E, and F to the Bochner Declaration; and (4) the judgment and amended judgment filed in the *Hardeman* case, copies of which are attached as exhibits G and H to the Bochner Declaration.

February 7, 2020

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MONSANTO COMPANY

DECLARATION OF DEAN A. BOCHNER

I, Dean A. Bochner, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner at Horvitz & Levy LLP, attorneys of record for defendant and appellant Monsanto Company. I have personal knowledge of the facts set forth herein. If called as a witness, I could and would competently testify to the matters stated herein.

2. Attached hereto as exhibit A is a true and correct copy of the brief of the United States as amicus curiae in support of Monsanto filed in *Monsanto Company v. Edwin Hardeman*, United States Court of Appeals for the Ninth Circuit No. 19-16636 (*Hardeman*).

3. Attached hereto as exhibit B is a true and correct copy of the January 21, 2020 order issued by the California Court of Appeal in *Johnson v. Monsanto Company* (A155940 & A156706, app. pending) (*Johnson*) granting Monsanto's request for judicial notice of the amicus curiae brief attached hereto as exhibit A.

4. Attached hereto as exhibit C are true and correct copies of pages 1325, 5058, 5265, 5266, and 5267 of the reporter's transcript of proceedings in the *Johnson* appeal.

5. Attached hereto as exhibit D is a true and correct copy of the notice of entry of judgment filed in the trial court on August 23, 2018, in the *Johnson* case.

6. Attached hereto as exhibit E is a true and correct copy of the trial court's order, filed October 22, 2018, denying Monsanto's motion for judgment notwithstanding the verdict and conditionally denying Monsanto's motion for new trial in the *Johnson* case.

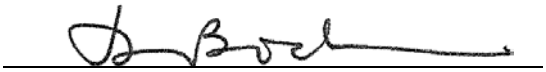
7. Attached hereto as exhibit F is a true and correct copy of Plaintiff's notice of acceptance of remittitur, dated and served on Monsanto Company on October 26, 2018.

8. Attached hereto as exhibit G is a true and correct copy of the judgment filed on May 3, 2019 in the *Hardeman* case.

9. Attached hereto as exhibit H is a true and correct copy of the amended judgment filed on July 17, 2019 in the *Hardeman* case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 7, 2020, at Burbank, California.



Dean A. Bochner

No. 19-16636

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Monsanto Company,
Defendant/Appellant,

v.

Edwin Hardeman,
Plaintiff/Appellee.

Appeal from the United States District Court
for the Northern District of California
Nos. 3:16-cv-00525 (Hon. Vince Chhabria)

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF MONSANTO

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INTRODUCTION

The district court in this case erred. When regulating pesticides under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), EPA has long declared, "The label is the law."[1] For "[i]t is a violation of Federal law to use [a pesticide] in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). *See also* 40 C.F.R. § 156.10(i)(2)(ii). Every time EPA reviews and approves the label for a registered pesticide, it is making federal law. EPA's decisions must also run a gauntlet of judicial review. And the outcome of that administrative law and judicial-review process then applies to a pesticide's users. It also applies to a pesticide's manufacturer and sellers. It is unlawful for manufacturers and sellers to make claims on their labels that differ from what EPA approves. 7 U.S.C. § 136j(a)(1)(B).

States can generally restrict the sale or use of pesticides. But they cannot "impose or continue in effect any requirements ***for labeling*** or packaging ***in addition to or different from*** those required under this subchapter." 7 U.S.C. § 136v(a), (b) (emphasis added). Through its application of state common law, Plaintiff did exactly that. He claimed that Monsanto failed a legal duty to make additional statements on the label about alleged cancer risks associated with Monsanto's glyphosate

[1] *See, e.g., EPA, Pesticide Registration Manual* (last updated April 2017), *available at* https://www.epa.gov/pesticide-registration/pesticide-registration-manual.

pesticide—cancer risks that EPA has for decades concluded science does not support.

EPA reviewed and approved Monsanto's glyphosate pesticide label. That approved label was the law tailored to Monsanto's product. Yet Plaintiff asserted safety labeling requirements exist under California law in addition to and different from that required, reviewed, and approved by EPA. Plaintiff is wrong and his lawyers sailed directly into preempted territory in how they opted to try this case.

INTEREST OF THE UNITED STATES

The United States, through the Environmental Protection Agency (EPA), has responsibility for implementing and enforcing the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. FIFRA generally requires that EPA must register a pesticide and approve its label before that pesticide may be distributed, sold, or used in any State. 7 U.S.C. § 136a. That label, once reviewed and approved by EPA, is controlling. States retain the power to restrict the sale, or use of pesticides within their borders, but they cannot "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(a), (b).

Plaintiff here sued the manufacturer of the pesticide Roundup®. This pesticide contains an active ingredient called glyphosate, which Plaintiff alleges

causes cancer. Plaintiff alleged state law causes of action relating to the manufacturer's failure of the common law legal duty to warn of the alleged risk.

Roundup is registered under FIFRA and its EPA-approved label does not contain a cancer warning. The United States has a strong interest in preserving Congress's express delineation of federal versus state authority, which ensures that the federal government can establish and maintain nationally uniform requirements for the labeling and packaging of pesticides.

The United States files this brief as of right pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. FIFRA

Congress created FIFRA through a series of enactments to regulate the labeling, sale, and use of pesticides, including herbicides. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, *see* ch. 125, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and safety concerns." *Id.*; *see also* Federal Environmental Pesticide Control Act of 1972 (1972 Amendments), Pub. L. No. 92-516, 86 Stat. 973. The 1972 Amendments effectively "transformed FIFRA

from a labeling law into a comprehensive regulatory statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus*, 467 U.S. at 991). Congress has continued to amend FIFRA in response to experience gained in regulating pesticides. *See, e.g.*, Federal Pesticide Act of 1978 (1978 Amendments), Pub. L. No. 95-396, 92 Stat. 819; Food Quality Protection Act of 1996 (1996 Amendments), Pub. L. No. 104-170, Tit. II, 110 Stat. 1489.

Section 136a(c)(5) of FIFRA provides that EPA "shall register a pesticide" if the agency determines, in light of any restrictions placed on the pesticide's use, that:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5). EPA has promulgated FIFRA regulations establishing the registration process. *See* 40 C.F.R. § 152 et seq. As part of that process, EPA must and does review and approve of the statements manufacturers propose to make on a label. *See* 40 §§ C.F.R 152.40-152.55. If EPA has reason to believe a pesticide product violates FIFRA's provisions, EPA may issue "stop sale, use, or removal" orders, 7 U.S.C. § 136k(a), the offending products may be seized and condemned, 7 U.S.C. § 136k(b), and the pesticide manufacturer may be subject to civil and

criminal penalties, 7 U.S.C. § 136l. *See* 7 U.S.C. 136j (identifying "[u]nlawful acts").

EPA is required to review each pesticide registration every fifteen years to ensure that each registration continues to satisfy FIFRA's standards. 40 C.F.R. § 155.40(a). EPA also must review and approve any significant change to the labeling or packaging of a FIFRA-registered product. *See* 7 U.S.C. § 136a(c); 40 C.F.R. § 152.44(a).

FIFRA establishes a program for federal-state cooperation in regulating pesticides. *See Mortier*, 501 U.S. at 601-602. Section 136v, captioned "Authority of States," sets forth key principles of that relationship. *See* 7 U.S.C. § 136v. Section 136v(a) recognizes that, as a general matter, States retain their historic authority to regulate pesticide sale or use, provided that a State does not permit a sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. § 136v(a).

Nevertheless, to ensure a uniform nationwide regulation of pesticide labeling, Section 136v(b) forbids a State from imposing any additional or different requirements on pesticide labeling or packaging than those imposed by FIFRA:

> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). Sections 136v(c)(1) through (c)(4) set out additional limitations on state-issued registrations. 7 U.S.C. § 136v(c)(2)-(4). In short, Section 136v provides that a State may prohibit the sale or use of any pesticide within its borders. Under specified conditions, a State may also allow a pesticide to be used within its borders for purposes other than those provided in the federal registration.

FIFRA defines the term "label" as "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." *Id.* § 136(p)(1). FIFRA defines "labeling" more broadly as:

> [A]ll labels ***and all other written, printed, or graphic matter***: (A) ***accompanying the pesticide or device at any time***; ***or*** (B) to which reference is made on the label or ***in literature accompanying the pesticide*** or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, and the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

Id. § 136(p)(2) (emphasis added).

FIFRA prohibits the sale and distribution of misbranded, unregistered, or adulterated pesticides and the use of any registered pesticide in a manner inconsistent

with its labeling. 7 U.S.C. § 136j(a)(1). One way a pesticide may be misbranded is if its label bears a statement that "is false or misleading." 7 U.S.C. § 136(q)(1)(A).

B. California's Proposition 65

Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5–25249.14, known as Proposition 65, the Governor of California is required to publish a list of chemicals said to be known to the State to cause cancer. The contents are determined by certain identified entities, including EPA and the International Agency for Research on Cancer. Proposition 65 also prohibits any person in the course of doing business from knowingly and intentionally exposing anyone to the listed chemicals without a prior "clear and reasonable" warning. Cal. Health & Safety Code § 25249.6. This means that the warning must: (1) clearly say that the chemical involved is known to the State of California to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. 27 Cal. Code Regs. § 25601. California recognizes several ways to provide the mandated warning. Cal. Code Regs. § 25602.

C. History of Glyphosate Review and California's Glyphosate Listing[2]

EPA first reviewed the potential carcinogenic effects of glyphosate in 1985.[3] The reviewing panel concluded that glyphosate, was "possibly carcinogenic to humans," though this conclusion was subsequently amended to a lower risk category after the original data was reassessed. *Id.* at 1. In 1991, EPA reviewed additional glyphosate studies and concluded that the substance should be classified as having "non-carcinogenicity for humans." This designation supported EPA's re-registration of glyphosate in 1993.[4] EPA relied on this 1991 review in a series of glyphosate tolerance rulemakings occurring from 1997 to 2008. *See i.e.*, 62 Fed. Reg. 17,723 (1997); 67 Fed. Reg. 60,936 (2002); 69 Fed. Reg. 65,083 (2004).

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[2] In recounting the history of EPA's glyphosate review the United States cites to government reports and records. This Court may take judicial notice of such reports and records. *See Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (recognizing that government records and reports are generally appropriate for judicial notice); Fed. R. Evid. 201(b)(2) (The court may judicially notice a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

[3] *See* EPA Office of Pesticides & Toxic Substances, "Second Peer Review of Glyphosate," at 3 (Oct. 30, 1991), available at https://archive.epa.gov/pesticides/chemicalsearch/chemical/foia/web/pdf/103601/417300-1991-10-30a.pdf.

[4] EPA Office of Pesticides and Toxic Substances, "Reregistration Eligibility Decision Glyphosate," (September 1993), available at https://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-417300_1-Sep-93.pdf.

EPA revised its carcinogen risk assessment guidelines in 2005. The lowest risk category under the 2005 guidelines is "not likely to be carcinogenic to humans."[5] In 2015, during the last Administration, EPA's Cancer Assessment Review Committee reevaluated available glyphosate data, and classified glyphosate as "not likely to be carcinogenic to humans."[6] On December 12, 2017, EPA's Office of Pesticide Programs issued a paper entitled "Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential."[7] EPA undertook this evaluation as part of its 15-year registration review. *Id.* at 12. The 2017 evaluation includes review of existing studies that registrants had not previously submitted to the Agency, as well as a comprehensive literature review. *Id.* at 20-22. In 2017, EPA concluded that "the strongest support" was for a conclusion that glyphosate is "not likely to be carcinogenic in humans." *Id.* at 143. This 2017 paper is part of EPA's glyphosate registration review process—a process that remains ongoing.

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[5] EPA Risk Assessment Forum, "Guidelines for Carcinogen Risk Assessment," at 2-57 (March 2005), available at https://www.epa.gov/risk/guidelines-carcinogen-risk-assessment.

[6] EPA Office of Chemical Safety & Pollution Prevention, "Glyphosate: Report of the Cancer Assessment Review Committee," at 10 (October 1, 2015), available at https://www.biologicaldiversity.org/campaigns/pesticides_reduction/pdfs/EPA-HQ-OPP-2009-0361-0057.pdf.

[7] EPA Office of Pesticide Programs, "Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential," (Dec. 12, 2017), available at https://cfpub.epa.gov/si/si_public_record_Report.cfm?Lab=OPP&dirEntryId=337935.

On July 7, 2017, California listed glyphosate as a substance regulated under Proposition 65, based on the International Agency for Research on Cancer's classification of the pesticide as "probably carcinogenic to humans." Because this listing triggered Proposition 65's warning requirements, many manufacturers that had been registered to use glyphosate reached out to EPA for guidance. Some specifically sought EPA's approval to amend their product labels to satisfy Proposition 65. EPA did approve a limited number of applications allowing the addition of a Proposition 65 glyphosate cancer warning to pesticide labels when requested. EPA did not, however, consider these statements to be "Human Hazard and Precautionary Statements" as administered in 40 C.F.R. § 152.156 Subpart D (156.60 *et seq.*). Because the statement was not a FIFRA required statement, and because it was framed as a statement about California's assessment, it did not receive the same level or review as other parts of the label. These label-change approvals, however, were erroneous because the proposed edits warned of a cancer risk that, according to EPA's assessment, does not exist.[8]

As a result, such a warning instead constituted prohibited misbranding. *See* 7 U.S.C. § 136(q)(1)(A) (defining "misbranded" to include representations that are "false or misleading in any particular"); § 136j(a)(1)(E) (establishing that it is illegal to sell a misbranded pesticide). *See generally* 40 C.F.R. § 152.112(f) (allowing EPA

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[8] *See* n.6, *supra*.

approval of an application under FIFRA Section 3(c)(5), 7 U.S.C. § 136a(c)(5), only where "[t]he Agency has determined that the product is not misbranded").

In an August 7, 2019 letter, EPA informed all glyphosate registrants that EPA had concluded glyphosate is "not likely to be carcinogenic to humans."[9] EPA then stated that products bearing a Proposition 65 warning statement due to the presence of glyphosate are misbranded under FIFRA because such a statement is "false and misleading." *See* EPA August 7 Letter at 1. In support of the representation that glyphosate is "not likely to be carcinogenic," EPA cited to its 2017 glyphosate evaluation. *Id.*

D. Facts and District Court Proceedings

Plaintiff, Edwin Hardeman, who regularly used Roundup for many years beginning in the 1980's, was diagnosed with cancer in 2015. ER2294.[10] In 2016, Mr. Hardeman filed a complaint against Monsanto seeking compensatory, economic, and punitive damages. Mr. Hardeman brought common law claims based on Monsanto's alleged negligent and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing,

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[9] EPA Office of Chemical Safety & Pollution Prevention, Letter from Michael L. Goodis, Director, Registration Division to registrants of glyphosate (Aug. 7, 2019), available at https://www.epa.gov/sites/production/files/2019-08/documents/glyphosate_registrant_letter_-_8-7-19_-_signed.pdf (EPA August 7 Letter).

[10] ER refers to the Excerpts of Record filed with Monsanto's Opening Brief. SER refers to the Supplemental Excerpts of Record filed with this brief.

advertising, distribution, labeling, and sale of Roundup. ER2280; ER2294. Plaintiff filed claims for (1) negligence; (2) design defect; (3) failure to warn; and (4) breach of implied warranty. ER2296-2306.

Monsanto filed a motion to dismiss, arguing that the first three claims were essentially "warnings-based" claims that were expressly preempted by FIFRA. *See Hardeman v. Monsanto Co.*, 216 F. Supp. 3d 1037, 1037-39 (N.D. Cal. 2016), ER117. Monsanto argued that Plaintiff's state-law claims sought to compel a labeling requirement that differed from the label approved by EPA. *Id.* The District Court denied the motion to dismiss, holding that none of the claims were preempted. The district court reasoned that Plaintiff's claims were not preempted because they were consistent with FIFRA. Because FIFRA requires a pesticide label to contain warnings adequate to protect health and the environment, California law similarly requiring warnings of risks is permissible. *Id.*

The district court then conducted a 19-day jury trial. Plaintiff dropped his implied warranty claim prior to trial and tried only his negligence, design defect, and failure to warn claims. During the course of trial, the Court held that Plaintiff's design defect claim relied solely on a consumer expectations test. *See* SER001. This had the effect of converting the design claim to a "warnings-based" claim. *Id.* As a result, all three claims that went to trial were based on a failure to warn theory.

Phase I of the trial concluded with the jury finding that Plaintiff had proved that his exposure to Roundup was a substantial factor in causing his cancer. Phase II concluded with the jury finding that Plaintiff proved "that Roundup's design was defective"; "that Roundup lacked sufficient warnings of the risk of [cancer]," and that "Monsanto was negligent by not using reasonable care to warn about Roundup's [cancer] risk." ER1680-1681. The jury awarded $5,267,634.10 in compensatory damages and $75,000,000 in punitive damages. *Id.* The Court subsequently reduced the punitive damages award to $20,000,000. ER10.

SUMMARY OF ARGUMENT

FIFRA prohibits States from imposing "any requirements" for pesticide labeling that are "in addition to or different from" those required under FIFRA. 7 U.S.C. § 136v(b). Federal law can preempt not only state statutes and regulations, but state common law claims based on duties sounding in tort. The plain terms of FIFRA's prohibition expressly preempt state pesticide labeling requirements, regardless of whether those requirements are expressed through positive enactments or common-law duties.

Under FIFRA, the label is the law. EPA approved the label for the pesticide/herbicide at issue here, Roundup, through a registration process that did not require a cancer warning. In fact, EPA has never required a labeling warning of a cancer risk posed by Roundup, and such a warning would be inconsistent with the

agency's scientific assessments of the carcinogenic potential of the product. Mr. Hardeman nevertheless sought damages under California common law, alleging that Monsanto had failed to adequately warn consumers of cancer risks posed by the active ingredient in Roundup. FIFRA therefore preempts Mr. Hardeman's claims to the extent that they are based on the lack of a warning on Roundup's labeling.

ARGUMENT

FIFRA preempts state tort claims that would subject pesticide manufacturers to inconsistent and additional product labeling requirements.

A. Section 136v(b) preempts State common-law duties that would impose requirements for labeling "in addition to or different from" those required under FIFRA.

Section 136v(b) broadly and expressly prohibits "any requirements for labeling" that are "in addition to or different from" those that FIFRA imposes. 7 U.S.C. 136v(b). Section 136v(b)'s plain text does not distinguish among state labeling requirements based on their origin in a state legislature's enactment of statutes, a state agency's promulgation of rules, or a state court's articulation of common-law standards of care. *See Bates v. Dow Agrosciences LLC*, 544 U.S., 431, 443 (2005). And thus a court's articulation of common-law standards of care can be preempted just like a legislative or regulatory labeling requirement. *Id.*

Mr. Hardeman's failure to warn claims fall within the express preemptive scope of FIFRA. This scope is defined through a two-part test. *See id.* at 444. ***First***,

the state law "must be a requirement ***'for labeling or packaging'***; rules governing the design of a product, for example, are not preempted." *Id.* (quoting 7 U.S.C. § 136v(b)). ***Second***, the state law "must impose a labeling or packaging requirement that is '***in addition to or different from*** those required under [FIFRA].'" *Id.* (quoting 7 U.S.C. § 136v(b)). Thus, although FIFRA does not prevent a State from making the violation of federal labeling requirements a state offense and imposing separate sanctions, States cannot impose distinct labeling requirements. *See id.* at 442. Mr. Hardeman's nevertheless based his failure to warn claims on the existence of just such preempted requirements.

First, Monsanto notes that Mr. Hardeman argued to the jury throughout the District Court trial that Monsanto's common law duty included labeling obligations. Monsanto Opening Br. at 25-26. This representation comports with the United States' review of the closing arguments.[11] During his closing statement, counsel declared:

> And one of those requests for admission is that Monsanto says - - they admit, they have never warned that Roundup causes cancer. It's not on the label, Ladies and Gentlemen.

SER28. During his recitation of the scientific evidence counsel followed with:

> Let's go to the animal [studies]. We heard - - remember Dr. Portier testified in Phase One about the mice and rats? The first one, *Knezevich*

[11] The United States has not reviewed all 21 volumes of the trial transcript but our spot review of the record has revealed nothing that would seem to undermine the basic parameters sketched above as to how this case was tried.

> *& Hogan,* 1983 - - this is before Mr. Hardeman ever started spraying Roundup - - when that study came out originally in 1983, if Monsanto had done the right thing and put a warning on the label, we wouldn't be here. We wouldn't be here. Instead, they didn't.

SER30. And finally, when discussing how Monsanto should react to those studies counsel said:

> What is Monsanto's response when they are told that it is - - it is a Category C oncogene[12]? A responsible company would first say, should we take this off the market? Or should we test it? Or should we put a warning on it that it is an oncogene? It is going to cause cancer. They don't do anything.

SER35.

Second, FIFRA defines "label" to include "written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." 7 U.S.C. § 136(p). This definition clearly includes the warnings that counsel referenced at trial. Indeed, in its closing argument, Mr. Hardeman's counsel did not advance any specific examples, ***other than a label warning***, to illustrate how Monsanto could have warned Mr. Hardeman of the cancer risk allegedly posed by Roundup. *See* SER28, 30, 35; https://iaspub.epa.gov/apex/pesticides/f?p=PPLS:1.

Third, even if Mr. Hardeman did raise an argument that Monsanto might have provided a warning someplace other than Roundup's labeling, that does not save Mr.

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[12] An "oncogene" is "a gene found in the chromosomes of tumor cells whose activation is associated with the initial and continuing conversion of normal cells into cancer cells." https://medical-dictionary.thefreedictionary.com/oncogene.

Hardeman's case from preemption. Where a claim relies, even in part, on a prohibited argument, this raises questions of whether the trial record was so infected that the case must be remanded for retrial. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 733 (9th Cir. 1999) (remanding jury award of damages for tortious interference where two of the three statements Plaintiff relied upon could not violate the Lanham Act or state defamation standards as a matter of law, and damages based on the third statement could not be isolated in the record), *overruled on other ground by Lexmark, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Even if alternate, non-"label" or non-"labeling" warnings could satisfy Monsanto's common-law duties, remand and retrial is still appropriate. Plaintiff's label theory is inextricably intertwined with the evidence relied on by the jury to establish the elements of Plaintiff's claims.

Notably, Mr. Hardeman did not merely seek a label warning that is "different from" EPA's labeling requirements for glyphosate. He added a glyphosate cancer warning to Roundup that EPA rejects. Following California's Proposition 65 listing in 2017, certain companies that were registered to sell and distribute glyphosate sought EPA's approval to amend the labels of their products to include a Proposition 65 cancer warning. Though there were implementation mistakes at an earlier stage, EPA ultimately rejected those warnings. On August 7, 2019, EPA sent a letter to all glyphosate registrants reiterating its disagreement with the International Agency for

Research on Cancer's assessment. A 2017 evaluation of glyphosate by EPA scientists continues to conclude it is "not likely to be carcinogenic to humans." *See* August 7, 2019 letter.

In the 2017 evaluation, EPA specifically considered and rejected the International Agency for Research on Cancer's assessment.[13] Thus, in its August 7 letter, EPA warned that any pesticide products with labels ***bearing*** the Proposition 65 warning due to the presence of glyphosate ***would be deemed misbranded*** pursuant to section 2(q)(1)(A) of FIFRA. The Proposition 65 warning therefore makes a product misbranded because it is misleading.

Mr. Hardeman's alleged legal duty to warn nevertheless required a glyphosate cancer warning on a Roundup label. That not only required a different label (a requirement preempted by FIFRA)—it would almost certainly compel Monsanto to produce a misleading label warning very much at odds with EPA's scientific assessment of the carcinogenic potential of glyphosate, similar to the Proposition 65 warning already rejected by EPA.[14] There is no dispute—nor could there be any

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[13] *See* n.7, *supra*; 2017 study at 13, 23, 32-33, 63-64, and 146.

[14] Distinct from express preemption, implied preemption occurs where "it is impossible for a private party to comply with both state and federal law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–373 (2000) (internal quotation marks omitted). Implied preemption would also bar Mr. Hardeman's tort theory, to the extent his theory is based on a labeling requirement. *See Wyeth v. Levine*, 555 U.S. 555, 571 (2009) (discussing implied preemption standard). We acknowledge, however, that even in the face of EPA's consistent historic assessment of the cancer

dispute—that FIFRA does not require a warning on Roundup's label that glyphosate causes cancer. To the extent that Mr. Hardeman's theory at trial was tied to Monsanto's failure to include a mandatory state-law-based glyphosate cancer warning on Roundup labels, such a warning is different from the requirements that FIFRA imposed for the labeling and packaging of this product and therefore a legal nullity.

B. The District Court's analysis is erroneous.

In denying Monsanto's motion to dismiss, the District Court held that a state-required glyphosate cancer warning was essentially no different from FIFRA's requirement that label warnings are "adequate to protect health and the environment." *Hardeman v. Monsanto Co.*, 216 F.Supp.3d 1037, 1038 (N.D. Cal.). The District Court compared this general FIFRA standard to California's general strict liability and negligence standards that require a manufacturer to warn of known risks. *Id.* This comparison misses the thrust and full import of FIFRA's preemption provision. It also ignored the fact that EPA had many times addressed the carcinogenic potential of glyphosate ***in particular*** and determined that glyphosate is not likely to be carcinogenic to humans.

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risk posed by glyphosate, EPA mistakenly approved glyphosate cancer warnings on at least two prior occasions. This Court does not need to reach implied preemption, however, because the claims as to labeling and packaging are expressly preempted.

First, in order to avoid federal preemption under FIFRA, it is not enough for a state law merely to be advancing ***similar*** policies or interests. 7 U.S.C. § 136v. Instead, where California general common-law standards impose any inconsistent labeling or packaging requirement, the California common-law claims are be preempted, ***even if the standard supporting those claims is phrased similarly to the standard imposed by Congress through FIFRA***.

Moreover, the potential that glyphosate is carcinogenic to humans is not something that EPA has ignored. EPA has studied and expressly addressed the carcinogenic potential of glyphosate a number of times over the past three decades, *see supra* Statement of the Case § C. And EPA continues to assess it. *See* Glyphosate Proposed Interim Registration Review Decision; Notice of Availability, 84 Fed. Reg. 19782 (May 6, 2019). Through FIFRA, Congress determined that EPA should make these scientific judgments for the nation as a whole. States may, of course, restrict or prohibit the sale or use of pesticides in the State if they disagree with EPA's assessment. But States are prohibited from second-guessing EPA's determination of what risks should be reflected on pesticide labeling. 7 U.S.C. § 136v(a), (b).

Second, the District Court also suggested that EPA's actions under FIFRA were insufficiently formal to trigger preemption. *Hardeman*, 216 F.Supp.3d at 1038-39. That is incorrect. The EPA approved label is a very formal affair that is

the foundation of any FIFRA preemption argument, and that label (and the associated registration process) establishes "requirements" sufficient to support a preemption analysis. The process of registering a pesticide is a scientific, legal, and administrative procedure through which EPA examines the ingredients of the pesticide, where it will be used, the amount, frequency, and timing of its use and storage-related issues. *See* 40 C.F.R. § 152.40-152.55 (Registration Procedures). This process includes evaluation of human health risks, including review of aggregated risks through food, water and residential exposure as well as occupational risks. *See* 40 C.F.R. § 152.112; Pesticide Registration Evaluation Process available at https://www.epa.gov/pesticide-registration/about-pesticide-registration#label; *see also* EPA Pesticide Registration Manual available at https://www.epa.gov/pesticide-registration/pesticide-registration-manual.

Every pesticide product label, including the Roundup label, is reviewed, and must be approved, as part of this process. And EPA seeks to ensure that labels provide clear directions for effective product performance while minimizing risk to human health and the environment. Once a product is registered, EPA posts the approved labels. *See* https://www.epa.gov/pesticide-labels/pesticide-product-label-system-ppls-more-information. Thereafter, "[t]he label is the law." *See, e.g., Introduction to EPA, Pesticide Registration Manual* (last updated April 2017), *available at* https://www.epa.gov/pesticide-registration/pesticide-registration-

manual. And the Supreme Court has recognized that such premarket agency approvals are sufficient to trigger preemption. *See generally Riegel v. Medtronic, Inc.*, 552 U.S. 320, 323 (2008) (holding that premarket approval of individual medical devices were "requirements" sufficient to trigger preemption under the Federal Food, Drug, and Cosmetic Act (FDCA).

Third, the District Court incorrectly stated that Mr. Hardeman's complaint was based on "Monsanto's alleged violation of FIFRA." *Hardeman*, 216 F.Supp.3d at 1038. This is incorrect, too. Mr. Hardeman alleged neither a FIFRA claim nor a claim under the Food, Drug, and Cosmetic Act.

Congress provides for such challenges to the EPA-approved tolerance levels and labels of any Roundup ingredient. For example, individuals may file a petition challenging a pesticide registration action in federal district court. 7 U.S.C. § 136n(a). The label approval is part of such a registration action. EPA must determine that the human dietary risk from pesticide residues in food is consistent with safety standards from the FDCA. *See* 7 U.S.C. 136(bb)(2). And the tolerance is the maximum residue of a pesticide that can legally be present in food or feed. 21 U.S.C. § 346a(a). At the conclusion of these processes, glyphosate labels could have been challenged through FIFRA's judicial review process. Individuals might also petition to request amendment of a tolerance level. *See* 21 U.S.C. § 346a(d); 40

C.F.R. § 180.7. But Mr. Hardeman did not allege either a FIFRA or an FDCA violation regarding glyphosate—neither before EPA nor the district court.

C. FIFRA's preemption of state-law labeling requirements is broad and no exception applies here that would allow Mr. Hardeman's claims to proceed.

With respect to registered product labels, the FIFRA preemption provision is sweeping. It preempts any state law that "would impose a labeling requirement inconsistent with those established by FIFRA." *Worm v. American Cyanimid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992). A state may impose different or additional ***remedies—or bar or restrict a pesticide use entirely***—but it may not impose different or additional labeling requirements. *Bates*, 544 U.S. at 448.

Despite this broad scope, the Supreme Court has recognized that the FIFRA preemption provision is not unlimited. It did not reach state-law design-defect claims where the particular claim "was not a 'requirement for labeling or packaging' for purposes of FIFRA and thus fell outside the class of claims covered by the express pre-emption provision at issue in that case." *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 491 (2013), citing *Bates*, 544 U.S. at 431, 443–444. But that is inapplicable here.

In *Bates*, a group of farmers brought claims under Texas law. They alleged that a pesticide had damaged their crop. On that issue, Congress's 1978 FIFRA amendment had allowed EPA to ***waive*** data requirements pertaining to efficacy and

so approve labels without examining efficacy claims. *Bates*, 544 U.S. at 440. *See also* 7 U.S.C. § 136a(c)(5). EPA invoked this authority, and announced it was waiving efficacy review. *See* 44 Fed. Reg. 27,932 (1979); 40 C.F.R. § 158.640(b) (2004).

When reaching its decision, the Court recognized that FIFRA did not preempt the state-law claims seeking an efficacy-based warning, in part, because EPA did not evaluate the efficacy of the product at issue. *Id.* at 450. So EPA had not—by its non-review of the pesticides' efficacy claims—established a legal standard for state law to conflict with. Here, by contrast, Mr. Hardeman seeks to apply state law to impose a human-health warning. And carcinogenicity is a risk that EPA indisputably ***does (and did)*** evaluate under FIFRA. *See supra* Statement of the Case § C. That is why the farmers' claims were not preempted. *Id.* at 447.

This distinction between efficacy-related label statements and health-related label statements is consistent with other Supreme Court decisions. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 497-498 (1996), the Court considered the reach of a similar preemption provision in part of the FDCA. The FDCA, too, provides that no State may establish any requirement relating to the safety or effectiveness of a medical device "which is different from, or in addition to" a requirement mandated by the FDCA. 21 U.S.C. § 360k(a). In *Lohr*, the Court concluded that "general federal regulations governing the labeling and manufacture of all medical devices"

under the FDCA did not necessarily preempt all state tort claims of general applicability. *Id.* at 497-98. But that state tort requirements would be preempted when inconsistent with the FDA's "'specific counterpart regulations or . . . other specific requirements applicable to a particular device'" and its safety. 518 U.S. at 497-498 (quoting 21 C.F.R. § 808.1(d)).

In another case, the Court applied that rule. It held that the FDCA preempted state claims when the "Federal Government ha[d] established requirements applicable to" the particular medical device in question. *Riegel*, 552 U.S. at 321. Thus, under both statutes, the Court has recognized that where the agency had not established specific standards on point, state law claims were not preempted. Nevertheless, in the sphere of regulation where an agency has acted, states cannot impose additional requirements.

As previously noted, EPA has authority over pesticide labels and packaging. *See* 7 U.S.C. §§ 136a, 136q. EPA is required to ensure that labels are not misbranded, and was required by Congress to protect the public from the dissemination of false or misleading information. *See* 7 U.S.C. § 136(q)(1)(A); 40 C.F.R. § 152.112(f). EPA may not approve a pesticide's introduction into commerce unless the Administrator finds that the pesticide "will not generally cause unreasonable adverse effects on the environment" when used in accordance with any EPA-imposed restrictions and "with widespread and commonly recognized

practice." 7 U.S.C. § 136a(c)(5)(D). "Unreasonable adverse effects on the environment" are defined to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id.* § 136(bb). And there is no exception to the bedrock requirement that EPA assess health impacts during the pesticide registration process—unlike EPA's ability to opt out of efficacy review.

In fact, forty-four versions of the label for the original formulation of Roundup have been accepted by EPA since 1991. EPA most recently approved the Roundup label in 2009.[15] In EPA's August 7, 2019 letter to glyphosate registrants, EPA clearly expressed its position that a strong glyphosate cancer warning on a pesticide label is misbranding.

Finally, legislative history reveals no Congressional intent to preserve tort actions related to labeling requirements that address the health effects of a product. To the contrary, the Committee Reports supporting Congress's 1972 overhaul of FIFRA contain statements expressing an intent to provide for broad preemption of state requirements respecting pesticide labels. The House Committee Reports states, with reference to Section 136v(b), that "the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and

[15] A list of approved labels is available by searching the "Product" field of EPA's Pesticide Product and Label System for "Roundup." *See* https://iaspub.epa.gov/apex/pesticides/f?p=PPLS:1.

packaging." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). The Senate Committee Report expresses a similar intent, stating "[Section 136v(b)] preempts any State labeling or packaging requirements differing from such requirements under the Act." S. Rep. No. 838, 92d Cong., 2d Sess. Pt. 1, at 30 (1972). Those statements suggest that Congress envisioned that all state labeling or packaging "requirements"—whatever the form—would be preempted.

CONCLUSION

For all of the foregoing reasons, Mr. Hardeman's claims of failure to warn in Monsanto labeling are preempted. The judgment of the district court should be reversed and this case should be either dismissed or, in the alternative, remanded.

Respectfully submitted,

s/ *Matthew R. Oakes*

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December 20, 2019
DJ# 90-12-15843

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 19-16636

I am the attorney or self-represented party.

This brief contains 6,083 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  [ ] it is a joint brief submitted by separately represented parties;
  [ ] a party or parties are filing a single brief in response to multiple briefs; or
  [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ *Matthew R. Oakes*

Date December 20, 2019

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DEWAYNE JOHNSON, Plaintiff and Appellant, v. MONSANTO COMPANY, Defendant and Appellant.	A155940 & A156706 (San Francisco County Super. Ct. No. CGC16550128)

BY THE COURT:

The court rules on the several outstanding motions in these consolidated appeals as follows.

Respondent Dewayne Lee Johnson filed a request for judicial notice on July 31, 2019, asking the court to judicially notice a trial-court order in a different lawsuit against appellant Monsanto Company. The request is granted.

On August 19, 2019, Monsanto filed a notice of new authority (Cal. Rules of Court, rule 8.254) to support its preemption argument. Johnson's August 29 motion to strike Monsanto's notice is denied.

Monsanto's January 15, 2020 request for judicial notice of an amicus curiae brief filed by the Environmental Protection Agency (EPA) in the Ninth Circuit Court of Appeals (*Monsanto Company v. Edwin Hardeman*, No. 19-16636) is granted.

The foregoing rulings are made without a determination of relevance, and without a determination whether this court ultimately will give effect to such evidence. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.)

The court also requests further briefing on Monsanto's preemption arguments, as follows.

As the parties are aware, Monsanto argued in its motion for summary judgment that Johnson's causes of action were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. § 136 et seq.). Monsanto contended that Johnson's failure-to-warn causes of action failed because the EPA repeatedly had approved the labels for its products containing glyphosate. Citing *Wyeth v. Levine* (2009) 555 U.S. 555 (*Wyeth*), the company contended that it thus would have been impossible to comply with both federal and state labeling requirements. The trial court concluded that Johnson's causes of action were not preempted.

On appeal, Monsanto devotes about four pages of its 95-page opening brief to renewing its argument that FIFRA preempts all of Johnson's causes of action. And only about two of those pages are devoted to the argument that FIFRA preempts Johnson's failure-to-warn claims because it would have been impossible to comply with both federal and state labeling requirements.

Since the filing of Monsanto's opening brief, the EPA has taken further action relevant to the labeling of products containing glyphosate, and Monsanto has taken steps to make evidence of those actions part of the appellate record (the subject of the court's rulings, above). As the court understands Monsanto's position, there always has been clear evidence that the EPA would not have approved a label change to its glyphosate-based products, which means it would have been impossible under *Wyeth*, *supra*, 555 U.S. at page 571, to comply with both federal and state requirements. And this argument is further supported by EPA actions taken after the jury's verdict in this case, according to Monsanto.

Also since the jury's verdict in this case, the U.S. Supreme Court has held that the question whether the FDA would not have approved a label change (thus preempting a state-law failure-to-warn claim under *Wyeth*) is a question for a judge, not a jury. (*Merck*

Sharp & Dohme Corp. v. Albrecht (2019) ___ U.S. ___ [139 S.Ct. 1668, 1672].) As the trial court observed in denying Monsanto's motion for summary judgment, however, it does not appear that any court has extended *Wyeth* to FIFRA.

Please answer the following questions:

(1) Should *Wyeth* be extended to FIFRA, such that a court should determine whether there is clear evidence the EPA would not have approved a change to the labels of Monsanto's glyphosate-based products?

(2) Assuming that *Wyeth* applies, is this a determination that should be made by this court in the first instance or on remand in the trial court? And whichever court makes the determination, how should it be made? (E.g., *Merck Sharp & Dohme Corp. v. Albrecht*, *supra*, ___ U.S. ___ [139 S.Ct. at p. 1672] [" 'clear evidence' is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning"].)

(3) If a court were to determine that FIFRA preempts Johnson's failure-to-warn causes of action under *Wyeth*, but not Johnson's design-defect cause of action, what effect, if any, would that have on the jury's verdict? The court is familiar with the parties' arguments on whether FIFRA preempts Johnson's design-defect cause of action and is interested for purposes of this question in how a court should rule assuming that only the failure-to-warn causes of action are preempted.

The parties shall file simultaneous supplemental briefs within 21 days of the date of this order. The briefs shall be no longer than 25 pages. Given that this case has calendar preference, the court is not inclined to grant requests for an extension of time absent the parties' agreement to an extension or a showing of extraordinary good cause.

Date: 01/21/2020

Humes, P. J. P.J.

PRESIDING JUSTICE

every doctor agrees that it's just a matter of time. Maybe two years at best. He's gone through repeated rounds of chemotherapy, radiation, UV therapy. He's done everything in his power to try to fight this. And he's actually in between treatments right now. So he's 10:16:19
feeling a lot better. He can move around and he can walk. But chemo starts in a few weeks, and we all know how that can affect somebody.

You're going to learn, Ladies and Gentlemen, that this is not the first lawsuit. Monsanto has been 10:16:34
sued repeatedly over the years specifically related to the chemical glyphosate which is in Roundup -- I'm going to talk about that in just a second -- and its association specifically with non-Hodgkin's lymphoma. But I'll be clear. Although there have been prior 10:16:51
lawsuits filed, there has never been a case that has gone to a jury. And so I want to be very, very clear. You members, as part of this jury, are actually part of something really important. Because this product has been on the market for 40 years, and without a question, 10:17:13
each one of you, whether or not you want to be or not, are actually part of history. And the world's watching because what you do here has really important consequences. And you're going to see stuff that nobody has ever seen. Documents that have never seen the public 10:17:32

And if you return a verdict today that does that, that actually changes the world. I mean, it's crazy to say that; right? I told you all at the beginning of this trial that you were part of history, and you really are, and so let me just say thank you.

I know you guys didn't actually have a choice to be on this jury, so it's kind of a weird thing to thank you for your service, but you could be on a jury and not pay attention, and not one of you has done that. You've asked incredibly good questions. Some of them we were able to answer. Some of them we were not. But the questions told us exactly how closely you were tracking this case. Some of you have five notebooks of notes. That's unbelievable. The level with which you've paid attention to this case, thank you, and I really mean that.

Not just for me, though, for Mr. Johnson and his family. And Mrs. Johnson would be here, but her job wouldn't let her off today, so she actually is working right now. A consequence of the bills, you know, and hopefully she'll be here tomorrow, but they wouldn't give her paid leave, and they need the money to pay the bills, so I'm sorry she couldn't be here today.

All right. So this case really involves three fundamental questions. And the jury verdict form we're

everywhere."

So he finished his speech, his fantasy speech, after it was sustained. We made the objection again. It was sustained, and he was admonished, and he was done, so he moved on.

So the objections were totally futile. Pages 7 and 8 of our brief lay out the reasons why all of this is timely preserved. We've raised it while the jury is still waiting to be charged. You can cure it with a curative instruction right now. It's entirely proper. We ask that the whole thing be read, but your Honor's proposal is also quite acceptable to us.

THE COURT: All right. So the references to champagne in the boardroom at Monsanto were improper. The reference was -- the statement was objected to, and I sustained the objection. And when it came up a second time, I did admonish Mr. Wisner and sustain the objection, so even though that statement should never have been made, I think that that's been addressed.

And as I said out the outset, some of the other statements or arguments that were made were perhaps pushing the line, Mr. Wisner. But the one that I think was really inappropriate and the one that I'm most concerned about with regard to the jury's deliberations were the arguments about changing the world, being a part

of history, et cetera, with regard to punitive damages.

So when they come in today for their final pre-deliberation instructions, I am going to refer them back to the punitive damage instructions and say to them, "You've heard argument yesterday with regard to the purpose of punitive damages, and I want you to be clear what the purpose of punitive damages is, and that is, that if you find liability in this case, and if you decide to award punitive damages, those punitive damages are only the punish Monsanto for any alleged wrongful conduct that harmed Mr. Johnson only."

And I'll refer them to the instruction and tell them, "Punitive damages may not be used to punish Monsanto for the impact of its alleged misconduct on persons other than Mr. Johnson, and so any references to that in closing arguments yesterday should be completely disregarded." Okay. And then --

MR. WISNER: Yes, your Honor.

THE COURT: And after that, they'll be discharged to begin their deliberation.

MR. GRIFFIS: Thank you, your Honor.

THE COURT: Okay. Good. Please let the jury in.

(Jury enters courtroom.)

THE COURT: Good morning. And welcome back,

Ladies and Gentlemen.

I have a few final instructions to read to you before you begin your deliberations in this case. Before we return to the pre-deliberation instructions, there is one matter that I'd like to address with you. And that is: Yesterday during closing arguments, you heard discussion from plaintiff's counsel about the purpose of punitive damages and a reference to changing the world or something to that effect, and I want to remind you and tell you again, as I instructed you yesterday, as to the purpose of punitive damages.

The purpose of punitive damages is explained in great detail in Instruction Number 25, which I read to you yesterday. I'm not going to read the entire instruction to you again, but I want to remind you that if, in fact, you find liability in this case and if you decide to award punitive damages, the purpose of punitive damages is only to punish Monsanto for any crime that was visited upon Mr. Johnson. And you'll see at the conclusion of the instruction there, "Punitive damages may not be used to punish Monsanto for the impact of its alleged misconduct on persons other than Mr. Johnson."

So keep that in mind during your deliberations. If you have any questions about the proper purpose of punitive damages, should you reach that discussion, refer

Superior Court of California
County of San Francisco
Department 504

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case Number: CGC-16-550128

NOTICE OF ENTRY OF JUDGMENT

(CCP §664.5), (CCP §668.5)

TO: ALL COUNSEL FOR PLAINTIFFS AND DEFENDANTS:

You and each of you will take notice that **JUDGMENT** has been filed in the above entitled case pursuant to CCP §668.5.

DATED: August 23, 2018

T. MICHAEL YUEN, Clerk

by: /s/ Linda Fong
Linda Fong, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case Number: CGC-16-550128

CERTIFICATE OF MAILING
[CCP 1013a(4)]

I, Linda Fong, a deputy clerk of the Superior Court of California, County of San Francisco, certify that I am not a party to the within action.

On August 23 2018, I served the attached **JUDGMENT ON JURY VERDICT** by placing a copy thereof in a sealed envelope, addressed as follows:

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Jeffrey A. Travers, Esq.
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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: August 23, 2018

T. MICHAEL YUEN, Clerk

by: /s/ Linda Fong
Linda Fong, Deputy Clerk

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DEWAYNE JOHNSON

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

[PROPOSED] JUDGMENT ON JURY VERDICT

Honorable Suzanne R. Bolanos

Trial Date: June 18, 2018
Department: 504

This case came on for trial in the above entitled matter on June 18, 2018 in Department 504 of the Superior Court of California, in and for the County of San Francisco, before the Honorable Suzanne R. Bolanos, Judge presiding. Plaintiff Dewayne Lee Johnson appeared by attorneys David Dickens of the Miller Firm LLC; R. Brent Wisner of Baum, Hedlund, Aristei & Goldman, PC; and Mark Burton of Audet and Partners, LLP. Defendant Monsanto Company appeared by attorneys George C. Lombardi of Winston & Strawn LLP; Kirby T. Griffis of Hollingsworth, LLP; and Sandra A. Edwards of Farella, Braun & Martel, LLP.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. Following the hearing of all evidence, instructions from the court, and argument of all counsel, the cause was submitted to the jury. The jury deliberated and thereafter, on August 10, 2018, returned its verdict as follows:

CLAIM OF DESIGN DEFECT

1. Are the Roundup Pro® or Ranger Pro® products ones about which an ordinary consumer can form reasonable minimum safety expectations?

Yes	No
[X]	[ ]

If your answer to question 1 is yes, then answer question 2. If you answered no, proceed to question 4.

2. Did Roundup Pro® or Ranger Pro® fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?

Yes	No
[X]	[ ]

If your answer to question 2 is yes, then answer question 3. If you answered no, proceed to question 4.

3. Was the Roundup Pro® or Ranger Pro® design a substantial factor in causing harm to Mr. Johnson?

Yes	No
[X]	[ ]

Answer question 4.

CLAIM OF STRICT LIABILITY—FAILURE TO WARN

4. Did Roundup Pro® or Ranger Pro® have potential risks that were known or knowable in light of the scientific knowledge that was generally accepted in the scientific community at the time of their manufacture, distribution or sale?

Yes	No
[X]	[ ]

If your answer to question 4 is yes, then answer question 5. If you answered no, proceed to question 9.

5. Did the potential risks of Roundup Pro® or Ranger Pro® present a substantial danger to persons using or misusing Roundup Pro® or Ranger Pro® in an intended or reasonably foreseeable way?

Yes	No
[X]	[ ]

If your answer to question 5 is yes, then answer question 6. If you answered no, proceed to question 9.

6. Would ordinary consumers have recognized the potential risks?

Yes	No
[ ]	[X]

If your answer to question 6 is no, then answer question 7. If you answered yes, proceed to question 9.

7. Did Monsanto fail to adequately warn of the potential risks?

Yes	No
[X]	[ ]

If your answer to question 7 is yes, then answer question 8. If you answered no, proceed to question 9.

8. Was the lack of sufficient warnings a substantial factor in causing harm to Mr. Johnson?

Yes	No
[X]	[ ]

Go to question 9.

CLAIM OF NEGLIGENT FAILURE TO WARN

9. Did Monsanto know or should it reasonably have known that Roundup Pro® or Ranger Pro® were dangerous or were likely to be dangerous when used or misused in a reasonably foreseeable manner?

Yes	No
[X]	[ ]

If your answer to question 9 is yes, then answer question 10. If you answered no, proceed to question 14.

10. Did Monsanto know or should it reasonably have known that users would not realize the danger?

Yes	No
[X]	[ ]

If your answer to question 10 is yes, then answer question 11. If you answered no, proceed to question 14.

11. Did Monsanto fail to adequately warn of the danger or instruct on the safe use of Roundup Pro® or Ranger Pro®?

Yes	No
[X]	[ ]

If your answer to question 11 is yes, then answer question 12. If you answered no, proceed to question 14.

12. Would a reasonable manufacturer, distributor, or seller under the same or similar circumstances have warned of the danger or instructed on the safe use of Roundup Pro® or Ranger Pro®?

Yes	No
[X]	[ ]

If your answer to question 12 is yes, then answer question 13. If you answered no, proceed to question 14.

13. Was Monsanto's failure to warn a substantial factor in causing harm to Mr. Johnson?

Yes	No
[X]	[ ]

Proceed to question 14.

CLAIM OF DAMAGES

If you answered yes to question 3, 8, or 13, then answer the questions below about damages. If you did not answer or answered no to question 3, 8, and 13, stop here, answer no further questions, and have the presiding juror sign and date this form.

14. What are Mr. Johnson's damages?

Past economic loss:	$ 819,882.32
Future economic loss:	$ 1,433,327.00
Past noneconomic loss:	$ 4,000,000.00
Future noneconomic loss:	$ 33,000,000.00

PUNITIVE DAMAGES

15. Did you find by clear and convincing evidence that Monsanto acted with malice or oppression in the conduct upon which you base your finding of liability in favor of Mr. Johnson?

Yes	No
[X]	[ ]

If your answer to question 15 is yes, then answer question 16. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

16. Was the conduct constituting malice or oppression committed, ratified, or authorized by one or more officers, directors, or managing agents of Monsanto acting on behalf of Monsanto?

Yes	No
[X]	[ ]

If your answer(s) to question 16 is yes, then proceed to question 17. If you answered no as to question 16, stop here, answer no further questions, and have the presiding juror sign and date this form.

17. What amount of punitive damages, if any, do you award to Mr. Johnson?

$ 250,000,000.00

Signed: Jennifer Koo
Presiding Juror

Dated: August 10, 2018

It appearing by reason of said verdict that Plaintiff Dewayne Lee Johnson is entitled to judgment against Defendant Monsanto Company;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

Plaintiff Dewayne Lee Johnson shall have judgment entered against Defendant Monsanto Company in the amount of two hundred eighty-nine million two hundred fifty-three thousand two hundred nine dollars and thirty-two cents ($289,253,209.32).

~~This judgment is entered nunc pro tunc as of August 17, 2018.~~

The judgment against Defendant shall be increased to include prevailing party costs and interest to Plaintiff Dewayne Lee Johnson as later determined. Pursuant to memorandum of costs.

Dated: August 23, 2018

Hon. Suzanne R. Bolanos
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

ORDER DENYING MONSANTO COMPANY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT and CONDITIONALLY DENYING MONSANTO'S MOTION FOR NEW TRIAL

BACKGROUND

I. BRIEF OVERVIEW OF CASE

This case involves the trial of design defect and failure to warn claims asserted by Dewayne Johnson ("Plaintiff") alleging that his exposure to glyphosate and glyphosate-based herbicides ("GBHs") developed by Monsanto Company ("Monsanto") caused him to develop mycosis fungoides ("MF"), a subtype of non-Hodgkin's lymphoma ("NHL").

Plaintiff testified he first began using GBHs, at the earliest, in June 2012. In October 2014, Plaintiff was diagnosed with NHL. Plaintiff stopped using GBHs in approximately January 2016. The parties stipulated to a trial date of June 18, 2018, and trial commenced on that date.

Among other things, this case required the jury to resolve the complex scientific question of whether Plaintiff's exposure to GBHs caused his NHL. Both sides presented expert testimony about the science underlying GBHs. The evidence introduced by Plaintiff's experts focused largely on epidemiology studies and an IARC Monograph published in March 2015, along with various animal and genotoxicity studies. Plaintiff proffered Dr. Portier, a biostatistician; Dr. Neugut, an epidemiologist; Dr. Nabhan, an oncologist; and Dr. Sawyer, a toxicologist, to testify about various aspects of the science underlying GBHs. As discussed below, Dr. Nabhan, who proffered a differential diagnosis opinion, formed the linchpin of Plaintiff's case that his exposure to GBHs caused his cancer.

Monsanto proffered Dr. Mucci, an epidemiologist; Dr. Foster, a toxicologist; Dr. Kuzel, an oncologist; and Dr. al-Khatib, a weed scientist.

Both parties designated the deposition testimony of several factual witnesses, including scientists involved with the evaluation of GBHs' safety and regulatory approval. The evidence showed that Monsanto has produced GBHs in the United States and much of the rest of the world for decades, and that glyphosate has developed one of the largest bodies of scientific data of any substance in the world. Before and after IARC's classification of glyphosate as a "probable" human carcinogen, regulatory and public health agencies worldwide have reviewed and rejected claims about the carcinogenicity of GBHs.

During trial, Monsanto timely moved for nonsuit and a directed verdict, both of which

were denied. The jury concluded its deliberations on August 10, 2018, and found in favor of Plaintiff, awarding economic loss in the amount of $2,253,209.35; noneconomic loss in the amount of $37,000,000.00; and punitive damages in the amount of $250,000,000.00.

Notice of Monsanto's Motion for Judgment Notwithstanding the Verdict (JNOV) and New Trial was timely filed, and the Motions were argued concurrently.

ANALYSIS

II. LEGAL STANDARD FOR JNOV

In ruling on a JNOV motion, the trial court may not weigh the evidence or make its own credibility determinations. *King v. State of California* (2015) 242 Cal.App.4th 265, 287. In deference to our strongly held belief in the constitutional right to a jury trial and a policy of judicial economy against disregarding the jury's verdict, the law regarding JNOV motions is very strict. "Conflicts in the evidence are resolved *against* the moving defendant and in favor of the plaintiff; all reasonable inferences to be drawn from the evidence are drawn against the moving defendant and in favor of the plaintiff." *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743,750. Furthermore, in ruling on a motion for JNOV, a court may not change a prior ruling as to the admissibility of evidence. "[W]e must take the record as we find it. We cannot strike or disregard any evidence favorable to the prevailing party merely because it was erroneously received." *Waller v. Southern California Gas Co.* (1959) 170 Cal.App.2d 747, 757; *Estate of Callahan* (1967) 67 Cal.2d 609, 617.

III. THERE IS NO LEGAL BASIS TO DISTURB THE JURY'S DETERMINATION THAT PLAINTIFF'S EXPOSURE TO GBHs WAS A SUBSTANTIAL FACTOR IN CAUSING HIS NHL

All of Plaintiff's claims require him to prove by a preponderance of the evidence that his use of GBHs was a "substantial factor" in causing his harm. California law recognizes that such proof is "especially troublesome" in cases alleging cancer as the injury, because "it is frequently difficult to determine the nature and cause of a particular cancerous growth." *Jones v. Ortho Corp.* (1985) 163 Cal.App.3d 396, 403.

Plaintiff's evidence that his NHL was caused by his exposure to GBHs was based on the

testimony of Dr. Nabhan, a former practicing oncologist.[1] Dr. Nabhan does not dispute that he is unable to identify a cause of NHL in the majority of his patients. Tr. 2990:6-14; 2997-2998. Nonetheless, Dr. Nabhan opined that Mr. Johnson's cancer was not idiopathic and that there was substantial evidence that his NHL was caused by his exposure to GBHs: a "known carcinogen causing non-Hodgkin's lymphoma." Tr. 2997:5-10.

Dr. Nabhan elected to conduct a type of causation analysis known as a differential diagnosis, or differential etiology, in reaching the opinion that GBHs caused Plaintiff's NHL. Differential diagnosis is a process whereby the physician begins by 'ruling in' all possible causes of the plaintiff's illness then 'rules out' the least plausible causes until the most likely cause remains. The final result of a differential diagnosis forms the basis of the physician's conclusion regarding what caused the plaintiff's illness. *Cooper v. Takeda Pharms. Am., Inc.* (2015) 239 Cal. App. 4th 555, 565–66.

In performing his differential diagnosis, Dr. Nabhan explained that because Mr. Johnson was much younger than the average patient who developed the disease this raised a "red flag" that his cancer is not likely to be idiopathic and more likely to be caused by an exposure. Tr. 2842:23-2844:19. Dr. Nabhan considered the known risk factors and causes of NHL including age, race, immunosuppressant therapies, autoimmune diseases, skin conditions, occupation, occupational exposures and viruses. *Id.* at 2842-2852. Dr. Nabhan opined that sun exposure, tobacco, and alcohol are not known causes of NHL and could therefore be excluded. *Id.* at 2852-2853. After conducting his differential diagnosis, Dr. Nabhan concluded that Mr. Johnson's only known risk factors were his race (African American) and exposure to GBHs. Tr. 2853:19-23. Dr. Nabhan therefore concluded that the GBHs were the most substantial contributing factor to Mr. Johnson's NHL. *Id.* at 2853:24-2854:2.

Dr. Nabhan's methodology in this case is similar to the differential diagnosis accepted by the Court of Appeal in *Cooper*. The trial court in *Cooper* granted defendant's JNOV motion because in

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[1] Plaintiff also presented Dr. Sawyer to discuss Plaintiff's use of GBHs. Dr. Sawyer did not provide an exposure dose, but testified that Plaintiff's days of exposure "puts him approximately in the middle of the human epidemiology studies that show human cancer. He falls in the middle of the exposure categories…." Tr. 3674:25-3675:13.

the Court's view the testimony of the expert oncologist, Dr. Smith, did not establish specific causation between the drug at issue and plaintiff's cancer. In reversing the trial court's JNOV, the Court of Appeal emphasized that "It is not necessary *in the trial of civil cases* that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty *as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment.*" *Cooper*, 239 Cal.App.4th at 580. The Court further held that "[b]are conceivability of another possible cause does not defeat a claim: the relevant question is whether there is 'substantial evidence' of an alternative explanation for the disease." *Id.* at 586. Finding that Dr. Smith's opinion met the threshold test for admissibility, the Court of Appeal instructed that the jury was free to accept Dr. Smith's testimony regarding specific causation and that the trial court erred in granting the JNOV. *Id.*

As with Dr. Smith in *Cooper*, Dr. Nabhan did not need to eliminate every other possible cause of Plaintiff's cancer. *Id.* at 580. Because there is no substantial evidence of an alternative explanation for Plaintiff's NHL, the jury here was free to give weight to Dr. Nabhan's testimony that GBHs were a substantial factor in causing the cancer. *Id.* at 586. Dr. Nabhan was cross-examined and the defense presented expert witnesses to criticize the basis of Dr. Nabhan's opinion. "The court does not resolve scientific controversies." *Id.* at 592 (*citing Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal 4th 747, 772). That is a matter for the jury to resolve.

Monsanto also argues that the jury's award of $37 million for past and future noneconomic damages is excessive and unsupported by the evidence. In particular, Monsanto objects to Plaintiff's closing argument that Plaintiff should receive $1 million per year for his entire lifespan (as projected for a healthy person his age by actuary) "because he deserves that money…it doesn't matter if he dies in two years or dies in 20." Tr. 5110:13-18. Monsanto is correct that future damages are limited by a plaintiff's projected remaining lifespan. *See, e.g., Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276,305-06 (2016) (reducing damages to level based on plaintiff's life expectancy at trial). In this case, the Court read CACI instructions 3905A and 3932 to the jury which explain that to recover for future noneconomic loss the Plaintiff must prove that he is reasonably certain to suffer that harm. The Court presumes that the jury followed its instructions "and that its verdict reflects the legal limitations

those instructions imposed." *Cassim v. Allstate Insurance Co.* (2004) 33 Cal. 4th 780, 803-804 (quoting *Saari v. Jongordon Corp.* (1992) 5 Cal. App. 4th 797, 808).

For the reasons stated, the Court declines to grant Monsanto's JNOV regarding liability.

IV. PUNITIVE DAMAGES

As to his punitive damages claim, Plaintiff was required to prove by clear and convincing evidence that an officer, director, or managing agent of Monsanto acted with malice or oppression in the conduct that gave rise to liability. Cal. Civ. Code § 3294(a) (b).

Monsanto argues that there is no clear and convincing evidence of a specific managing agent authorizing or ratifying malicious conduct or engaging in conscious disregard of safety. While Monsanto is correct, Plaintiff is not required to identify a particular managing agent if he can illustrate by clear and convincing inference that the company as a whole acted maliciously. See *Pacific Gas & Electric Co. v. Superior Court* (2018) 24 Cal.App.5th 1150, 1172–73 (holding that corporate malice may be demonstrated by company policy or the actions and knowledge of many corporate employees rather than a specific managing agent). "In most of the cases in which the 'managing agent' issue has resulted in reversal of a punitive damage award, initial liability arises from a particular tortious act of an employee of the corporation. [Citations.] Defendant has cited no case, and our own research has failed to disclose any case, in which a series of corporate actions and decisions, such as the design, production, and marketing of an automobile, has been found inadequate to support an award of punitive damages on the basis that the multitude of employees involved in various aspects of the process were not high enough in the corporate chain of command. When the entire organization is involved in acts that constitute malice, there is no danger a blameless corporation will be punished for bad acts over which it had no control, the primary goal of the 'managing agent' requirement." *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1140, vacated on other grounds in *Ford Motor Co. v. Romo* (2003) 538 U.S. 1028.[2] The jury could find that the decision by Monsanto to continue marketing GBH's notwithstanding a possible link with NHL constitutes corporate malice for purposes

[2] Although this opinion was vacated on due process grounds for excessive punitive damages, its analysis regarding the managing agent requirement has been cited recently by the California Court of Appeal in *Pacific Gas & Electric Co. v. Superior Court* (2018) 24 Cal.App.5th 1150.

of punitive damages. *Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757 at 814, vacated on other grounds in *Kim v. Toyota Motor Corp.* (2018) 6 Cal. 5th 21. Because the managing agent requirement may be satisfied by a "series of corporate actions" advancing a product rather than precise conduct by a high-level official at an identifiable period of time, Monsanto's argument about the lack of evidence of conduct by a managing agent must fail.

Under the punitive damages statute "malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences." *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299. Punitive damages have been upheld where a defendant has failed to conduct adequate testing on a product. *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 869 (affirming award of punitive damages where evidence showed that adequate testing would have revealed an association between tampon use and toxic shock, that the manufacturer's testing was inadequate, and that the manufacturer decided not to do any further testing even when faced with consumer complaints.) Punitive damages have also been upheld where "there was a 'reasonable disagreement' among experts" *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 559–60, vacated on other grounds in *Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931, 127 S.Ct. 2250[3] (citing *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 810). The jury is "entitled to" reject the claims of Defendant's experts in reaching a verdict on punitive damages. *Id.* Thus, the jury could conclude that Monsanto acted with malice by consciously disregarding a probable safety risk of GBHs and continuing to market and sell its product without a warning.

However, as the U.S. Supreme Court held in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416–17, punitive damages awards are limited by the Fourteenth Amendment of the U.S. Constitution. Punitive damages found to exceed the ceiling of what due process allows must be reduced. *Id.* at 416. "[A] constitutional reduction . . . is a determination that the law does not

[3]Although this opinion was vacated with respect to constitutional limits of punitive damage awards, the California Supreme Court continues to cite this case with respect to the availability of punitive damage awards. *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 796.

permit the award." *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 214 (quoting *Johansen v. Combustion Engineering, Inc.* (11th Cir. 1999) 170 F.3d 1320, 1331). In other words, without second-guessing the jury's determination, a court has "a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause." *Id.*

When evaluating whether the defendant's actions warrant the extent of the punitive damages, courts consider three factors: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the compensatory damages award and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized in comparable cases. *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171–72. The third factor is inapplicable here as this is a common law tort action and the parties have not pointed to any statute providing a civil penalty for marketing a dangerous product.

Regarding the second factor, courts establish a ratio of punitive damages to the actual harm determined by compensatory damages. "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Simon*, 35 Cal.4th 1159, 1182 (quoting 538 U.S. 408, 425). Particularly when the non-economic component of compensatory damages is high, a lower ratio of compensatory to punitive damages may be appropriate because the total compensatory damages themselves serve the deterrent effect of punitive damages. *Id.* at 1189. In this case, the $39,253,209.35 award of compensatory damages, $37,000,000.00 of which is noneconomic, is fairly considered substantial. *See, e.g., Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 718–20 (determining that a largely noneconomic $1,905,000 compensatory damages award was substantial in the context of harassment and employment discrimination); *Walker v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965, 974 ($1.5 million in noneconomic damages is substantial); *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal. App.4th 1, 11("$6.5 million in compensatory damages...was, to say the least, substantial").

Under these circumstances the law mandates that the ratio be reduced to one to one. In *Roby* the California Supreme Court directed a reduction of punitive damages to a one to one ratio with compensatory damages at $1,905,000 because that was the "maximum punitive damages that may be

awarded...in light of the constraints imposed by the federal Constitution." *Roby*, 47 Cal.4th at 799. In a case such as this where there is a punitive element to the compensatory damages award, the law supports only a one to one ratio for punitive damages.

The cases on federal due process constraints on punitive damages also evaluate the first factor, degree of reprehensibility. In this case, the second factor, the permissible ratio between punitive damages and compensatory damages, is dispositive and an evaluation of degree of reprehensibility is not necessary. The compensatory damages award of $39,253,209 is extremely high for a single plaintiff and consists largely of non-economic damages which the due process case law recognizes has a punitive element. If the level of reprehensibility of Monsanto's conduct was high, there would be no constitutional basis to allow a higher ratio since the amount of compensatory damages is high and includes a punitive element. Similarly, if the level of reprehensibility was low, there would be no constitutional basis to further reduce the amount of punitive damages since this Court has not been cited to and could not locate any case holding that federal due process requires reducing a punitive damages award to less than a one to one ratio with compensatory damages. Accordingly, regardless of the level of reprehensibility of Monsanto's conduct, the constitutionally required ratio is one to one.

In enforcing due process limits, the Court does not sit as a replacement for the jury but only as a check on arbitrary awards. The punitive damages award must be constitutionally reduced to the maximum allowed by due process in this case—$39,253,209.35—equal to the amount of compensatory damages awarded by the jury based on its findings of harm to the Plaintiff.

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V. ORDER

For the reasons stated above, Monsanto's Motion for Judgment Notwithstanding the Verdict is denied. If the Plaintiff consents to a remittitur of the award of punitive damages to equal the amount of the compensatory damages award, Monsanto's Motion for New Trial will be denied. Pursuant to CCP § 662.5(a)(2), Plaintiff must indicate his acceptance of the remittitur no later than Friday, December 7, 2018 or it will be deemed rejected and Monsanto's Motion for New Trial will be granted as to punitive damages only.

IT IS SO ORDERED.

Date: 10/22/18

SUZANNE R. BOLANOS
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
Department 504

DEWAYNE JOHNSON, Plaintiff, vs. MONSANTO COMPANY, et al., Defendants.	Case No.: CGC-16-550128 **CERTIFICATE OF ELECTRONIC SERVICE** (CCP § 1010.6 & CRC 2.251)

I, R. Michael Diles, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On October 22, 2018, I electronically served **ORDER DENYING MONSANTO COMPANY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT and CONDITIONALLY DENYING MONSANTO'S MOTION FOR NEW TRIAL**, via File & Serve*Xpress* on the recipients designated on the Transaction Receipt located on the File & Serve*Xpress* website.

Dated: October 22, 2018

T. MICHAEL YUEN, Clerk

By: R. Michael Diles
R. Michael Diles, Deputy Clerk

CERTIFICATE OF ELECTRONIC SERVICE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Dewayne Johnson Plaintiff, vs. Monsanto Company Defendant	Case No. CGC-16-550128 **PLAINTIFF'S NOTICE OF ACCEPTANCE OF REMITTITUR** Hon. Judge Suzanne R. Bolanos

TO THE COURT, DEFENDANT AND ITS COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that pursuant to the Court's Order dated October 22, 2018 conditionally denying Monsanto's Motion for New Trial and CCP § 662.5 , the Plaintiff will accept the reduction of punitive damages to the amount of $39,253,209.35. The total verdict would therefore be in the amount of $78,506,418.70. The Plaintiff accepts the remittitur with the intent to avoid the further

burden of a new trial or appeal. If the Defendant appeals the Court's October 22, 2018 order on any grounds and thereby deprives Plaintiff of "the benefits he has sought by his consent to the remittitur," then the Plaintiff does not waive his right to appeal the reduction of punitive damages. *Miller v. Nat'l Am. Life Ins. Co.* (Ct. App. 1976) 54 Cal. App. 3d 331, 345.

Dated: October 26, 2018

Respectfully Submitted,

THE MILLER FIRM, LLC

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON, Plaintiff, v. MONSANTO COMPANY, ET AL., Defendants.	Case No.: CGC-16-550128 **PROOF OF SERVICE**

PROOF OF SERVICE

I, Curtis G. Hoke, declare as follows:

I am a citizen of the United States and am employed in Orange County, Virginia. I am over the age of eighteen years and not a party to the within action. My business address is 108 Railroad Avenue, Orange, Virginia 22960. On October 26, 2018, I served the following documents by the method indicated below:

1. PLAINTIFF'S NOTICE OF ACCEPTANCE OF REMITTITUR

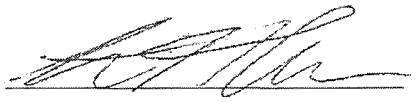
2. [PROPOSED] AMENDED JUDGMENT ON JURY VERDICT

☑ **By Electronically Serving** the document(s) described above via LexisNexis File & Serve by 7:00 p.m. Pacific Standard Time on all parties appearing on the LexisNexis File & Serve service list.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this October 26, 2018 at Orange, Virginia.



Curtis G. Hoke,
Declarant

Johnson v. Monsanto Company, et al.
San Francisco Superior Court Case No.: CGC-16-550128

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: ROUNDUP PRODUCTS LIABILITY LITGATION	MDL No. 2741 Case No. 16-md-02741-VC
This document relates to: *Hardeman v. Monsanto*, 3:16-cv-00525-VC	**PRETRIAL ORDER NO. 145: JUDGMENT**

This action having come for trial before this Court and jury and the issues having been tried and the jury having duly rendered its verdict on March 27, 2019,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Edwin Hardeman, shall recover from the Defendant, Monsanto Company, the following sums for compensatory damages:

(a) Past economic loss for Edwin Hardeman	$200,967.10
(b) Past noneconomic loss for Edwin Hardeman	$3,066,667.00
(c) Future noneconomic loss for Edwin Hardeman	$2,000,000.00
TOTAL COMPENSATORY DAMAGES:	$5,267,634.10

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, Edwin Hardeman, shall recover from the Defendant, Monsanto Company, $75,000,000.00 in punitive damages. Thus, the total judgment in this case pending determination of awardable costs is **$80,267,634.10.**

IT IS FURTHER ORDERED THAT Defendant, Monsanto Company, shall pay interest upon this judgment at the federal interest rate governed by 28 U.S.C. § 1961, and shall

pay for recoverable court costs incurred in this action by the Plaintiff as determined by this Court following submission by Plaintiff of his bill of costs.

Execution may issue for all judgment amounts, interests, and costs thirty (30) days after entry of the judgment.

IT IS SO ORDERED.

Dated: May 3, 2019

VINCE CHHABRIA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: ROUNDUP PRODUCTS LIABILITY LITIGATION	MDL No. 2741 Case No. 16-md-02741-VC
This document relates to: *Hardeman v. Monsanto*, 16-cv-00525-VC	**PRETRIAL ORDER NO. 164: AMENDED JUDGMENT**

In light of the order granting in part Monsanto's motion for judgment as a matter of law, *see* Pretrial Order No. 160, Dkt. No. 4576, as well as the order granting Mr. Hardeman's motion to amend the interest rate, *see* Pretrial Order No. 163, Dkt. No. 4601, Edwin Hardeman shall recover from Monsanto Co. the following sums for compensatory and punitive damages:

Past economic loss	$200,967.10
Past noneconomic loss	$3,066,667.00
Future noneconomic loss	$2,000,000.00
Punitive damages	$20,000,000.00

Monsanto shall pay prejudgment interest for past economic damages awarded ($200,967.10) at the rate of seven percent (7%) from the date of the filing of the Complaint, February 1, 2016, through the entry of the original judgment on May 3, 2019, resulting in total prejudgment interest of $45,748.92. Thus, the total judgment in this case pending determination of awardable costs is $25,313,383.02.

Monsanto shall pay postjudgment interest upon this judgment at the federal interest rate governed by 28 U.S.C. § 1961, and shall pay for recoverable court costs incurred in this action by Mr. Hardeman as determined by this Court following review of Mr. Hardeman's bill of costs.

Execution may issue for all amended judgment amounts, interests, and costs thirty (30) days after entry of this judgment.

IT IS SO ORDERED.

Date: July 17, 2019

Honorable Vince Chhabria
United States District Court

A158228

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

ALVA AND ALBERTA PILLIOD,
Plaintiffs and Cross-Appellants,

v.

MONSANTO COMPANY,
Defendant and Appellant.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT
WINIFRED SMITH, JUDGE • CASE NO. RG17862702

[PROPOSED] ORDER

FOR GOOD CAUSE SHOWN, the court grants Monsanto's motion to take judicial notice of the documents attached as exhibits A, C, D, E, F, G, and H to the Declaration of Dean A. Bochner.

Dated: _____ _____
Presiding Justice

PROOF OF SERVICE

Pilliod et al. v. Monsanto Company
Case No. A158228

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On February 7, 2020, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DEAN A. BOCHNER; [PROPOSED] ORDER** on the interested parties in this action as follows:

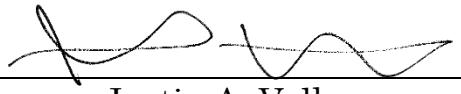
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 7, 2020, at Burbank, California.



Justin A. Volk

SERVICE LIST
Pilliod et al. v. Monsanto Company
Case No. A158228

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Honorable Winifred Smith Alameda County Superior Court 1221 Oak Street Oakland, CA 94612	**Trial Judge** Trial Court Case No. RG17862702 *Via U.S. Mail*