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14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
FOR THE COUNTY OF ALAMEDA

16 COORDINATION PROCEEDING
17 SPECIAL TITLE (Rule 3.550)

18 ROUNDUP PRODUCTS CASES

19 THIS DOCUMENT RELATES TO:

20 *Alva Pilliod, et al. v. Monsanto*
21 *Company*, Case No. RG17862702

Case No. JCCP NO. 4953

Case No. RG17862702

ASSIGNED FOR ALL PURPOSES TO
22 JUDGE WINIFRED SMITH
23 DEPARTMENT 21

**MONSANTO COMPANY'S NOTICE OF
24 MOTION AND MOTION TO REVERSE
25 BIFURCATE TRIAL [Filed Concurrently with
26 Request for Judicial Notice]**

Hearing Date: February 8, 2019
Time: 11:00 am
Department: 21

Complaint Filed: June 2, 2018
Trial Date: March 18, 2019

Reservation No.: R-2036784

EMBOSSER
FILED
ALAMEDA COUNTY
JAN 15 2019
CLERK OF THE SUPERIOR COURT
Anita Dhir

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on February 8, 2019 at 11:00 a.m. in Department 21 of the
3 above-entitled Court, located at 1221 Oak Street, Oakland, California, Defendants will bring on
4 for hearing their Motion to Reverse Bifurcate Trial, on the grounds that bifurcating trial into two
5 phases – a first phase where medical causation will be decided and, if necessary, a second phase
6 to address Monsanto’s liability – will avoid undue prejudice and jury confusion as well as
7 promote judicial economy. See Code Civ. Proc. §§ 1048, 598.

8 The Motion is based upon this Notice, the attached Memorandum of Points and
9 Authorities, the concurrently filed Request for Judicial Notice and exhibits thereto, the pleadings
10 and files in this action, and such evidence and argument that may be presented at or prior to the
11 hearing.

12
13 DATED: January 14, 2019

Respectfully submitted,

14 /s/ Eric G. Lasker

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant Monsanto Company (“Monsanto”) respectfully requests that the Court reverse
4 bifurcate trial into two phases – a first phase focused on medical causation (*i.e.*, did the product at
5 issue cause the specific plaintiff’s injury) and damages, and, if necessary, a second phase to
6 address Monsanto’s liability. This Court need only look across the Bay to determine whether
7 reverse bifurcation is appropriate for a Roundup/glyphosate trial. A little over ten days ago, the
8 federal court presiding over the multidistrict litigation (“MDL Court”) in *In Re: Roundup Product*
9 *Liability Litigation* (“*In Re: Roundup*”) granted Monsanto’s request for reverse bifurcation in the
10 first group of three single-plaintiff MDL trials where the first phase of each trial will “address
11 causation only and the second phase [will] address all remaining liability and damage issues. *In*
12 *Re: Roundup*, PTO 61 Re: Bifurcation at 1 (Exhibit 1 to Accompanying Request for Judicial
13 Notice (“RJN”). The MDL Court explained why bifurcation is warranted: “A significant
14 portion of plaintiffs’ case involves attacks on Monsanto for attempting to influence regulatory
15 agencies and manipulate public opinion regarding glyphosate. These issues are relevant to
16 punitive damages and some liability questions. But when it comes to whether glyphosate caused
17 a plaintiff’s NHL [Non-Hodgkin’s lymphoma], ***these issues are mostly a distraction, and a***
18 ***significant one at that.***” *Id.* (emphasis added).

19 Contrary to Plaintiffs’ anticipated argument in opposition to this motion, reverse
20 bifurcation is not a new or novel procedure. Starting at least from the 1980s, and applying the
21 principles found in California *Code of Civil Procedure* (“C.C.P.”) §1048, or equivalent federal or
22 state rules of civil procedure (*i.e.* F.R.C.P. 42(b)), courts throughout the country have reverse
23 bifurcated trials in personal injury litigations where juries have been asked to resolve complex
24 and dispositive issues of causation first, including in cases involving:

- 25 • **Asbestos**, *see, e.g., Shetterly v. Raymark Indus., Inc.*, 117 F.3d 776, 782 (4th Cir.
26 1997); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 152 (3d Cir. 1995); *Angelo v.*
27 *Armstrong World Indus., Inc.*, 11 F.3d 957, 964-65 (10th Cir. 1993); *Buttram v.*
28 *Owens-Corning Fiberglas Corp.*, 16 Cal. 4th 520, 526 (1997); *Williamson v. Plant*
Insulation Co., 23 Cal. App. 4th 1406, 1412 (1994); *White v. Owens-Corning*
Fiberglas, Corp., 668 A.2d 136, 139 (Pa. Super. Ct. 1995); *Jones v. Johns-*

1 *Manville Corp.*, 22 Phila. Cty. Rptr. 91, 93-94 (C.P. Phila. Cty. 1991).

- 2 • **Bendectin**, see *In re Bendectin Litig.*, 857 F.2d 290, 309 (6th Cir. 1988).
- 3 • **DES**, see, e.g., *In re N.Y. Cty. DES Litig.*, 621 N.Y.S.2d 332, 333 (N.Y. App. Div. 1995) (affirming DES trial with “reverse-bifurcated proceeding”).
- 4 • **Diet Drugs**, see, e.g., Order, *Stafford v. Wyeth Corp.*, No. CIV-02-1118-L (W.D. Okla. Jan. 13, 2006); Order, *Bristley v. Wyeth*, No. H-02-4264 (S.D. Tex. May 27, 2005); Hr’g Tr. at 3-16, *Hines v. Am. Home Prods. Corp.*, No. DD001645 (Cal. Super. Ct. Oct. 12, 2004); Hr’g Tr. at 37:1-11, *Granillo v. Wyeth, Inc.*, No. D-0101-CV-200400361 (N.M. Dist. Ct. Oct. 6, 2005); Hr’g Tr. at 42:3-4, *Fazzini v. Wyeth, Inc.*, No. 1775 (C.P. Phila. Cty. Feb. 16, 2005); Order Regarding Reverse Bifurcation, *Hoyt v. Wyeth Inc.*, No. 3781 (C.P. Phila. Cty. Feb. 10, 2005); Order, *Dupree v. Wyeth*, No. 2429 (C.P. Phila. Cty. Oct. 13, 2004); Hr’g Tr. at 4:14-17, *Archer v. Wyeth, Inc.*, No. 2595 (C.P. Phila. Cty. Sept. 20, 2004); Order, *Hansen v. Am. Home Prods. Corp.*, No. 1063 (C.P. Phila. Cty. Sept. 15, 2004); Order Regarding Bifurcation, *Danielson v. Wyeth*, No. 3968 (C.P. Phila. Cty. Sept. 15, 2004); Hr’g Tr. at 13, *Berntson v. Wyeth*, No. 2304 (C.P. Phila. Cty. Aug. 17, 2004); Hr’g Tr. at 55:12-14, *Downard v. Wyeth*, No. 170 (C.P. Phila. Cty. Aug. 16, 2004); Order Granting Wyeth’s Mot. for Reverse Bifurcation of Tr., *Castereno v. Wyeth*, No. 18463 (Tex. Dist. Ct. Jan. 12, 2006); Order Granting Wyeth’s Mot. for Reverse Bifurcation of Tr., *Pence v. Wyeth*, No. 18028 (Tex. Dist. Ct. Jan. 12, 2006); Order, *Bradford v. Wyeth*, No. 8154 (Tex. Dist. Ct. Jan. 10, 2006); Order Granting Wyeth’s Mot. for Reverse Bifurcation of Tr., *Rogers v. Wyeth*, No. 03-05-19169 (Tex. Dist. Ct. Jan. 3, 2006); Order Granting Wyeth’s Mot. for Reverse Bifurcation of Tr., *Haley v. Wyeth*, No. 03-05-19179 (Tex. Dist. Ct. Jan. 3, 2006) (Collectively Exhibit 2 to RJN).¹
- 15 • **Hormone Replacement Therapy**, see, e.g., Order Granting Phased Tr., *Buxton v. Wyeth Pharm., Inc.*, No. 202 (C.P. Phila. Cty. July 12, 2010) (Exhibit 3 to RJN) (ordering reverse bifurcation in hormone replacement therapy case); Pretrial Conference Hr’g Tr. at 5, 7-8, *Barton v. Wyeth Pharm., Inc.*, No. 6301 (C.P. Phila. Cty. Sept. 9, 2009) (Exhibit 4 to RJN) (same); Pretrial Conference Hr’g Tr. at 27-33, *Nelson v. Wyeth Pharm., Inc.*, No. 1670 (C.P. Phila. Cty. Sept. 5, 2006) (Exhibit 5 to RJN) (same).
- 19 • **Other personal injuries**, *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 216 (6th Cir. 1982) (affirming reverse bifurcation in personal injury trial arising from hotel fire), *cert. denied*, 461 U.S. 929 (1985).

21 The issue of causation in this case turns on the underlying scientific studies that have been
22 conducted on glyphosate and glyphosate-based formulations. It also involves analysis of whether
23 Plaintiffs’ experts can reliably use a “differential diagnosis” to opine that Roundup in fact caused
24 a particular plaintiff’s NHL, in light of the plaintiff’s specific medical history and potential

25 _____
26 ¹ Reverse bifurcation in the *Diet Drug* litigation occurred following an initial national settlement that barred punitive
27 damages in opt-out cases, but the fundamental principle of trying medical causation before liability was endorsed by
28 the Third Circuit. See *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 318 (3rd Cir. 2004); see also *In Re Diet
Drugs Prods. Liab. Litig.*, 123 F. App’x 465, 470-72 (3d Cir. 2005) (subsequent decision affirming a state court’s
discretion to utilize reverse bifurcation)

1 alternative risk factors or causes. As confirmed by the MDL Court’s recent decision, bifurcation
2 is particularly appropriate in these Roundup trials because it will allow the jury to evaluate
3 scientific and medical causation—a predicate for each of plaintiffs’ claims—based on the actual
4 scientific studies and evidence, and avoid potential confusion or distraction created by the
5 assessments of that evidence by regulators and IARC, and by arguments about the methods and
6 motives of those bodies.²

7 The MDL Court’s order appropriately places the threshold scientific and medical
8 causation question first – whether Roundup can cause NHL and whether in fact it did cause it in a
9 specific plaintiff. While evidence of the longstanding, worldwide regulatory approval of
10 glyphosate (and IARC’s apparent dissent from that consensus) may be relevant to Monsanto’s
11 good faith in marketing its product or to some liability questions, evidence of these regulatory
12 approvals and IARC’s divergent findings (and Plaintiffs’ allegations that Monsanto try to
13 improperly influence them) raises concerns under California *Evidence Code* §352 because it will
14 confuse, and distract the jury from the central scientific evidence. What the actual regulatory
15 bodies and IARC have said about the science is not a substitute for the jury’s own evaluation of
16 the science. But a trial focused on those bodies’ decisions is likely to result in that scenario where
17 the jury ends up debating the merits of other bodies’ decisions, rather than evaluating the science
18 on its own. Furthermore, Monsanto’s actions or alleged attempts to influence regulatory agencies
19 are unrelated to “whether glyphosate caused a plaintiff’s NHL.” *In Re: Roundup*, PTO 61 Re:
20 Bifurcation at 1.

21 Plaintiffs’ counsel’s anticipated arguments at trial that IARC’s assessment of glyphosate
22 should control, and that Monsanto allegedly attempted to influence regulatory agencies regarding
23 glyphosate products will confuse and distract the jury from evaluating the threshold causation
24 issues. Just one day after issuing its bifurcation order, the MDL Court rejected plaintiffs’

25 ² Judge Chhabria noted that the jury in phase 1 of a bifurcated trial will likely need to receive “at least some limited
26 information about the IARC classification through expert testimony,” but the Court has left that question open and
27 has indicated that it will likely provide a limiting instruction if such evidence is admitted. *In Re: Roundup*, PTO 61
28 Re: Bifurcation at 1-2. Moreover, it is Monsanto’s position that if *limited* evidence of IARC is admitted, limited
evidence of the numerous, international regulatory bodies that have disagreed with IARC should also be admitted in
phase 1.

1 counsel's efforts to change that ruling. The MDL Court again emphasized that causation is
2 proper for Phase I, when Plaintiffs' counsel insisted that Monsanto's actions are somehow central
3 to the science:

4 **MR. WISNER:** [...] In any event, Your Honor, the reason why I raise this is
5 because of what you just said. Monsanto's knowledge of whether or not it causes
6 cancer -- I mean, there can be no dispute that they of all people should know the
7 answer to that question.

8 **THE COURT:** The point is that you are mischaracterizing what Monsanto people
9 have said, and you are putting your own spin on what Monsanto people have said.
10 **The question in the first phase is going to be what has the science shown or
11 not shown.**

12 *In Re: Roundup*, Jan. 4, 2019 CMC Hr'g Tr. at 23:15-19 (emphasis added) (Exhibit 6 to
13 RJN). The MDL Court rejected plaintiffs' counsel's repeated attempts to interject Monsanto's
14 alleged conduct into the first phase, stating definitively that "whether Monsanto's conduct has
15 actually been terrible and which aspects of it have been terrible and which aspects of it haven't
16 been terrible, none of which or most of which does not really relate to the question of whether
17 Roundup causes NHL." *Id.* at 28:12-16. Plaintiffs' arguments to the contrary are aimed at
18 confusing the jury and distracting from the issues related directly to causation.

19 Finally, reverse bifurcation is consistent with the principles of judicial economy that
20 California courts have considered in applying C.C.P. §1048. If the jury were to rule in
21 Monsanto's favor on causation, there would be no need for further trial proceedings. And there is
22 little to no overlap in the potential witnesses that would testify in each phase of the trial: the
23 experts who have assessed the epidemiological evidence, animal studies, alleged genotoxicity,
24 and each Plaintiff's medical history would need to testify only in Phase 1, and corporate and
25 regulatory witnesses could potentially testify in Phase 2, if needed. Both phases could be tried
26 efficiently, avoiding undue burden on the Court and potential jurors. Trying the phases in
27 succession would allow for a more streamlined presentation of evidence in Phase 2 (if it is
28 necessary) before a jury already familiar with many of the underlying facts.

26 **II. FACTUAL BACKGROUND**

27 By way of background, Roundup ®-branded products ("Roundup") are a glyphosate-

1 based herbicide (“GBH”) that Monsanto introduced to the marketplace in 1974. For decades
2 now, farmers have used these GBHs, including Roundup, to increase crop yields, while home-
3 owners and landscaping companies have used them for highly effective weed control.
4 Glyphosate is one of the most thoroughly studied herbicides in the world, and GBHs have
5 received regulatory approval in more than 160 countries – including the United States
6 Environmental Protection Agency (“EPA”) and those similarly tasked with human health and
7 environmental protection in Canada, Australia, New Zealand, South Korea, Japan, and the
8 European Union. Here, the EPA has approved Roundup herbicides (and other GBHs) for sale in
9 the United States for almost forty-five years.

10 *Every* major regulatory agency charged with approving GBHs has concluded, with the
11 benefit of all the available primary data, that glyphosate is *not* likely to pose risks of
12 carcinogenicity, including NHL, in humans.³ Non-regulatory bodies concerned with public
13 health have reached the same conclusions.⁴ In the forty-plus years since EPA first approved a
14 Roundup herbicide, a robust scientific database has developed for glyphosate and GBHs,
15 including multiple published human population studies (epidemiology), over a dozen long-term
16 rodent carcinogenicity bioassays, and hundreds of mechanistic studies.⁵

17
18 ³ See, e.g., EPA Office of Pesticide Programs, *Glyphosate Issue Paper: Evaluation of Carcinogenic Potential* at 140
19 (Sept. 12, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0385-0094> (“EPA OPP”) (“strongest support is for ‘not likely to be carcinogenic to humans’ at the doses relevant to human health risk assessment”); European Food Safety Authority, *Conclusion on the peer review of the pesticide risk assessment of the active substance glyphosate*, 13(11) EFSA J. 4302 at 11 (2015), <http://onlinelibrary.wiley.com/doi/10.2903/j.efsa.2015.4302/epdf> (“EFSA 2015”) (“glyphosate is unlikely to pose a carcinogenic hazard to humans”); European Chemicals Agency, *Opinion Proposing Harmonized Classification and Labelling at EU Level of glyphosate (ISO); N-(phosphonomethyl) glycine* at 31 (Mar. 15, 2017), <https://echa.europa.eu/documents/10162/2d3a87cc-5ca1-31d6-8967-9f124f1ab7ae> (“based on the epidemiological data as well as on data from long-term studies in rats and mice ... no hazard classification for carcinogenicity is warranted for glyphosate”); New Zealand EPA, *Review of the Evidence Relating to Glyphosate and Carcinogenicity* at 16 (Aug. 11, 2016), http://www.epa.govt.nz/Publications/EPA_glyphosate_review.pdf (“The overall conclusion is that ... glyphosate is unlikely to be genotoxic or carcinogenic to humans and does not require classification ... as a carcinogen or mutagen.”).

24 ⁴ E.g., Joint Management of Pesticide Residues, *Pesticide residues in food – 2004, Joint FAO/WHO Meeting on Pesticide Residues* at 158 (2006), http://apps.who.int/iris/bitstream/10665/43624/1/9241665203_eng.pdf, (“JMPR”) (“In view of the absence of a carcinogenic potential in animals and the lack of genotoxicity in standard tests, the Meeting concluded that glyphosate is unlikely to pose a carcinogenic risk to humans.”).

26 ⁵ See EPP OPP at 130 (“A large database is available for evaluating the carcinogenicity potential of glyphosate.”); EFSA 2015 at 10 (“The glyphosate dossier consists of an exceptionally large database, therefore the toxicological evaluation . . . rel[ies] on a magnitude of valid studies rather than on one ‘key study’ for each endpoint.”). Many of these studies were conducted by independent investigators neither working with nor funded by Monsanto.

1 Against this forty-year history, Plaintiffs allege here, that they developed cancer –
2 specifically, NHL – caused by exposure to Roundup herbicides, relying on a glyphosate
3 “monograph” issued in 2015 by the International Agency for Research on Cancer (IARC).
4 However, the EPA and several foreign regulatory agencies have re-affirmed their prior
5 conclusions, that glyphosate is not a carcinogen, in detailed scientific reports that include
6 evaluations of the IARC monograph. Moreover, a recent publication from the government-
7 sponsored Agricultural Health Study (“AHS”), which was run by the National Cancer Institute
8 and is the most comprehensive, reliable epidemiology study regarding herbicide applicators
9 exposed to GBHs in real-world conditions, found no association between GBHs exposure and
10 NHL.⁶

11 Overlaying this regulatory history of repeated non-carcinogenicity findings is the cancer at
12 issue in this litigation – Non-Hodgkin’s Lymphoma, a highly diverse group of
13 lymphohematopoietic cancers classified into more than 60 distinct subtypes. It is a common
14 cancer that has no known cause in the vast majority of cases. While there are several established
15 risk factors for developing one of these 60 different subtypes of NHL (including age, autoimmune
16 disease, acquired immunodeficiencies (HIV), organ recipient transplants and viral infections like
17 Hepatitis), Roundup is not one of them. But whether Roundup can cause NHL and, whether
18 Roundup did in fact cause the specific NHL subtype that either of the Pilliods had are the
19 threshold causation questions.

20 **III. LEGAL ARGUMENT**

21 **A. Standard of Review**

22 C.C.P. §1048 is substantially similar to Federal Rule of Civil Procedure 42, and provides
23 that for “convenience, to avoid prejudice, or when separate trials will be conducive to expedition
24 and economy, [the court] may order a separate trial of any cause of action, [including
25 crossclaims], or of any separate issue or of any number of causes of action or issues, preserving
26

27 ⁶ G. Andreotti et al., *Glyphosate Use and Cancer Incidence in the Agricultural Health Study*, 110 J. Nat’l Cancer
28 Inst. 509 (2018).

1 the right of trial by jury required by the Constitution or a statute of this state or United States.”
2 Cal. Code. Civ. Proc. §1048. *See generally Orange County Water Dist. v. Alcoa Global*
3 *Fasteners, Inc.*, 219 Cal. Rptr. 3d 474, 561 (Cal. Ct. App. 2017); *Finley v. Superior Court*, 96
4 Cal. Rptr. 2d 128, 135 (Cal. Ct. App. 2000).⁷

5 A trial court has broad discretion to bifurcate a trial pursuant to Section 1048. *See*
6 *National Elec. Supply Co. v. Mt. Diablo Unified School Dist.*, 9 Cal. Rptr. 864, 866 (Cal. Ct. App.
7 1960). California appellate courts review a district court’s decision to bifurcate a trial for abuse
8 of discretion, and routinely affirm the use of bifurcated trials. *Id.*; *Grappo v. Coventry Financial*
9 *Corp.*, 286 Cal. Rptr. 714, 718 (Cal. Ct. App. 1991); *Orange County Water Dist. v. Alcoa Global*
10 *Fasteners, Inc.*, 219 Cal. Rptr. 3d 474, 561 (Cal. Ct. App. 2017).⁸

11 Additionally, this Court enjoys broad authority to manage this JCCP. It “is the intent of
12 the Judicial Counsel to vest in the coordinating judge *whatever great breadth of discretion may*
13 *be necessary and appropriate* to ease the transition through the judicial system of the logjam of
14 cases which give rise to coordination.” *McGhan Medical Corp. v. Superior Court*, 11 Cal. App.
15 4th 804, 812 (1992) (emphasis added); *see Ford Motor Warranty Cases*, 11 Cal. App. 5th 626,
16 645 (2017) (quoting *McGhan*, 11 Cal. App. 4th at 812); *Abelson v. Nat’l Union Fire Ins. Co.*, 28
17 Cal. App. 4th 776, 786 (1994) (same). Thus, “the procedure which may be utilized by the
18 coordinating judge are flexible indeed.” *McGhan*, 11 Cal. App. 4th at 812; *see Ford Motor*, 11
19 Cal. App. 5th at 644 (quoting *McGhan*, 11 Cal. App. 4th at 812).

20 **B. The Court Should Reverse Bifurcate Trial**

21 This Court should adopt the rationale expressed by the reasoning, and decision of the
22

23 ⁷ California *Code of Civil Procedure* §598 also permits bifurcation of trial into phases, stating that “the trial of any
24 issue or any part thereof shall precede the trial of any other issue or any part thereof in the case,” “when the
convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be
promoted thereby.” Cal. Civ. Proc. §598.

25 ⁸ Recently, in *Allstate Insurance Company v. Breeden*, the Ninth Circuit affirmed a district court’s *sua sponte*
26 bifurcation of liability and damages, holding that “Allstate’s liability under the disputed insurance policy was a
27 dispositive issue; the jury’s verdict on Allstate’s misrepresentation claim obviated the need for a jury trial on
28 Breeden’s claims for damages, which properly served the goals of Rule 42(b).” 410 F. App’x at 6, 9 (9th Cir. 2010);
see also Horton v. Jones, 103 Cal. Rptr. 399, 401 (Cal. Ct. App. 1972) (Principal reason for bifurcation is to avoid
“the waste of time and money caused by the unnecessary trial of damage questions in cases where the liability issue
is resolved against the plaintiff.”).

1 MDL Court in *In Re: Roundup* and grant this motion to reverse bifurcate the upcoming *Pilliod*
2 trial. *See In Re: Roundup*, PTO 61 at 1 (“Monsanto’s request to bifurcate the three bellwether
3 trials, with the first phase to address causation only and the second phase to address all remaining
4 liability and damage issues, is granted.”). Again the MDL Court explained why bifurcation is
5 received: Plaintiffs’ anticipated attacks on Monsanto’s attempts to influence regulatory agencies
6 and manipulate public opinion regarding glyphosate “*are mostly a distraction, and a significant*
7 *one at that*” “when it comes to whether glyphosate caused a plaintiff’s NHL.” *Id.*

8 Courts throughout the country have commonly employed reverse bifurcation in cases
9 involving potentially dispositive issues of medical causation, including toxic torts, asbestos,
10 pharmaceuticals, and other mass torts. *See, e.g., supra* at 1-2 (collecting cases). The Manual for
11 Complex Litigation (<https://www.cand.uscourts.gov/complexlitmanual>) notes that “[i]n pursuing
12 traditional or test case trials, the judge may conduct a unitary trial, bifurcate liability and
13 damages, or create other helpful trial structures.” Manual For Complex Litig. (Fourth) at 465, §
14 22.93 (2004) (footnote omitted). As noted above, the experiences from mass tort litigations
15 involving asbestos, Bendectin, DES, diet drugs, and hormone replacement therapy amply
16 demonstrate the value of reverse bifurcation.

17 As cited previously, several California courts have bifurcated asbestos trials, with causation
18 tried in the first phase, and liability in the second. *See Buttram v. Owens-Corning Fiberglas*
19 *Corp.*, 16 Cal. 4th 520, 526 (1997) (“After a bifurcated trial (phase 1 addressing causation and
20 compensatory damages, phase II addressing exposure and liability issues”); *Williamson v. Plant*
21 *Insulation Co.*, 23 Cal. App. 4th 1406, 1412 (1994) (“[T]he trial was ordered bifurcated, with
22 issues of statute of limitations, causation and damages to be tried in the first phase, and issues of
23 liability and comparative fault in the second”). Likewise, numerous federal appellate courts
24 applying Federal Rule 42(b), have upheld a trial procedure like the one requested here, where in
25 the first phase, the jury focused on “whether the plaintiff [had] a disease that was caused by [the
26 alleged product],” and (if necessary) in the second phase, the jury considered “what warnings the
27 defendants should have given . . . and whether the products to which the plaintiff was exposed

1 were the defendants’.” *Angelo*, 11 F.3d at 965; *see also Shetterly*, 117 F.3d at 782 (affirming
2 reverse bifurcation in asbestos trial); *In re Bendectin Litig.*, 857 F.2d at 309 (affirming district
3 court decision to try the issue of causation in a first phase and the issue of liability in a later phase
4 in action alleging that the anti-nausea drug Bendectin caused plaintiffs’ birth defects); *accord In re*
5 *Beverly Hills Fire Litig.*, 695 F.2d at 216 (affirming reverse bifurcation in a hotel fire case).⁹

6 The Tenth Circuit’s seminal decision in *Angelo* affirmed a similar phased trial procedure
7 for reasons that apply here. The plaintiffs in *Angelo*, like here, argued that the district court
8 abused its discretion by using the reverse bifurcation format because it was prejudicial to them
9 and because the issues in the trial were inseparable. 11 F.3d at 964-65.

10 The Tenth Circuit disagreed, holding that while bifurcation would be “improper if the
11 issues [were] not separable,” the phase one issues of damages and causation and the phase two
12 issues of liability and punitive damages were “clearly separable.” *Id.* The court explained:

13 The first phase considers only whether the plaintiff has a disease that was caused
14 by asbestos, and what damages the plaintiff suffered as a result. The evidence
15 therefore concentrates on the plaintiff’s health history, the extent of his exposure to
16 asbestos, the possible causes of his illness, and the losses he has suffered from his
17 illness. The second phase, on the other hand, concentrates on what warnings the
defendants should have given in light of the “state of the art” and whether the
products to which the plaintiff was exposed were the defendants’. Punitive
damages are also decided in the second phase, because they also focus on the
defendants’ conduct.

18 *Id.* at 965. The Tenth Circuit also held that reverse bifurcation was efficient and economical
19 because at the time of the district court’s bifurcation order, “[plaintiffs’] claim was one of more
20 than 600 asbestos cases on” the Northern District of Oklahoma’s docket. Under those
21 circumstances, reverse bifurcation would “obviously save[] time and money by eliminating some
22 cases after the first phase, thus avoiding trial of the defendants’ liability.” *Id.* at 964.¹⁰

23
24 ⁹ *See also Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 356 (3d Cir. 1999) (noting without disapproval that asbestos
25 products trial with a single plaintiff “proceeded in a reverse bifurcated format” with “damages . . . considered in
Phase I and liability in Phase II”); *Kirk*, 61 F.3d at 152 (same).

26 ¹⁰ The administrative decision of the Pennsylvania state court in Philadelphia County to stop the practice of reverse
27 bifurcation absent consent of the parties does not change the rationale for or acceptance of the practice by federal
28 appellate courts under Rule 42 or by California courts under C.C.P. §1048. *Cf.* Gen. Court Regulation No. 2012-01
at 2, *In re: Mass Tort & Asbestos Programs* (C.P. Phila. Cty. Feb. 15, 2012), available at
<https://www.courts.phila.gov/pdf/regs/2012/cpajgr2012-01.pdf>.

1 **C. Reverse Bifurcation Avoids Undue Prejudice And Jury Confusion.**

2 As in *Angelo*, and consistent with C.C.P §1048, Monsanto’s proposal will involve
3 separating the trial into two phases involving distinct issues. Phase One will focus on the
4 scientific and medical evidence of causation and involve testimony from witnesses who have
5 assessed the epidemiological, and other scientific studies, as well as each plaintiff’s separate
6 medical history. Phase Two, by contrast, will involve the regulatory history, including IARC’s
7 assessment, Monsanto’s responses to that history and assessments, the reasonableness of its
8 decisions to market and sell a product with universal regulatory approval, and any other issues
9 relevant to liability.

10 As the MDL Court determined, this approach has the benefit of avoiding undue prejudice
11 to the parties and juror confusion. As noted above, reverse bifurcation will ensure that the jury
12 focuses on the central evidence regarding causation. At the same time, bifurcation will eliminate
13 the risk that the jury will become “significantly distracted”, and misled by extraneous evidence of
14 corporate conduct, or by the complex regulatory record. The jury should conduct its own
15 assessment of the key causation evidence without the risk of confusion created by superfluous,
16 third-party evaluations of that evidence (especially because regulators and IARC apply different
17 statutory or other criteria in their evaluations), or of distraction by arguments regarding the
18 reliability and credibility of IARC or the EPA and other worldwide regulatory agencies.¹¹

19 Reverse bifurcation also makes good sense in light of Plaintiffs’ counsel’s anticipated plan
20 to focus on, and improperly bolster, the IARC classification of glyphosate and Monsanto’s
21 actions in response to this classification as central to their “narrative” in the causation case.¹²

22 _____
23 ¹¹ The potential for juror confusion is also heightened in these cases if the trial is not bifurcated because the jurors
24 will hear expert testimony on the *current* state of the science (which relates to medical causation) as well as expert
25 testimony on the state of the science when Plaintiffs *actually used Roundup products* (which relates to liability).
26 Phasing trial would alleviate some of this confusion by allowing the jury to focus solely on current scientific
27 knowledge relevant to causation issues in Phase I. Only if the trial proceeds to Phase II would the jury then be
28 presented with the extensive testimony on the historical scientific literature.

¹² A little over one month ago, Plaintiffs’ counsel made this very argument before the MDL Court: “‘Roundup has
been on the market for 40 years. It has a demonstrated record of safety.’ And there’s so much untruth about that that
we have to unpack. We will do that with evidence, but a lot of it involves IARC because what IARC did is it’s the
change in the narrative.” *In Re: Roundup*, Dec. 5, 2018 CMC Hr’g Tr. at 59:6-10 (Exhibit 7 to RJN); *see also id.* at
70:25-71:4 (“[F]or what it’s worth, IARC in the realm of academics is like the Blue Blood of scientists, you know.
So it’s, like, the fact that our guys have all been on panels and they were there, I mean, that’s really an important part
of the gravitas of their opinion.”). Plaintiffs’ counsel made these comments even after the Court clearly stated that

1 Even “limited” information about IARC’s assessment in phase I—which Monsanto maintains is
2 still improper and distracting—poisons the jury with Plaintiffs’ narrative surrounding the
3 classification and Monsanto’s alleged actions. For example, in describing a sample of
4 Monsanto’s company emails regarding IARC, Plaintiffs’ counsel attempted to conflate
5 Monsanto’s statements and the actual science, but the MDL Court correctly concluded that
6 counsel’s argument actually shows why reverse bifurcation is appropriate:

7 **MR. WISNER:** [Bill Heydens] says, you know, IARC says they are going to be
8 investigating Roundup over glyphosate. He says, Well, gosh, we are very
9 vulnerable here. There is a lot of epidemiology and toxicology that you can string
together and can find essentially causation.

10 **THE COURT:** I don't think that's what he said.

11 **MR. WISNER:** I appreciate, Your Honor, saying that.

12 **THE COURT:** You like to re-interpret what Monsanto people say in their e-mails,
but I don't think that's actually what he's saying.

13 **MR. WISNER:** Interpretation of what is said –

14 **THE COURT:** Which highlights the reason why I think it is a more fair trial to
15 bifurcate the question of causation because during the first phase, we want you
16 focusing not on mischaracterizing statements that Monsanto executives have
made. We want you focusing on the science.

17 *In Re: Roundup*, Jan. 4, 2019 CMC Hr’g Tr. at 22:4-19 (emphasis added). As the MDL Court
18 noted above, Plaintiffs’ penchant to mischaracterize documents or actions—particularly those of
19 Monsanto—will confuse the issues, distract from the science, and create undue, irreparable
20 prejudice.

21 Moreover, while the IARC glyphosate monograph, regulatory assessments and approvals,
22 and Plaintiffs’ allegations regarding Monsanto’s actions may be relevant in the case as to some
23 liability questions, California Evidence Code §352 prejudice concerns are significant on the issue
24 of causation. Allowing all of this evidence to come in subject to a limiting instruction cannot
25 cure that undue prejudice—there is a clear risk, exemplified by the San Francisco jury’s 2018

26 “[a] ‘hazard assessment,’ as IARC and other public health bodies define that inquiry, is not what the jury needs to
27 conduct when deciding whether glyphosate actually causes NHL in people at past or current exposure levels.” *In Re:*
28 *Roundup*, PTO 45 at 12 (Exhibit 8 to RJN).

1 verdict in the *Johnson* case and apparently invited by the Plaintiffs here and in the MDL Court,
2 that the jury will be tempted to simply adopt one side of the alleged debate between regulators
3 and IARC rather than undertaking the necessary job of independently assessing the scientific
4 evidence to determine whether the plaintiff has satisfied his or her legal burden of proving
5 causation. Reverse bifurcation eliminates that risk and replaces it with a trial that properly
6 focuses the jury’s attention on the scientific evidence.

7 **D. Reverse Bifurcation Promotes Judicial Economy.**

8 Reverse bifurcation also encourages judicial efficiency, a bedrock of Cal. Code. Civ. Proc.
9 §1048, and its federal equivalent, Rule 42(b). If the jury finds in Monsanto’s favor on causation,
10 it “obviate[s] the need for a jury trial on” liability or punitive damages and saves time and money,
11 “which properly serve[s] the goals of Rule 42(b).” *Allstate Ins. Co.*, 410 F App’x at 9.¹³
12 Bifurcation will avoid the presentation of potentially days of conduct and regulatory evidence
13 through multiple witnesses if the jury finds the absence of causation.

14 The proposed bifurcation will not prolong the overall length of the complete trial—as
15 noted above, the issues of causation and compensatory damages are separate and distinct from
16 Monsanto’s alleged negligence and company conduct and would involve testimony from different
17 witnesses. Even accepting Plaintiffs’ position in *In Re: Roundup* that Monsanto’s response to
18 IARC, the U.S. EPA, and foreign regulators is relevant to liability and punitive damages, that
19 evidence has no relevance to the proposed phase one issue of causation, and thus there is no risk
20 of duplicative testimony across the two phases. *See, e.g., Angelo*, 11 F.3d at 964-65 (holding that
21 evidence relating to causation and damages, which would “concentrate[] on the plaintiff’s health
22 history, the extent of his exposure to [the product], the possible causes of his illness, and the
23 losses he has suffered from his illness,” is clearly separable from liability evidence, which would

24
25 ¹³ California courts recognize and encourage the judicial economy that bifurcated proceedings may bring. This is
26 implicit in the California asbestos cases cited previously, where phase II witnesses and evidence on liability,
27 exposure or comparative fault would be avoided if issues of causation and damages are found against the Plaintiff.
28 Similarly, in cases involving court-decided equitable issues and jury-decided legal issues, California courts have
noted that it is the “better practice for trial courts [] to decide equitable issues first for the explicit reason that a jury
trial on any legal issues may be avoided.” *Orange County Water Dist. v. Alcoa Global Fasteners, Inc.*, 219 Cal. Rptr.
3d 474, 561 (Cal. Ct. App. 2017).

1 “concentrate[] on what warnings the defendants should have given,” punitive damages, and other
2 issues regarding the defendants’ conduct).

3 **IV. CONCLUSION**

4 For the reasons set forth above, the Court should grant Monsanto’s Motion to Reverse
5 Bifurcate Trial.

6 DATED: January 14, 2019

Respectfully submitted,

7 /s/ Eric G. Lasker

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