SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ALVA AND ALBERTA PILLIOD, Plaintiffs, v. MONSANTO COMPANY; WILBUR-ELLIS COMPANY, LLC; and WILBUR-ELLIS FEED, LLC, Defendants.	Case No. RG17-862702 AMENDED ORDER (1) DENYING MOTIONS OF DEFENDANT FOR JNOV AND (2) CONDITIONALLY GRANTING MOTIONS OF DEFENDANT FOR NEW TRIAL.[1] DATE 7/19/19 TIME 9:00 AM DEPT 21

The motions of Monsanto JNOV and for new trial came on for hearing on Friday 7/19/19, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Good cause appearing, IT IS HEREBY ORDERED: The motion of Monsanto for JNOV is DENIED. (CCP 629.) The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of $30,736,480. The

[1] The Amended Order expands on and clarifies some of the court's thinking regarding the interaction between common law and regulatory issues. The Amended Order does not change the result.

motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of $56,005,830. (CCP 662.6(a)(2).)

MOTION FOR JNOV

The motions of Monsanto for JNOV under CCP 629 are DENIED.

STANDARD

The court may enter judgment notwithstanding the verdict and enter a directed verdict. (CCP 629.) "A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Magic Kitchen LLC v. Good Things Int'l, Ltd.* (2007) 153 Cal. App. 4th 1144, 1154 (2007.) (CCP 629.)

CAUSATION

All claims required plaintiffs to prove that Roundup caused the Pilliods to get NHL.

The court finds the evidence can support a finding that Roundup caused the Pilliods to get NHL. The evidence was disputed regarding general causation. For example, NHL can be idiopathic. The evidence was disputed regarding specific causation. For example, in addition to being potentially idiopathic, there was evidence that each Pilliod had one or more risk factors that suggest other causes of the NHL.

Causation is, however, a fact issue. The court found that plaintiff's experts could present evidence under *Sargon* and that it was the responsibility of the jury to consider and weigh that evidence. The evidence supports a finding of causation. (*Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL 3001626 at *20-25.) .

WARNINGS CLAIMS.

The claim for failure to warn required plaintiffs to demonstrate that Roundup's alleged risk of NHL was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge" at the time that Monsanto distributed the Roundup that allegedly caused their injuries. The evidence supports the verdict on the warning claims.

DESIGN DEFECT CLAIMS

The claims for strict liability and negligent design required Plaintiffs to prove that there was a defect in the design of Roundup and that the defect caused their harm. (*Trejo v. Johnson & Johnson* (2017) 13 Cal. App. 5th 110, 142. The evidence supports the verdict on the design defect claims.

PUNITIVE DAMAGES

The claim for punitive damages required plaintiffs to prove by clear and convincing evidence that Monsanto committed malice, oppression, or fraud. (Civ. Code § 3294.)

The court finds the evidence can support a finding by clear and convincing evidence that Monsanto committed malice, oppression, or fraud. The court addresses punitive damages in the motion for new trial.

MRS. PILLIOD'S FUTURE ECONOMIC DAMAGES

"Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. … The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.)

As a matter of law, the court cannot enter JNOV on the amount of Ms. Pilliod's economic damages unless it determines that the only correct amount of economic damages is no damages. The court may grant JNOV "only when it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support." (*Spillman v. City and County of San Francisco* (1967) 252 Cal.App.2d 782, 786.) Even if the court were to determine that the evidence did not support the award of $2,957,710 as Ms. Pilliod's economic damages, the court could not state that some amount of economic damages was correct as a matter of law and that no other reasonable conclusion was legally deducible.

In *Hozz v. Felder* (1959) 167 Cal.App.2d 197, 200, the court stated, "Applying such rule to the evidence presented in the present case, it is quite apparent that the jury could have returned various verdicts, all supported by substantial evidence. Necessarily, therefore, under such circumstances, the court was without power to grant plaintiffs' motion for a directed verdict and thus was equally without power to order a judgment n. o. v." (See also *Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1606 fn 6 (reversing grant of JNOV on damages and stating, "Quite obviously, there is no specific amount of such damages to which she was entitled as a matter of law.")

The evidence supported the award of some damages and that amount cannot be determined with specificity based on undisputed evidence. Therefore, the court cannot enter JNOV on the amount of Mrs. Pilliod's economic damages.

FIFRA PREEEMPTION

The motion for JNOV based on FIFRA preemption is DENIED.

The court addressed FIFRA preemption in the order of 3/18/19 at 17-19. The court's order of 3/18/19 at 18-19, stated that there were triable issues of fact because there was no evidence that Monsanto applied to change the label, so the trier of fact would need to decide whether there was "clear evidence" that the EPA would have not approved a label change if Monsanto had applied for a label change. (*In re Fosamax (Alendronate Sodium) Products Liability Litigation* (3rd Cir., 2017) 852 F.3d 268, 299 [impossibility is a fact issue for the trier of fact].)"

The court recalls that in pre-trial proceedings, Monsanto asked for a jury instruction and finding on the impossibility defense. The court denied the instruction and did not direct the jury to make a finding on the impossibility defense. During the course of the trial Monsanto did not ask the court to hear evidence and decide the impossibility defense.

The jury returned its verdict in this case on 5/13/19. One week later, on 5/20/19, the court entered judgment in this case. Also on 5/20/19, the United States Supreme Court issued *Merck v. Albrecht* (2019) 139 S.Ct. 1668, which held that the question of whether FDA would have approved of a change to a drug's label is a question of law for the court to decide, rather than a question of fact for a jury to decide.

The evidence in the case has closed, the jury has returned its verdict, and the court has entered its judgment. The court will not reopen the trial to permit Monsanto to present its impossibility defense to the court.

MOTION FOR NEW TRIAL

The motions of Monsanto for a new trial as to Alva and Alberta Pilliod are CONDITIONALLY GRANTED.

IRREGULARITIES IN THE PROCEEDING

Misconduct during Closing Statement and Misconduct throughout Trial. The motion on this ground is DENIED.

Monsanto has identified incidents of misconduct. Counsel for plaintiff did on occasion overstate matters and violate the court's orders. The court directs counsel for plaintiff to the following statement: "Stern's conduct was improper. Such conduct not only falls below professional standards, it unnecessarily places the client at risk. " '[P]unishment of counsel to the detriment of his client is not the function of the court. [Citation.] Intemperate and unprofessional conduct by counsel ... runs a grave and unjustifiable risk of sacrificing an otherwise sound case for recovery, and as such is a disservice to a litigant.' " ... We expect more from our attorneys." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 298.)

Monsanto has not demonstrated that the misconduct resulted in a miscarriage of justice. The court can find a "miscarriage of justice" only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. A

'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.* (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

The court does not find that the misconduct resulted in a miscarriage of justice. The court issued curative instructions to the jury. The facts are similar to those in *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, and *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 295-298, where in both cases the court observed that there were several incidents of misconduct during trial but that there were also corrective instructions.

Joining Plaintiffs' Separate Claims in a Single Trial. The motion on this ground is DENIED. The court addressed the concerns in the order of 1/25/19. The proceedings during trial do not persuade the court that it erred in permitting the claims of the Pilliods to be tried in a single case. As noted in the prior order, the evidence that both spouses used Roundup and both developed NHL would almost certainly have been presented to each jury had the claims been tried separately.

Local pretrial publicity. The motion on this ground is DENIED.

Admission of expert evidence. The motion on this ground is DENIED. The court addressed the concerns in the *Sargon* order of 3/18/19.

Admission or exclusion of evidence.

Proposition 65. The motion on this ground is DENIED. The court admitted EPA information because it was directly relevant. The court initially excluded Proposition 65 information because it concerned a different scientific standard. The court later reasoned that if information regarding non-EPA entities were to be admitted, that it be admitted evenhandedly. For that reason, the court put the parties to an election (1) whether the jury should hear a broad range of information including California's Proposition 65 and also information from various

countries or (2) whether the jury should hear a narrow range of information limited to EPA information. The court admitted the broader range of information.

Industrial Bio-Test (IBT). The motion on this ground is DENIED. The court admitted information about the scientific fraud at IBT because it was relevant to Monsanto's initial efforts to obtain information about the safety of glyphosate. Monsanto had the opportunity to present evidence about its subsequent studies.

EPA's 2019 Proposed Interim Registration Decision. The motion on this ground is DENIED. After plaintiffs had rested their case, on 4/23/19, the EPA released a document captioned "Proposed Interim Registration Review Decision." (Brown Dec., Exh U.) The document was a "proposed" decision and not a final decision on the interim review, so it did not reflect an EPA decision. The document stated that the EPA had considered comments and that the proposed decision was that the EPA would not change its position. The proposed decision was therefore entitled to little, if any, weight and was also cumulative information. (Evid Code 352.) In addition, the EPA released the document after plaintiffs had rested their case. The science regarding glyphosate is still developing. Therefore, the court must balance the procedural goal of trial (which is to reach a conclusion) and the substantive goal of trial (which to ascertain the truth). The court reasoned that admitting the new EPA document would add cumulative information and unduly consume additional time. (Evid Code 352.)

Trace Contaminants and Impurities. The motion on this ground is DENIED. The occasional information about trace contaminants and impurities was not material. Monsanto had the opportunity to explain that they were not at issue in this case.

POEA (surfactant). The motion on this ground is DENIED. The information about POEA was material because it was an ingredient in Roundup. Monsanto had the opportunity to

explain its choice to use POEA and how POEA did or did not affect exposure to and absorption of glyphosate.

"List Price" of Revlimid. The motion on this ground is GRANTED. The court discusses this in the context of the constitutionality of the damages award.

INSTRUCTIONAL ERRORS

Consumer Expectation Instruction. The court finds no error in giving this instruction.

Punitive Damages Instruction. The court finds no error in giving this instruction. The court gave CACI 3940. There were two plaintiffs, so the jury had the opportunity to consider punitive damages separately for each.

THE WEIGHT OF THE EVIDENCE - MERITS

The court finds that there was substantial evidence to support the jury's findings that (1) Roundup was a substantial factor in causing Alva Pilliod's DLBCL, (2) Roundup was a substantial factor in causing Alberta Pilliod's PCNSL, and (3) Roundup was defectively designed. The evidence was disputed, but there is substantial evidence to support the jury's findings that glyphosate can cause NHL and did cause each of the plaintiffs to develop NHL.

The court finds that there was substantial evidence to support the jury's findings on the failure to warn claims. There is evidence that Monsanto was in possession of evidence that glyphosate might be hazardous well before the Pilliods were diagnosed and well before they stopped using Roundup. The phrase "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge" is central to the issue.

The legal standard is designed to address the situation where there are a variety of scientific opinions. A plaintiff cannot rely on a minority or outlier theory to support a failure to warn claim. A defendant is permitted to rely on "the generally recognized and prevailing best scientific and medical knowledge" in making its decisions about warnings.

In this case, there was evidence that Monsanto continuously sought to influence the scientific literature to prevent its internal concerns from reaching the public. If the jury finds that a defendant has intentionally and successfully sought to influence the generally recognized and prevailing best scientific and medical knowledge to minimize scientific discovery or recognition of a risk, then the jury can reasonably infer that the scientific information would probably have been adverse to the defendant. (CACI 203, 204.) From that inference, the jury can reasonably infer that the generally recognized and prevailing best scientific and medical knowledge would have supported a duty to warn if the defendant had not interfered with the development of scientific and medical knowledge.

Regarding knowledge, there is evidence that Monsanto had information that was not available to the scientific or medical community and that it sought to impede, discourage, or distort scientific inquiry and the resulting science. There is evidence that for some period of time Monsanto's efforts affected what was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge." As a result, the questions of what Monsanto knew and when did it know it for purposes of the duty to warn are not limited to what was generally recognized. The court finds that there was substantial evidence to support verdict on the duty to warn claim.

///

CONSTITUTIONALITY OF THE DAMAGE AWARDS

ECONOMIC LOSS - MRS. PILLIOD'S ECONOMIC DAMAGE

"Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty." (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.)

Mrs. Pilliod's entire future economic damage case was based on her need for a lifetime supply of Revlimid. Mrs. Pilliod presented evidence that would support the finding that her future cost of medication is likely to be approximately $15,000 per month, approximately $200,000 per year, and a total of $2,957,710. This finding required the jury to make implicit findings both about the cost of the medication and that she would be required to pay for medication in the future.

Monsanto argues that the court erred in admitting evidence of the retail cost of the Revlimid as stated on a document from drugs.com. The proper way to think about the reasonable value of medical services is the market or exchange value, which is what the plaintiff paid or an insurance company paid on her behalf. (*Howell v. Hamilton Meats and Provisions, Inc.* (2011) 52 Ca.4th 541, 556, and *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050-51, state "Therefore, for insured plaintiffs, the reasonable market or exchange value of medical services will not be the amount *billed* by a medical provider or hospital, but the amount *paid* pursuant to the reduced rate negotiated by the plaintiff's insurance company.

Mrs. Pilliod presented evidence of the retail cost of the Revlimid as stated on a document from drugs.com. Mrs. Pilliod did not present evidence of what she or her insurance company actually paid for the Revlimid. Applying *Howell* to this case, the court erred in permitting Mrs. Pilliod to present evidence of the retail cost of Revlimid.

Monsanto argues that the court erred in preventing Monsanto from presenting evidence about that a third party was paying for Mrs. Pilliod's medicine. In *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 180-181, the court of appeal held that the trial court should have permitted the defendant to present evidence that the Affordable Care Act. The common thread in this case and in *Cuevas* was how to address the uncertainty of whether the third party payments would continue in the future. In *Cuevas*, the court held that the trial court erred in excluding evidence of future insurance benefits that might be available under the ACA on the basis that the ACA was unlikely to continue was an abuse of discretion. *Cuevas* noted that at the time of trial there was evidence that ACA was "reasonably certain to continue well into the future." Applying *Cuevas* to this case, the trial court erred in not permitting Monsanto to present evidence regarding whether a third party was likely to pay for Mrs. Pilliod's Revlimid in the future.

The court finds that the only evidence regarding Mrs. Pilliod's economic damages was indirect evidence that might arguably permit a jury to estimate Mrs. Pilliod's economic damages, but that any such estimate would have been very close to speculation. The court finds that Mrs. Pilliod's reasonably supportable future economic damages are $50,000.

NONECONOMIC LOSS – PAIN AND SUFFERRING.

"One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. … In a very real sense, the jury is asked to evaluate in terms of money a determent for

which monetary compensation cannot be ascertained with any demonstrable accuracy. … Moreover, [n]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 295-300.)

Mr. Pilliod is 77 years old and Mrs. Pilliod is a few years younger. The Pilliods emphasize that they lead the active lives before their diagnoses. The measure of damages is not, however, to compare a plaintiff's current combination of age, unrelated ailments, and injury with the plaintiff's younger former self without the injury. The measure of damages is to compare a plaintiff's current combination of age, unrelated ailments, and injury with the plaintiff's hypothetical current combination of age and unrelated ailments without the injury.

In the preference statute, there is a legislatively acknowledged increased risk of death or incapacity due to being over the age of 70. (*Kline v. Superior Court* (1991) 227 Cal.App.3d 512, 515.) The legislatively acknowledged risks that come with age that support a different, and lower, standard for trial preference logically must also be a factor in evaluating whether the effects of aging were and are the proximate cause of the any injury, disability, impaired enjoyment of life, or increased susceptibility to future harm or injury.

The court has considered *Izell v. Union Carbide* (2014) 231 Cal.App.4th 962. In that case the plaintiff was an 86 year old man with a 2-3 year life expectancy. The jury awarded $10 million in future noneconomic damages. The trial judge decreased the future damages to $2 million. The Court of Appeal affirmed applying the abuse of discretion standard, stating "Though we recognize the remitted amount remains on the high end of noneconomic damages

awards discussed in reported mesothelioma decisions—particularly for plaintiffs of the Izells' advanced age—this alone is not sufficient to second-guess the trial judge, who presided over the four-week trial and personally observed "the injury and the impairment that has resulted."" (231 Cal.App.4th at 981.) *Izell* is authority for the proposition that $1 million per year was not an abuse of discretion on the facts of that case, but it is not authority that $1 million per year is appropriate or required in this case.

The jury awarded Mr. Pilliod $8 million for past noneconomic loss and $10 million for future noneconomic loss. The record reflects that Mr. Pilliod went through a one-year period of intense medical care related to his NHL, but that his situation has stabilized. Although Mr. Pilliod's health is impaired, his situation is due not only to the NHL but also to his history of epilepsy, skin cancer, and other ailments. The court finds that the past noneconomic loss is not supportable by the evidence. The court finds that reasonable noneconomic damages supported by the evidence are $1,000,000 per year for the one past year period of intense medical care ($1,000,000), $300,000 per year for each of the other seven past years ($2,100,000), and $300,000 per year for each of the future 10 years ($3,000,000), for a total of $6,100,000.

The jury awarded Mrs. Pilliod $8 million for past noneconomic loss and $26 million for future noneconomic loss. The evidence reflects that Mrs. Pilliod went through a longer period of intense medical care and that her health has been more impaired by the NHL. Mrs. Pilliod has been relatively healthy other than the NHL. The court finds that the noneconomic loss is not supportable by the evidence. The court finds that reasonable noneconomic damages supported by the evidence are $1,000,000 per year for the two past year period of intense medical care ($2,000,000), $600,000 per year for each of the other two past years ($1,200,000), and $600,000 per year for each of the future 13 years ($7,800,000), for a total of $11,000,000.

PUNITIVE DAMAGES

The award of punitive damages requires plaintiffs to prove by clear and convincing evidence that Monsanto committed malice, oppression, or fraud. (Civ. Code § 3294.) The court finds the evidence can support a finding by clear and convincing evidence that Monsanto committed malice, oppression, or fraud. A jury can award punitive damages based on a conscious disregard of consumer health and safety. (*Potter v. Firestone Tire & Rubber* (1993) 6 Cal.4th 965, 997-1000; *Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1690-1695.)

The amount of punitive damages are limited by constitutional considerations. The court must consider three "guideposts" to determine whether a punitive award comports with due process: (1) the degree of reprehensibility of the defendant's actions; (2) the ratio between the compensatory award and the punitive award; and (3) a comparison between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. (*Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 712 (2009); *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172.)

The court finds that there was clear and convincing evidence that Monsanto's actions were reprehensible. The "clear and convincing" standard requires evidence "so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind." (*Pacific Gas & Electric v. Superior Court* (2018) 24 Cal.App.5th 1150, 1158.) Clear and convincing evidence requires more than a preponderance of the evidence, but it does not require proof beyond a reasonable doubt. (Evid Code 115; *People v. Buford* (2016) 4 Cal.App.5th 885, 895-896.)

The jury could have found that plaintiffs proved by clear and convincing evidence that Monsanto's actions were reprehensible. The bulk of the evidence that supports punitive evidence was about Monsanto's research on glyphosate and efforts to influence research on glyphosate. In reviewing the evidence, the court draws a distinction between efforts to influence scientific research, which concerns the discovery and recognition of facts, and efforts to influence regulation, which concerns policy choices based on the known facts.

A defendant's efforts to impede, discourage, or distort scientific inquiry into facts could support an award of punitive damages. Such efforts would show a conscious disregard for the health of persons exposed to glyphosate by interfering with the creation and publication of scientific information that is directly relevant to public health. In contrast, a defendant's efforts to influence or persuade agencies regarding policy decisions cannot support punitive damages. A defendant has a right to petition the government and government agencies regarding policy choices.

Absent preemption, each person has common law duties that are independent of any obligations based on formal regulation.[1] Although a person's right to petition the government regarding policy choices and formal regulation is protected activity and cannot be reprehensible as a matter of law, the person's related action or inaction can still be reprehensible if it demonstrates a conscious disregard for the health and safety of others. The existence of some relationship between a person's actions as part of the political and regulatory process and the person's actions as they affect others outside that process does not immunize the actions from findings that they are reprehensible and warrant punitive damages.

---

[1] This paragraph expands on the analysis in the order of 7/25/19.

The courts recognize a similar distinction between evidence and argument. The Evidence Code ensures that evidence is reliable by requiring foundation, prohibiting hearsay, and so forth. In contrast, counsel are given wide latitude during argument. "The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) (See also *Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 147-148.)

In this case there was clear and convincing evidence that Monsanto made efforts to impede, discourage, or distort scientific inquiry and the resulting science. Monsanto conducted initial studies about glyphosate but decided to not look further when there were indications that glyphosate might cause cancers. Monsanto retained Dr. Parry as a consultant to investigate glyphosate, but then engaged in a campaign to discredit him when it disagreed with what his research indicated. Monsanto worked to publish articles that it had ghostwritten. Monsanto made an aggressive attempt to discredit the IARC decision.

In a pretrial motion on a case with similar evidence and claims Judge Karnow stated:

> The internal correspondence noted by Johnson could support a jury finding that Monsanto has long been aware of the risk that its glyphosate-based herbicides are carcinogenic, and more dangerous than glyphosate in isolation, but has continuously sought to influence the scientific literature to prevent its internal concerns from reaching the public sphere and to bolster its defenses in products liability actions.

(*Johnson v. Monsanto* (Cal. Superior Court, 2018) 2018 WL 2324413.) There was evidence in this case that would permit a jury to make those findings based on clear and convincing evidence.

This case is distinguishable from *Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL 3001626 at *26. *J&J* suggests that the defendant mounted a policy debate. In *J&J*, the defendant presented the science that supported its products and mounted a defense in public. *J&J* states:

> JJCI was aware of studies showing an association between talc and ovarian cancer, studies showing talc could migrate from the vagina to the ovaries, and the theory and corresponding research suggesting talc caused inflammation, eventually leading to ovarian cancer. … JJCI's response to these studies was to mount a defense against them. In attempts to influence or persuade agencies such as the NTP and IARC, and in response to media or governmental inquiry, JJCI's strategy was to describe the flaws of these studies, point out inconclusive results, and highlight the absence of any established causal link. …
>
> There was no evidence JJCI had any information about the dangers or risks of perineal talc use that was unavailable to the scientific or medical community. The company's critiques of available evidence were largely consistent with third party entities' evaluations of the same studies, including nontrade groups such as the IARC and the FDA.

(J&J, 2019 WL 3001626 at *26.) In contrast to actions of the defendant in *J&J* to question the science in public and to influence or persuade public agencies on regulatory decisions, in this

case there is evidence that Monsanto made efforts to impede, discourage, or distort the underlying scientific inquiry. Resorting again to the trial analogy, a party that suppresses evidence can earn an Evidence Code 413 and CACI 204 suppression of evidence instruction, but in argument an attorney can pick and choose what evidence she chooses to emphasize.

Monsanto's efforts to influence the scientific inquiry have a ripple effect because they affect several other issues.[1]

Regarding liability on the common law claim for failure to warn, Monsanto presented evidence that it relied on the publicly known and generally accepted science about glyphosate. Dr. Nabhan testified that reasonable people can disagree on whether glyphosate causes NHL. Monsanto presented evidence that it was following a complex and developing area of science. Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate support a jury finding that could not reasonably rely on what was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge."

Regarding liability on the common law claim for failure to warn and for design defect, Monsanto also presented Monsanto presented evidence that it relied on the EPA's regulatory decisions. Regulatory "action or inaction, though not dispositive, may be considered to show whether a product is safe or not safe." (*O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1393-1396.) Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate, support a jury finding that it could not reasonably rely on the EPA's regulatory action or inaction that was based on that science.

---

[1] The following paragraphs expand on the analysis in the order of 7/25/19.

Regarding the defense of impossibility based on preemption, Monsanto did not apply to the EPA to change the label on Roundup but argued at summary judgment that if it had applied for approval to change the label on Roundup, then there was clear evidence that the EPA would have denied the application. At summary judgment, Monsanto presented evidence that the EPA had consistently opined that glyphosate was not carcinogenic. (Order of 3/18/19 at 17-19.) Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate raise the issue of whether there could have been clear evidence that the EPA would have denied the hypothetical application if Monsanto had not made efforts to impede the scientific inquiry.

Again, this case is distinguishable from *Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL 3001626 at *27. In *J&J* the court stated, "The evidence established that JJCI has refused to draw a causal connection between perineal talc use and ovarian cancer before experts in the relevant fields have done so. The jury could reasonably conclude this was unreasonable and negligent. But it is not clear and convincing evidence of "despicable conduct.""

In *J&J*, the defendant looked that the public science and drew a conclusion from that science. The public science permitted different conclusions, so it was not reprehensible or despicable to draw the conclusion that there was no causal connection between the product and cancer. In this case, however, Monsanto made efforts to interfere with the underlying public scientific inquiry and as a result cannot have in good faith relied on the available public science in making its decisions about the danger of glyphosate.

At argument on 7/18/19, Monsanto argued that there was no evidence that it hid evidence from the EPA, captured the EPA, or that its efforts rendered the EPA's scientific evaluation and regulatory decisions invalid. Monsanto pointed to the decision of federal judge Chhabria in *Hardeman v. Monsanto*. (Pltf's response to Supp authority, Exh B, page 6.) This conflates three

issues. First, Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate were reprehensible and showed a conscious disregard for public health. Even if Monsanto did not hide evidence from the EPA, it nevertheless engaged in other efforts to impede, discourage, or distort the scientific inquiry. Second, Monsanto's success in those efforts is not relevant to whether the efforts were reprehensible. By analogy, an attempted crime is still be a crime even if it was unsuccessful. Monsanto's success in its efforts goes to causation for purposes of liability and damages. Third, Monsanto's efforts to affect policy decisions based on the science is protected lobbying activity and cannot as a matter of law be reprehensible even if Monsanto as a private entity was seeking to protect its profits while the public regulatory agencies were focused on the concerns of public health and agricultural productivity.

In conclusion, there was clear and convincing evidence that Monsanto undertook continuous efforts to impede, discourage, or distort the scientific inquiry about glyphosate and those actions were reprehensible and showed a conscious disregard for health.

The ratio between the compensatory award and the punitive awards were excessive. The United State Supreme Court has held that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." The United State Supreme Court also stated that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1690-1696.) In *BMW of North America v. Gore* (1996) 517 US 559, 580-581, the Court referenced early statutes permitting double, treble, or quadruple damages as a benchmark for ratios. California has several statutes that provide for treble damages. (Bus & Prof 17082; Civil Code 1738.15; Civil Code

1780(c); Civil Code 3345(b); Civil Code 3346(a).) Treble damages are the equivalent of punitive damages at a 2-1 ratio.

The verdict for Mr. Pilliod was $18,047,296.01 in compensatory damages and $1,000,000,000 in punitive damages, which was a ratio of 54-1. The verdict for Mrs. Pilliod was $37,158,876 in compensatory damages and $1,000,000,000 in punitive damages, which was a ratio of 27-1. These are unconstitutionally large ratios given the compensatory damages awarded by the jury.

The court would reduce the compensatory damages to $6,100,000 and $11,251,166. These are substantial awards, but as reduced by the court would not contain a punitive element. The inclusion or exclusion of a punitive element in a compensatory award is relevant because *Roby*, 47 Cal.4th at 718, recognized that the United States Supreme Court noted, "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."

The court considers the civil penalties that might be authorized or imposed based on Monsanto's conduct. Under FIFRA the EPA can fine a person up to $19,936 per offense for selling a product that does not contain a warning or caution statement adequate to protect public health. (7 USC 136(q) [misbranded]; 7 USC 136j(a)(1)(E) [unlawful to sell misbranded product]; 7 USC 136l [penalty for registrants for each offense]; 40 CFR 19.4 [$19,936 penalty per offense].) California can assess a penalty of $2,500 for each offense (H&S 25249.7.)

The word "offense" is not defined in FIFRA, so it is unclear whether Monsanto would have been liable for a penalty once for each plaintiffs' ongoing use of Roundup, once for each time each plaintiff purchased Roundup, once for each time each plaintiff applied Roundup, or once for each day that Roundup was in each plaintiffs' possession. Under federal law "if

Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . ." (*Bell v. United States* (1955) 349 U.S. 81, 75 S.Ct. 620, 622.) (*U.S. v. Corbin Farm Service* (E.E. Cal., 1978) 444 F.Supp.510, 526-532 [discussing multiplicity of offences in context of FIFRA and Migratory Bird Treaty].)

The FIFRA penalties suggest that the FIFRA penalty would be only $19,936 for each plaintiff. Assuming a penalty of $19,936 for each application of Roundup and one application per plaintiff per week for 10 years, then the penalties would result in a penalty of $10,366,720 per plaintiff.

The court can consider the punitive damages that Judge Bolanos in *Johnson v. Monsanto* (San Francisco Superior Court) found to be appropriate. In *Johnson*, the compensatory award was for $39,253,209, which the court found to be "extremely high for a single plaintiff and consists largely of non-economic damages which the due process case law recognizes has a punitive element." In light of the high compensatory damage award, the court found that a ratio of 1-1 was appropriate and awarded $39,253,209 in punitive damages. (*Johnson v. Monsanto* (Superior Court of California 2018) 2018 WL 5246323; Pltf's response to Supp authority, Exh B, page 7-8.)

The court can consider the punitive damages that Judge Chhabria in *Hardeman v. Monsanto* (N.D. Cal) found to be appropriate. In *Hardeman*, the compensatory award was for $5,066,667. The court found "It is easy to uphold the award of past noneconomic damages" which was $3,066,667, and that it was a "close question" to uphold the award of $2,000,000 in future noneconomic damages. The court found that a ratio of 4-1 was appropriate and awarded

$20,000,000 in punitive damages. (Hardeman v. Monsanto, (N.D. Cal. 2018) Case 16-md-02741-VC (Order dated 7/15/19 at pages 6-8); Pltf's response to Supp authority, Exh B.)

A different order in *Hardeman* noted that the court excluded evidence after the summer of 2012, which is when the plaintiff in that case stopped using Roundup. The court noted that if such evidence had been presented then the jury would have been presented with evidence of Monsanto's attempts to discredit the IARC decision. (Pltf's response to Supp authority, Exh A.) (Hardeman v. Monsanto, (N.D. Cal. 2018) Case 16-md-02741-VC (Order dated 7/12/19 at pages 6-7.) The differences in the evidence presented to the juries in the various cases is also a factor in determining what punitive damages are appropriate based on the evidence in any given case.

The trier of fact can consider the net worth of the defendant. *Simon*, 35 Cal.4th at 1185-1186, states that wealth cannot replace reprehensibility as a constraining principle but that the trier of fact can give some consideration to the defendant's financial condition. *Bigler-Engler*, 7 Cal.App.5th at 308, suggest that the defendant's net worth is a factor in ensuring that punitive damages are to deter, but not to destroy, the defendant. CACI 3940 states: "In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]." Monsanto has substantial financial resources.

The court has considered all of the above factors and gives the most weight to the evidence that Monsanto made an ongoing effort to impede, discourage, or distort scientific inquiry and the resulting science about glyphosate and thereby showed a conscious disregard for

public health. Consistent with the purpose of punitive damages, this is reprehensible conduct that affects the public and therefore warrants punitive damages.

For Mr. Pilliod, the court finds that the constitutionally permissible punitive damages are $24,589,184.04. This is four times his combined economic and non-economic compensatory damages. ($6,147,296.01 x 4.)

For Mrs. Pilliod, the court finds that the constitutionally permissible punitive damages are $44,804,664. This is an amount four times her combined economic ($201,166) and noneconomic compensatory damages ($11,000,000), but excludes the $2,957,710 attributable to the future cost of Revlimid. The court excludes the cost of the Revlimid from the punitive damage calculation because although there is evidence to support the cost of the drug as compensatory damages, the evidence is well short of clear and convincing and therefore the court determines that it is not a proper on the facts of this case to include it in the baseline for the punitive damages ratio test. ($11,201,166 x 4.)

ORDER

The motion of Monsanto for JNOV is DENIED.

The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the total amount of $30,736,480.04. This represents $47,296.01 in past economic loss, $3,100,000 for past noneconomic loss, $3,000,000 for future noneconomic loss, and $24,589,184.04 in punitive damages for a total of $30,736,480.04. (CCP 662.6(a)(2).)

The motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY GRANTED unless Mrs. Pilliod consents to entry of judgment in the total amount of

$56,005,830. This represents $201,166.76 in past economic loss, $50,000 in future economic losses, $3,200,000 for past noneconomic loss, $7,800,000 for future noneconomic loss, and $44,804,664 in punitive damages for a total of $56,005,830. (CCP 662.6(a)(2).)

July 26, 2019
Date

Winifred Y. Smith
Judge of the Superior Court