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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

COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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INTRODUCTION

The prevailing scientific consensus rejects the narrative that Plaintiffs presented to the judge and jury below. Regulatory agencies worldwide, after considering the vast body of available scientific evidence, reached a conclusion diametrically opposed to the opinions of Plaintiffs' experts at trial. In fact, EPA's consistent determination over three decades and five presidential administrations that the scientific record does not show Roundup causes cancer should have preempted Plaintiffs' state-law claims. Even if the claims are not preempted, under no reasonable construction of the scientific record can it be said that it is "generally accepted in the scientific community" that Roundup can

cause cancer—invalidating Plaintiffs' failure to warn claim as well as their design defect and negligence claims, which are also based on a failure to warn.

Moreover, Plaintiffs' experts used a scientifically unreliable methodology to isolate Roundup as the cause of Plaintiffs' cancer and thereby avoid Plaintiffs' numerous health conditions presenting causal risk factors far in excess of what even those experts attributed to Roundup. But the joint trial of the disparate claims of Mr. and Mrs. Pilliod eliminated any chance that Monsanto would receive a fair trial on these issues, especially given the efforts of Plaintiffs' counsel to inflame the jury to such an extreme that the jury believed $2 billion of punishment was justified. It was not: the worldwide regulatory consensus that glyphosate is not carcinogenic establishes the lack of clear and convincing evidence that Monsanto acted with malice—i.e., that it *intended* to harm Plaintiffs or consciously disregarded a *known* risk. The end result was one of injustice: Monsanto was found liable—and severely punished—for failing to provide a warning about a cancer risk that the federal regulator prohibited and that the scientific and regulatory community says does not exist. This result cannot stand.

LEGAL ARGUMENT

I. The court should reverse the judgment with directions because Plaintiffs' claims are preempted by federal law.

Plaintiffs do not deny that for decades, EPA has determined that glyphosate-based herbicides like Roundup are not likely to cause cancer. Neither do they contest that it is EPA's position that a cancer warning on such products would be false and misleading, rendering the product misbranded, in violation of federal law. These undisputed facts are dispositive.

Plaintiffs respond that California must have the "sovereign power to protect its citizens from pesticides." (RB/X-AOB 84.) But, while the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) permits states to regulate the use of EPA-approved pesticides, it just as clearly forecloses states from imposing their own labeling requirements in addition to, or different from, federal requirements. Similarly, Plaintiffs reduce decades of agency action, across five presidential administrations, to a mere "EPA employee's opinion," while accusing a federal agency of not doing its job during "this administration." (RB/X-AOB 82, 92.) Plaintiffs fail to contend with the administrative record of authoritative determinations by the agency itself, made through formal procedures expressly prescribed by Congress, over a period of nearly 30 years. That record leaves no doubt that Plaintiffs' claims are preempted.

A. All of Plaintiffs' claims are based on the Roundup label and are subject to preemption.

Plaintiffs attempt to avoid preemption by urging the court to sustain the verdict based solely on their design-defect claim, which they say is unaffected by federal preemption. (RB/X-AOB 71-77.)

Plaintiffs' brief leaves no doubt that their strict liability design-defect claim boils down to a failure to warn on Roundup's label. They pursue only a consumer expectations theory,[1] and argue that a consumer would not expect Roundup to cause cancer because "[t]here were no cancer warnings, nor advertisements to wear safety gear, on the bottles and labels of Roundup." (RB/X-AOB 74; see *ibid.* ["Monsanto never warned the Pilliods to wear gloves or of the risk of NHL"].) All of Plaintiffs' claims, however characterized, seek to enforce "requirements for labeling." (7 U.S.C. § 136v(b); see *Etcheverry v. Tri-Ag Serv., Inc.* (2000) 22 Cal.4th 316, 335 (*Etcheverry*) [preemption analysis under FIFRA applies "[w]hen a claim, *however couched*, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered" (emphasis added)], overruled in part on another ground in *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 436, 452-454 [125 S.Ct. 1788, 161 L.Ed.2d 687] (*Bates*);

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[1] As explained below and in the opening brief, the verdict cannot be supported by a purported negligent design theory based on the use of the surfactant polyethoxylated tallow amine (POEA) because no expert testified that the use of any surfactant had any role in causing Plaintiffs' cancer. (See AOB 72-73; pp. 35-36, 63, *post*.) Indeed, Plaintiffs have effectively abandoned that theory by not addressing it in their respondents' brief.

cf. *Pankey v. Petco Animal Supplies, Inc.* (June 24, 2020, D072779) ___ Cal.App.5th ___ [2020 WL 3445816, at pp. *14-*17] (*Pankey*) [discussing "interplay" between consumer expectations and failure to warn theories of liability].) The preemption issue is dispositive and cannot be avoided.

B. FIFRA expressly preempts Plaintiffs' claims.

FIFRA vests EPA with primary responsibility for the labeling of federally registered pesticides. To ensure "uniformity" of pesticide labeling, FIFRA's preemption provision bars a state from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under" FIFRA. (7 U.S.C. § 136v(b).) Under *Bates*, *supra*, 544 U.S. at p. 447, state law requirements may survive preemption only if they are "equivalent to, and fully consistent with, FIFRA's misbranding provisions." Plaintiffs correctly note that "state law and FIFRA are 'equivalent' when a violation of state law would also violate FIFRA's misbranding provisions." (RB/X-AOB 81.) Here, the opposite is true: as EPA has confirmed, *compliance* with the purported state-law requirement would violate FIFRA's misbranding provisions. (See EPA Registration Div. Director Michael L. Goodis, EPA Office of Pesticide Programs, Letter to EPA Registrants (Aug. 7, 2019) pp. 1-2 <https://tinyurl.com/y552m94m> [as of June 30, 2020] (hereafter EPA Aug. 2019 Letter).)

Plaintiffs insist that "EPA's approval of a label is not relevant to an equivalency analysis." (RB/X-AOB 81.) That misses

the point. Monsanto's argument has never been that the mere fact of registration, without more, automatically preempts state warning laws. Rather, a state-law warning requirement is preempted by section 136v(b) of title 7 of the United States Code where EPA has (1) reviewed the factual basis for the label statements at issue, and (2) made an authoritative agency determination rejecting the warning purportedly required by state law. That standard is met here.

Since it first registered a glyphosate-based pesticide for sale in the United States in 1974, EPA has repeatedly and formally concluded that a cancer warning should not be given for glyphosate-based pesticides. (AOB 22-34.) For example, in 1993, EPA re-registered glyphosate after following the formal process mandated by Congress and confirmed that glyphosate is non-carcinogenic for humans. (See 7 U.S.C. § 136a-1 et seq.; 9 AA 10105, 10110.) Likewise, in 2016 and 2017, EPA reconfirmed that glyphosate is non-carcinogenic after conducting a "thorough integrative weight-of-evidence evaluation of the available data"—which included a review of "63 epidemiological studies, 14 animal carcinogenicity studies, and nearly 90 genotoxicity studies." (9 AA 10034, 10214.) More recently, EPA has reaffirmed and reinforced those decisions by informing registrants of glyphosate-based pesticides that it would "exercise[ ] its misbranding authority" (*Fellner v. Tri-Union Seafoods, L.L.C.* (3d Cir. 2008) 539 F.3d 237, 255 (*Fellner*)) to reject any label containing a cancer warning (see EPA Aug. 2019 Letter, *supra*, at pp. 1-2). And in January 2020, EPA again followed the detailed statutory re-registration process

and reaffirmed, after notice-and-comment procedures, that glyphosate poses "no risks to human health" and is "not likely to be carcinogenic to humans." (EPA, Glyphosate Interim Registration Review Decision Case Number 0178 (Jan. 2020) p. 10 <https://bit.ly/2uqQDTu> [as of June 30, 2020] (hereafter EPA, Jan. 2020 Glyphosate Interim Registration Review Decision).)

In short, as the United States government recently advised the Ninth Circuit, "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." (Brief for United States as Amicus Curiae in Support of Monsanto, *Monsanto Co. v. Hardeman* (9th Cir., Dec. 20, 2019, No. 19-16636) (hereafter U.S. Brief), attached as exh. A to Declaration of Dean A. Bochner in Support of Monsanto's Motion for Judicial Notice, pp. 18-19.)[2] Plaintiffs do not engage with this regulatory history at all. Instead they argue against a straw man, contending that "[a]n EPA employee's opinion as to whether the glyphosate [*sic*] does or does not cause NHL" lacks preemptive force. (RB/X-AOB 82.) But what is before this court is not some "EPA employee's opinion," but formal EPA labeling decisions, following formal statutory procedures, consistent across decades and administrations. (*Ibid.*)

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[2] This court has deferred ruling on Monsanto's request to take judicial notice of the U.S. government's amicus curiae brief in *Hardeman*. When citing to this amicus brief, we cite to the Bates-stamped numbers in the bottom-right corner of each page, rather than the page numbers of the amicus brief itself.

Under the statutory scheme that Congress enacted, juries applying state law may not contradict such an authoritative implementation of FIFRA.[3]

Rather than confront this clear agency record, Plaintiffs claim that *Bates* "explicitly rejected the argument that FIFRA's misbranding provisions and FIFRA itself were 'intended by Congress to be interpreted authoritatively by EPA.' " (RB/X-AOB 78, quoting *Bates*, *supra*, 544 U.S. at p. 448.) But in the quoted passage, *Bates* was addressing an efficacy warning on which EPA had expressly declined to take a position: EPA had long waived review of "efficacy" warnings, so the question presented was whether a state jury could impose a labeling requirement in the face of EPA's silence. (*Bates*, at pp. 435-436, 440.) Nothing in *Bates* suggests that juries applying state law may enforce purported labeling requirements that *are directly contrary* to EPA's own determinations. *Bates* itself recognized that EPA's application of FIFRA's provisions has controlling preemptive force. (*Id.* at p. 447.)

Plaintiffs concede that *some* EPA actions giving content to FIFRA's labeling requirements preempt state labeling

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[3] The proper way to challenge binding decisions of a federal agency is through a challenge to the sufficiency of the agency's evidence under the Administrative Procedures Act, not by urging a jury applying state law to disagree with the agency. (Cf. *National Family Farm Coalition v. EPA* (9th Cir. June 3, 2020, No. 19-70115) ___ F.3d ___ [2020 WL 2901136] [vacating EPA registration decision for lack of substantial evidence].) Plaintiffs do not and could not dispute that EPA's longstanding determinations here were supported by substantial evidence.

requirements, but they insist that only regulations can have this effect. (See RB/X-AOB 81-82.) But the " 'CAUTION' " and " 'DANGER' " labels discussed in *Bates* show that cannot be so. (See *Bates*, *supra*, 544 U.S. at p. 453.) Although EPA has promulgated regulations assigning the warning labels " 'CAUTION' " and " 'DANGER' " to certain "toxicity categories" (40 C.F.R. §§ 156.62, 156.64 (2019)), those regulations by themselves do not determine which pesticides should bear which degree of warning. For that, EPA makes a pesticide-by-pesticide determination, in the context of the registration process. Although not a rulemaking, that individualized process bears all the hallmarks of formal agency action: It is prescribed by Congress, encompasses five distinct phases, entails the submission and review of voluminous data regarding the pesticide's safety and every claim made by the registrant regarding the pesticide, requires notice and comment, and yields a definitive determination by EPA about the warnings to appear on the pesticide's label. (See 7 U.S.C. § 136a et seq.; 40 C.F.R. § 155.50(b), (c) (2019).) Here, through the many regulatory actions mentioned above, EPA has "give[n] content to FIFRA's misbranding standards" via those same procedures (*Bates*, at p. 453), yielding an equally authoritative conclusion.

Plaintiffs again ignore the context of *Bates* when they argue that it "recognizes and emphasizes the important role of jury trials, stating 'tort suits can serve as a catalyst' in identifying risks of pesticides not yet recognized by the EPA." (RB/X-AOB 77, quoting *Bates*, *supra*, 544 U.S. at p. 451.) As noted above, in *Bates*, EPA

had expressly declined to vet, much less approve or disapprove, efficacy statements on the subject labels. Here, EPA has made scientific determinations for decades—including determinations made after being presented with Plaintiffs' contrary view of the science. (See p. 31, fn. 5, *post*.) A jury trial on the issues in *Bates* might have identified risks of pesticides EPA refused to consider; the jury trial here subverted EPA's considered judgment on an issue it had exercised its statutory authority to resolve.

This case is analogous to *Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312 [128 S.Ct. 999, 169 L.Ed.2d 892], in which the Supreme Court, applying a similarly worded preemption provision, held that FDA's premarket approval of a medical device—a process that included safety and labeling review—preempted a state tort suit alleging defects in that device. As the Court explained in *Riegel*, "the FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness." (*Id.* at p. 323.) The Court distinguished its decision in *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 493 [116 S.Ct. 2240, 135 L.Ed.2d 700], where it had concluded that a state-tort suit was not preempted because the agency had not reviewed the device for effectiveness and safety (but had instead approved it via an alternative pathway). *Lohr* is analogous to *Bates*, in which EPA had not reviewed the pesticide or its labeling for any claims of efficacy. Here, where EPA has frequently examined glyphosate's effects on human health and has determined that no

cancer warning is appropriate, preemption is compelled as in *Riegel*.

As a last-ditch effort to avoid preemption, Plaintiffs suggest that Monsanto could have conveyed a cancer warning through television advertising, as opposed to the label. (RB/X-AOB 82-84.) But as multiple courts, including the Ninth Circuit, have held, " 'any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging.' " (*Taylor AG Industries v. Pure-Gro* (9th Cir. 1995) 54 F.3d 555, 561 (*Taylor*), called into doubt on another ground by *Bates, supra,* 544 U.S. at p. 446 & fn. 21; see *Papas v. Upjohn Co.* (11th Cir. 1993) 985 F.2d 515, 519; *Worm v. American Cyanamid Co.* (4th Cir. 1993) 5 F.3d 744, 748.) Plaintiffs' challenge to Roundup advertising "boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered." (*Etcheverry*, *supra*, 22 Cal.4th at p. 335.) Indeed, *Bates* specifically recognized that "failure-to-warn claims" qualify as labeling requirements under FIFRA. (*Bates*, *supra*, 544 U.S. at p. 446.) Under Plaintiffs' approach, failure-to-warn claims would *never* be preempted: plaintiffs could easily recast a claim of failure to warn on the label as one for failure to deliver the same warning on non-label advertising.

Moreover, EPA regulations refute Plaintiffs' suggestion that "[n]othing prevented Monsanto from adding a statement to television commercials that Roundup has been associated with NHL." (RB/X-AOB 83.) FIFRA prohibits registrants from making

any claims in marketing a pesticide that "substantially differ" from claims in the approved labeling. (7 U.S.C. § 136j(a)(1)(B); see *id.*, § 136a(c)(1).) By regulation, "EPA interprets these provisions as *extending to advertisements in any advertising medium* to which pesticide users or the general public have access." (40 C.F.R. § 168.22(a) (2019), emphasis added.) Plaintiffs thus cannot pivot their preempted failure-to-warn claims from Roundup's label to its marketing.[4]

C. Plaintiffs' claims are impliedly preempted.

Plaintiffs' claims also fail under principles of impossibility preemption, for two independent reasons. First, there is clear evidence that EPA would reject the cancer warning that Plaintiffs say California law requires, and so would not allow Monsanto to issue such a warning. (See *Merck Sharp & Dohme Corp. v. Albrecht* (2019) ___ U.S. ___ [139 S.Ct. 1668, 203 L.Ed.2d 822] (*Merck*); *Wyeth v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187, 173 L.Ed.2d 51] (*Wyeth*).) Second, Monsanto cannot unilaterally change Roundup's label—or its formulation—without prior agency approval. (See *Mutual Pharmaceutical Co. v. Bartlett* (2013) 570 U.S. 472 [133 S.Ct. 2466, 186 L.Ed.2d 607] (*Bartlett*); *PLIVA, Inc.*

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[4] The cases cited by Plaintiffs did not address this regulation. (See RB/X-AOB 83-84.) Notably, Plaintiffs rely on *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941, 947, to argue that point-of-sale warnings are permissible, without mentioning the Ninth Circuit's later explanation that *Allenby* "never addressed the issue of whether common law damages could be imposed for the absence of these non-label warnings." (*Taylor*, *supra*, 54 F.3d at p. 561, fn. 2.)

v. Mensing (2011) 564 U.S. 604 [131 S.Ct. 2567, 180 L.Ed.2d 580] (*Mensing*).)

Plaintiffs initially dispute that impossibility preemption applies at all, but their arguments have no merit. It is simply not true that "[a]n implied preemption argument was specifically before the court in *Bates* and was rejected." (RB/X-AOB 85.) The scope of FIFRA's express preemption provision was the only question resolved by the Supreme Court, which did not cite or rely on principles of implied preemption. (See *Bates*, *supra*, 544 U.S. at pp. 440-441.) Because the lower court decision in *Bates* turned on express preemption, the Supreme Court had no occasion to or obligation to consider implied preemption—especially given its ultimate decision, which remanded for further review.

Plaintiffs fare no better in suggesting that "the existence of an express preemption clause" defeats the availability of implied preemption. (RB/X-AOB 86.) The Supreme Court has long held that "the existence of an 'express preemption provisio[n] does *not* bar the ordinary working of conflict preemption principles.' " (*Arizona v. United States* (2012) 567 U.S. 387, 406 [132 S.Ct. 2492, 183 L.Ed.2d 351]; see *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 869-872 [120 S.Ct. 1913, 146 L.Ed.2d 914].)

1. Monsanto cannot comply with both state law mandating a warning and federal law prohibiting that warning.

Under *Wyeth*, Plaintiffs' claims are preempted because there is clear evidence EPA would reject a cancer warning on Roundup.

Contrary to Plaintiffs' arguments (RB/X-AOB 89-90), EPA was "fully informed" of the "justifications for the warning" that Plaintiffs seek (see *Merck*, *supra*, 139 S.Ct. at p. 1678). As detailed in Monsanto's opening brief, the agency has repeatedly undertaken in-depth reviews of glyphosate's safety, each of which considered all available scientific evidence. (AOB 22-34.) Plaintiffs allege that there were more tests that Monsanto could have done. (RB/X-AOB 89-90.) But the question under *Merck* is whether the agency was "fully informed" of the *existing* evidence that would "justif[y] . . . the warning required by state law" (*Merck*, *supra*, 139 S.Ct. at p. 1678), not whether the manufacturer conducted every test the plaintiff could imagine running. In any event, Monsanto conducted all of the tests necessary for EPA to repeatedly approve Roundup for use. (See AOB 31-32.) Moreover, Plaintiffs do not identify a single piece of evidence that *EPA* failed to consider in determining that glyphosate does not cause cancer.[5]

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[5] In fact, as part of its notice-and-comment procedures, EPA considered comments and reports submitted by the very experts whose opinions Plaintiffs rely on in this case. (See, e.g., Comment Submitted by C. Benbrook on EPA Notice: Glyphosate Proposed Interim Registration Review Decision (Oct. 2, 2019), at <https://bit.ly/384uSbb> [as of June 30, 2020] [attaching 31 cited reports, including expert reports prepared by Dr. William Sawyer and Dr. Charles Benbrook, respectively]; Additional Comments of Christopher J. Portier, PhD to the FIFRA Scientific Advisory Panel, attached to Comments Submitted by Natural Resources Defense Council on EPA Notice: Registration Review: Draft Human Health and/or Ecological Risk Assessments for Several Pesticides (July 3, 2018), at <https://bit.ly/2Z6Hk6k> [as of June 30, 2020].) These comments have not changed the agency's conclusions. (See, e.g., EPA, Jan. 2020 Glyphosate Interim (continued...)

(See, e.g., AOB 48-49; RB/X-AOB 89-90; cf. *Risperdal and Invega Cases* (May 8, 2020, B284315, B284002, B284317) ___ Cal.App.5th ___ [2020 WL 2896715, at p. *10] [finding no clear evidence that FDA would have denied a label change because FDA "did not have" a table of new data that plaintiffs contended justified the change].) Similarly, the centerpiece of Plaintiffs' theory at trial was the 2015 report of the International Agency for Research on Cancer (IARC) (see, e.g., 32 RT 5570:5-10), which EPA squarely addressed and rejected (EPA Aug. 2019 Letter, *supra*, at p. 1).

Plaintiffs' objection that Monsanto "never requested a label change" makes no sense. (RB/X-AOB 89.) The "clear evidence" standard can be satisfied by evidence other than efforts by the registrant itself to add a warning. (*Seufert v. Merck Sharp & Dohme Corp.* (S.D.Cal. 2016) 187 F.Supp.3d 1163, 1169 [citing cases].) It would be pointless to require Monsanto to request permission to issue a warning it believes to be false, from an agency that has made clear in a long line of formal agency actions that it would deny that request.

EPA also "informed" Monsanto that it "would not approve" the warning that Plaintiffs seek to add to Roundup's label. (See *Merck*, *supra*, 139 S.Ct. at p. 1678.) For decades, EPA has consistently determined that glyphosate is not carcinogenic and that no cancer warning should be given for Monsanto's glyphosate-based products. (See *ante*, pp. 23-24.) EPA reiterated to all

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Registration Review Decision, *supra*, at p. 5 [noting that, during a 120-day comment period in 2019, EPA received nearly 283,300 comments and "[t]hese comments did not result in changes to the agency's risk assessments"].)

glyphosate registrants—including Monsanto—in August 2019 that it would reject any proposed label for such a product that included such a warning. (See EPA Aug. 2019 Letter, *supra*, at pp. 1-2; see also *National Association of Wheat Growers et al. v. Becerra* (E.D.Cal., June 22, 2020, No. 2:17-cv-2401 WBS EFB) 2020 WL 3412732, at p. *9 (*National Association of Wheat Growers*).)

Plaintiffs offer a series of unconvincing responses. First, Plaintiffs point to a 2017 label that included a Proposition 65 warning on glyphosate as an "Optional Marketing Statement[ ]," and assert that "[t]his approval was not a mistake." (RB/X-AOB 90; Pilliods' MJN, exh. 4, pp. 12-13.) But EPA has confirmed that such approvals were "erroneous" "implementation mistakes." (U.S. Brief, *supra*, at pp. 15, 22.) These mistakes, moreover, were the fault of the registrants, who failed to properly frame the warning as a " 'Human Hazard and Precautionary Statement[ ],' " so the labels "did not receive" the appropriate level of review. (*Id.* at p. 15.) In any case, a fleeting inconsistency cannot override 30 years of clear, considered determinations.

Second, Plaintiffs ask the court to ignore anything EPA has said "post-injury," including its August 2019 letter. This is a surprising argument, since the centerpiece of Plaintiffs' own theory—the 2015 IARC report—is also post-injury. (See pp. 44-45, *post*.) Looking only at the pre-injury timeframe would make no difference, because EPA's scientific determinations have been consistent for decades. (See AOB 21-23, 31-33, 44-45.) In any event, the cases Plaintiffs cite do not support their position. (See

In re Avandia Marketing, Sales, and Prod. Liability (3d Cir. 2019) 945 F.3d 749, 759-760 [rejecting reliance on an FDA letter because it did not reflect a "final determination," not because of its timing]; *Fellner*, *supra*, 539 F.3d at p. 255 [stating expressly that it "need not decide" the timing issue].) Moreover, in *Merck* it was assumed that agency action that occurred after some plaintiffs were injured was relevant. (See *Merck*, *supra*, 139 S.Ct. at pp. 1673-1676 [examining evidence from 1995 to 2010; some plaintiffs injured in 1999]; see also *Ridings v. Maurice* (W.D.Mo. 2020) ___ F.Supp.3d ___ [2020 WL 1264178, at pp. *10-*11, *21] [basing clear evidence ruling on FDA decisions in 2014-2015, despite injury occurring in 2013]; *Rheinfrank v. Abbott Laboratories, Inc.* (S.D.Ohio 2015) 119 F.Supp.3d 749, 766 [FDA decisions in 2006 and 2008 "constitute 'clear evidence' that when confronted by the issue in 2003, the FDA would have rejected an attempt to add a . . . warning"].)

Third, Plaintiffs incorrectly assert that EPA considered only the safety of glyphosate and not "the formulated product Roundup." (RB/X-AOB 91, emphasis omitted.) In fact, "[a]ll inert ingredients must be approved by EPA before they can be included in a pesticide," and the agency "review[s] safety information about each inert ingredient." (*Basic Information About Pesticide Ingredients*, Environmental Protection Agency <https://bit.ly/2yM1Boy> [as of June 30, 2020].) Thus, EPA did review the surfactants used in Roundup (alkyl amine polyalkoxylates (AAPs)) and concluded that, when used outdoors and in appropriate quantities, "[t]here are no human health exposure or risk issues that would preclude" their use in

connection with pesticides. (9 AA 9933.) As EPA explained in connection with its most recent re-registration decision, the agency "evaluated the hazard potential (*i.e.*, toxicity) of glyphosate and any inert ingredients with a battery of toxicity data from a multitude of studies throughout the risk assessment process." (EPA, Response from the Pesticide Re-evaluation Division (PRD) to Comments on the Glyphosate Proposed Interim Decision (Jan. 16, 2020) p. 6 <https://bit.ly/2UMeyXr> [as of June 30, 2020].) Accordingly, the agency concluded that "all registered uses" of glyphosate are safe for human use, including Roundup. (EPA, Jan. 2020 Glyphosate Interim Registration Review Decision, *supra*, at p. 9.) Most specifically, EPA found that "[t]here is no evidence that the AAPs are carcinogenic." (6 AA 6863-6864; 9 AA 9942.)

But in any event, Plaintiffs' claims are inescapably about glyphosate: if there is no evidence that glyphosate causes cancer, then there is no evidence that Roundup causes cancer. Neither of Plaintiffs' specific causation experts, Dr. Nabhan and Dr. Weisenburger, testified that Roundup, as opposed to glyphosate, caused Plaintiffs' NHL. (See 17 RT 2891:12-2982:2; 25 RT 4128:20-4129:13.) The only expert who gave any meaningful testimony about the formulation was Dr. Sawyer. But Dr. Sawyer could not opine as to whether the formulated product caused Plaintiffs' NHL because he is not an oncologist or medical doctor and did not consider Plaintiffs' other risk factors. (19 RT 3259:5-9.) And although Dr. Sawyer testified that certain surfactants are safer than the POEA surfactant used in Roundup, he did not testify that Plaintiffs' cancer was caused by POEA as opposed to a

different surfactant. Neither did he testify that Plaintiffs' cancer would have been avoided had Monsanto used a different formulation of its glyphosate-based products. Instead, Dr. Sawyer merely asserted that Roundup is more genotoxic than glyphosate, meaning that it can cause damage to DNA. (12 RT 1700:13-15.) But there is no dispute, and Plaintiffs' own expert Dr. Portier acknowledged, that just because something is genotoxic does not mean that it will lead to cancer, much less Plaintiffs' NHL. (See 13 RT 1982:23-1984:8, 1989:24-1991:17; 30 RT 5115:20-5117:10, 5119:3-5120:21, 5129:10-24.)

Finally, Plaintiffs criticize EPA's August 2019 letter as lacking the force of law. (RB/X-AOB 91-93.) That argument both ignores the many formal actions EPA has taken in addition to the 2019 letter, and contravenes Supreme Court precedent on what agency action carries the force of law.

Under *United States v. Mead Corp.* (2001) 533 U.S. 218 [121 S.Ct. 2164, 150 L.Ed.2d 292] (*Mead*), agency action other than rulemaking and formal adjudication can carry the force of law: "Congress contemplates administrative action with the effect of law when it provides for a *relatively formal* administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." (*Id.* at pp. 230-231, emphasis added.) *Merck* likewise made clear that agency action short of rulemaking or formal adjudication can carry the force of law, citing FDA processes that employ neither procedure. (See *Merck*, *supra*, 139 S.Ct. at p. 1679.) For example, *Merck* cited FDA regulations that authorize the agency to communicate its

official position on an individual drug to an applicant in a "complete response letter" (*ibid.*, citing 21 C.F.R. §§ 314.110(a), 314.125(b)(6) (2019))—similar to the formal, yet individualized, process that EPA employs to register and approve the label of a pesticide like Roundup. (See *Merck*, at p. 1679 [citing notification under 21 U.S.C. § 355(o)(4)(A) of new information to be included in drug labeling as "agency action carrying the force of law"].)

EPA's actions here are sufficiently formal to carry the force of law under *Merck*. First, EPA has issued numerous official decisions reiterating its conclusion that glyphosate does not cause cancer—including its registration of Roundup, its approval of Roundup's labeling, and, most recently, its 2020 re-registration review decision that followed notice-and-comment procedures. (See *ante*, pp. 23-24, 31-32, fn. 5.) Those decisions were made pursuant to specific administrative processes established by Congress to direct authoritative agency action in an individualized manner—processes far *more* formal than FDA's private, applicant-specific response letters cited in *Merck*. (See 7 U.S.C. §§ 136a et seq., 136a-1 et seq.)

EPA's August 2019 letter—reinforced by the United States government's amicus brief in *Hardeman*—confirms that the agency will not approve a cancer warning for glyphosate, making it unlawful for companies like Monsanto to add the warning Plaintiffs seek. The EPA letter responded to requests from registrants to add a cancer warning for glyphosate-based products and definitively informed the registrants of EPA's decision to *deny* those requests, explaining that including the warning would

render the products misbranded. (U.S. Brief, *supra*, at p. 15.) That "authoritative interpretation of [EPA's] FIFRA misbranding authority . . . has practical and significant legal effects." (*Reckitt Benckiser Inc. v. E.P.A.* (D.C. Cir. 2010) 613 F.3d 1131, 1138.) It commits EPA to rejecting future requests to add such a cancer warning, and directs registrants to remove any such warnings currently on their labeling or face legal consequences. (See 7 U.S.C. § 136*l*(a), (b).)

In any event, the August 2019 letter invoked EPA's 2017 determination that glyphosate is not carcinogenic, made as part of the formal, statutorily authorized process discussed above. Even if there were doubt about the formality of the letter standing alone, the agency actions it invokes or otherwise confirms unquestionably carry the force of law. (See *Mead*, *supra*, 533 U.S. at pp. 230-231.) EPA's meticulous consideration of glyphosate over decades was done through "procedure[s] tending to foster . . . fairness and deliberation" (*id.* at p. 230), and its authoritative decisions are far more than mere "agency musings" (*Merck*, *supra*, 139 S.Ct. at p. 1682 (conc. opn. of Thomas, J.)).

2. Monsanto cannot unilaterally change Roundup's label or formulation.

Impossibility preemption applies for a further, independent reason: Monsanto cannot unilaterally change Roundup's labeling—or its formulation—without prior agency approval. (See *Mensing*, *supra*, 564 U.S. 604; *Bartlett*, *supra*, 570 U.S. 472.)

Under the principle established in *Mensing* and *Bartlett*, "[i]f a private party . . . cannot comply with state law without first obtaining the approval of a federal regulatory agency, then the application of that law to that private party is preempted." (*Gustavsen v. Alcon Laboratories, Inc.* (1st Cir. 2018) 903 F.3d 1, 9 (*Gustavsen*); see *Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 154-155 (*Trejo*) [holding that design defect claim against brand-name drug manufacturer was preempted because any formulation change required prior FDA approval, despite plaintiff's argument that FDA might have approved the revised formulation]; *Yates v. Ortho-McNeil-Janssen Pharmaceuticals* (6th Cir. 2015) 808 F.3d 281, 298-299 (*Yates*) [same].) That is precisely the situation Monsanto finds itself in. (See 40 C.F.R. § 152.44(a) (2019) ["Except as provided by § 152.46, any modification in the composition, labeling, or packaging of a registered product must be submitted with an application for amended registration"]; *id.*, § 152.46(a)(1), (b) (2019) [exceptions only for "certain minor modifications"]; see also 2 AA 1295 ["a formulation change may only be accomplished through submission of an application for amended registration"].)

Plaintiffs offer only one argument for why the *Mensing*/*Bartlett* form of impossibility preemption should not apply: according to Plaintiffs, this type of preemption is limited to the "generic-drug regime." (RB/X-AOB 88.) But the *Mensing*/*Bartlett* form of impossibility preemption states a fundamental, generally applicable principle of preemption: "The question for 'impossibility' is whether the private party could

independently do under federal law what state law requires of it." (*Mensing*, *supra*, 564 U.S. at p. 620; see *Gustavsen*, *supra*, 903 F.3d at p. 9 ["If a private party . . . cannot comply with state law without first obtaining the approval of a federal regulatory agency, then the application of that law to that private party is preempted."].) That is unquestionably the case here. Under FIFRA, a pesticide manufacturer cannot independently change the composition of its product—prior EPA approval is required.

Though Plaintiffs do not explain why the reasoning of *Mensing* and *Bartlett* would be limited to "the generic-drug regime," the apparent reason is that generic drugs must be equivalent to brand-name drugs, restricting generic manufacturers from making their own label or design changes. But courts have expressly rejected such a limited reading of *Mensing* and *Bartlett*: numerous courts have held that design defect claims against *brand-name* manufacturers are preempted under those cases, *even though* those manufacturers are free to seek FDA approval for alternative formulations. (See, e.g., *Trejo*, *supra*, 13 Cal.App.5th at pp. 154-155; *Gustavsen*, *supra*, 903 F.3d at p. 10.)

The Sixth Circuit's decision in *Yates*, *supra*, 808 F.3d 281, is particularly instructive. In *Yates*, the plaintiff argued that the manufacturer of a brand-name estrogen patch "should have altered the formulation of [the product] after the FDA had approved the patch," or that it should have " 'adopt[ed] a safer design' " before approval. (*Id.* at pp. 298-299.) Plaintiff noted that products on the market in other countries showed that an

alternative design was available, and there was "no evidence that the FDA would have exercised its authority to prohibit defendants from creating and submitting such a design for approval." (*Id.* at p. 299.) The court nonetheless found the claims preempted. (*Id.* at p. 298.)

Just as redesign was not legally possible for the drug manufacturers in *Yates* without FDA approval, so too it was not legally possible for Monsanto to redesign Roundup without EPA approval. As explained above, Plaintiffs' design defect claims are based on Roundup's label, not its formulation (see *ante*, pp. 21-22), but any claim that Monsanto violated state law by failing to change Roundup's EPA-approved formulation is preempted for the same reasons as in *Yates* and *Trejo*.

II. The court should reverse the judgment with directions because there is no substantial evidence to support the jury's failure-to-warn and design defect findings.

A. The warning claims fail as a matter of law because there was no prevailing scientific consensus that Roundup causes cancer when Plaintiffs were diagnosed with NHL.

Plaintiffs acknowledge that to prevail on a failure-to-warn claim, it was not enough to establish that Monsanto could have deduced that a risk might exist. (See RB/X-AOB 93.) Instead, Plaintiffs had to prove that Roundup had potential risks that were " 'known or *knowable* in light of the generally recognized and

prevailing best scientific and medical knowledge at the time of manufacturer [*sic*] and distribution.' " (*Ibid.*, quoting *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483-1484 (*Valentine*); see *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002-1003 (*Anderson*); 32 RT 5485:9-14 [jury instruction: to establish their strict-liability failure-to-warn claims, Plaintiffs must prove "[t]hat Roundup had 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 the manufacture, distribution, and sale"]; see also AOB 53-54.)[6]

Although Plaintiffs acknowledge the applicable standard, they disregard the CACI Committee's explanation of what it means for a potential risk to be "generally accepted in the scientific community." CACI Committee commentary provides useful guidance to courts. (E.g., *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594-595; *DeWitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 250-251; *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 685.) Here, the committee was careful to explain what is *not* sufficient: "A risk may be 'generally recognized' as a view (knowledge) advanced by one body of scientific thought and

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[6] Plaintiffs cite *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, fn. 3, to argue that " 'knowable' " means only " 'knowledge obtainable "by the application of reasonable, developed human skill and foresight . . . ." ' " (RB/X-AOB 93-94.) But *Carlin* relies upon *Anderson* and does not purport to differ from *Anderson* in requiring that " 'known or knowable' " must be determined " 'in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.' " (*Valentine*, *supra*, 68 Cal.App.4th at pp. 1483-1484; see CACI No. 1205.)

experiment, but it may not be the 'prevailing' or 'best' scientific view; that is, it may be a minority view." (Directions for Use to CACI No. 1205 (2020) p. 723.) In this case, the record is undisputed that at the time Roundup was manufactured and sold to Plaintiffs—before IARC issued its Monograph—regulatory agencies worldwide, after review of the scientific evidence, unanimously confirmed that Roundup posed no cancer risk. (See AOB 21-23, 55; see also *National Association of Wheat Growers*, *supra*, 2020 WL 3412732, at p. *9 [observing that "every government regulator of which the court is aware, with the exception of the IARC, has found that there was no or insufficient evidence that glyphosate causes cancer"].)

Much of Plaintiffs' statement of facts purports to establish that there is substantial evidence, based on the *current* opinions of their experts, that Roundup has the potential to cause cancer. (See RB/X-AOB 31-44.) Plaintiffs then argue that their experts and the jury were entitled to "disagree" with the conclusions and methodologies of regulatory agencies on that question. (See RB/X-AOB 97.) But their experts' "disagreement" is irrelevant: Plaintiffs' failure-to-warn claims must be based on the prevailing scientific view at the time the product is manufactured and distributed, not expert testimony elicited at trial on the issue of general causation. Plaintiffs had the burden of proving each element of their failure-to-warn claims, which included proving that the potential risks of Roundup were known or knowable based on the generally accepted, prevailing scientific view at the relevant time. (2 RT 5485.) No amount of after-the-fact disagreement on

the part of Plaintiffs' experts with the conclusions of regulatory agencies and the authors of scientific studies changes the undisputed fact that no such prevailing view has ever existed, and certainly did not exist prior to Plaintiffs' cancer diagnoses.

Plaintiffs argue that the IARC Monograph provided such a prevailing view, and because there is evidence in the record establishing that a very small part of Plaintiffs' exposures occurred after IARC published its Monograph, Plaintiffs claim that evidence is all they needed to establish their failure-to-warn claims. (RB/X-AOB 94.) But the IARC Monograph cannot be considered at all in evaluating the evidentiary support for Plaintiffs' failure-to-warn claims. That is because Monsanto is potentially liable only for an alleged failure to warn that "was a substantial factor in causing [Plaintiffs'] harm." (2 RT 5485.) Plaintiffs provided no evidence that any exposures to Roundup that occurred after the Monograph was published in March 2015 caused their harm. To the contrary, Plaintiffs alleged in their complaint that exposures up until 2011 (when Mr. Pilliod was diagnosed with NHL) caused their harm. (1 AA 150.) At trial, Mrs. Pilliod confirmed that her husband stopped spraying Roundup at that time. (23 RT 3706:10-18.) Mrs. Pilliod said she continued to spray only a "little" after that point, and that she stopped in early 2015 when she was diagnosed with NHL. (23 RT 3740:6-3741:18; see also RB/X-AOB 94.) Consequently, Plaintiffs' experts based their causation analyses on Roundup exposures that occurred up to 2012, three years before the Monograph was published. (19 RT 3264:7-3265:23, 3272:19-3273:18.)

Plaintiffs point to testimony of Mr. Pilliod that he continued to spray Roundup until 2016 or 2017, after the IARC Monograph was published, which contradicted the testimony of his wife and his own complaint. (RB/X-AOB 94.) But that testimony, even if credited, is irrelevant because there is no dispute that in 2011—several years before the Monograph was published—Mr. Pilliod had been completely cured and was in remission. (17 RT 2830:17-20; 6 AA 7125; 30 RT 5217:4-5.) Obviously, any exposures to Roundup that occurred after Mr. Pilliod was diagnosed and cured of cancer had no role in causing his harm.[7]

Even if it is considered, the IARC Monograph, as Plaintiffs' experts acknowledged, expresses only the general conclusion that glyphosate can, at some theoretical dose, potentially cause cancer, not that the use of glyphosate-based herbicides presents any actual, real-world potential risk to consumers. (14 RT 2214:4-2217:3 [Plaintiffs' expert recognizes it was "not [IARC's] job" to assess whether glyphosate-based herbicides have the potential to

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[7] Plaintiffs contend that Mr. Pilliod's post-recovery exposures to Roundup put him at greater risk of developing another cancer. (RB/X-AOB 95.) But Mr. Pilliod did not request and the jury was not given CACI No. 1622, which addresses a claim of emotional distress involving the fear of cancer. Moreover, there is no evidence that would have justified such an instruction, even had it been requested. The respondents' brief cites only to testimony purporting to establish general causation—i.e., that glyphosate exposure generally has the potential to cause cancer. (RB/X-AOB 95.) Plaintiffs cite no evidence establishing that Mr. Pilliod himself was at an increased risk of developing a second cancer, much less that it was more likely than not such a cancer would manifest, which is a prerequisite to any claim for emotional distress based on a fear of cancer. (See CACI No. 1622.)

cause cancer at real-world exposure levels].) Such a real-world risk assessment was the job of regulatory agencies, who reviewed a broader array of data and reaffirmed their longstanding conclusions that glyphosate-based herbicides presented no such risks, even after IARC issued its Monograph. (See 13 RT 1920:7-11; 14 RT 2230:3-2232:3 [Plaintiffs' risk assessment expert acknowledges that regulatory agencies, not IARC, performed "risk assessments" that determine "whether there's a cancer risk to individuals in their daily lives"].)

It is undisputed that even after IARC published the Monograph, regulatory agencies worldwide reaffirmed their views that glyphosate-based herbicides pose no potential risk to humans:

(1) EPA's Cancer Assessment Review Committee reviewed "63 epidemiological studies, 14 animal carcinogenicity studies, and nearly 90 genotoxicity studies," and concluded, based on the risk assessment they conducted, that glyphosate is " '[n]ot [l]ikely to be [c]arcinogenic to [h]umans.' " (9 AA 10034, 10214.)

(2) The European Union's food safety agency similarly reevaluated and confirmed that glyphosate is unlikely to pose a carcinogenic risk to humans. (9 AA 9863.)

(3) The European Union's chemical safety agency concluded that "[b]ased on the epidemiological data as well as on data from long-term studies in rats and mice, taking a weight of evidence approach, no hazard classification for carcinogenicity is warranted for glyphosate." (8 AA 9520.)

(4) Australia's national pesticide regulator concluded that "exposure to glyphosate does not pose a carcinogenic or genotoxic risk to humans." (8 AA 9324, 9341.)

(5) New Zealand's Environmental Protection Agency re-reviewed the available scientific data in light of IARC's classification and found "glyphosate is unlikely to be genotoxic or carcinogenic to humans." (10 AA 10722.)

(6) Canada's national pesticide regulator concluded that "[g]lyphosate is not genotoxic," is "unlikely to pose a human cancer risk," and "products containing glyphosate do not present risks of concern to human health or the environment when used according to the revised label directions." (9 AA 10223-10224.)

Plaintiffs thus failed to establish a prevailing scientific view even after the IARC Monograph was published. Nevertheless, Plaintiffs argue that regardless of whether IARC's Monograph is considered, the jury was entitled to disregard the unanimous prevailing scientific view expressed in the opinions of regulatory agencies worldwide because, according to Plaintiffs' experts, the methodologies used by EPA and European regulators were not based on the best prevailing science. (RB/X-AOB 97-98.) But second-guessing a regulatory agency's interpretation of its own procedures does not change the fact that the conclusions of these regulatory agencies reflect the prevailing scientific view. And Plaintiffs presented no evidence or even an allegation that other regulatory agencies throughout the world—including those in Canada, Japan, New Zealand, and Australia—did not employ proper methodologies. Yet, they reached the same conclusions as

regulators in the United States and Europe. (Compare RB/X-AOB 97-98 with AOB 23.)

Moreover, it was not Monsanto's burden to prove the existence of a prevailing scientific view in its favor, as Plaintiffs suggest. Instead, Plaintiffs had the burden of offering evidence of a prevailing scientific view *in their favor*, and they failed to present any such evidence. They cannot point to a single scientist who reviewed all of the scientific literature *before* Plaintiffs were diagnosed with NHL—as multiple regulators did—and disagreed with those regulators' conclusions. The post-hoc, litigation-driven view presented by Plaintiffs' experts at the time of trial does not diminish the undisputed prevailing scientific view that existed before Plaintiffs were diagnosed with cancer.

Citing *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292 (*Echeverria*), Plaintiffs argue that Monsanto could have reached the conclusion that Roundup could cause cancer on its own had it investigated the issue responsibly and objectively. (RB/X-AOB 94.) But in *Echeverria*, the plaintiff presented evidence that before she was diagnosed with cancer, epidemiology studies and IARC had concluded that talcum powder presented a possible real-world risk of cancer, and the manufacturer had presented no evidence of a prevailing scientific view that talcum powder presented no such risk. (*Echeverria*, at p. 321.) Here, by contrast, as explained above, IARC had said nothing about glyphosate at the time of Plaintiffs' relevant exposures. Moreover, unlike in *Echeverria*, the undisputed evidence presented at trial demonstrated a prevailing scientific

view, based on multiple reviews of the science by regulatory agencies worldwide, that glyphosate-based herbicides do not present a cancer risk to humans. (See *National Association of Wheat Growers*, *supra*, 2020 WL 3412732, at pp. *8 [observing that "the great weight of evidence indicates that glyphosate is not known to cause cancer"], *9 [noting "the heavy weight of authority stating that glyphosate does not cause cancer"], *11 [rejecting proposed cancer warning because it "conveys the message that there is equal weight for and against the authority that glyphosate causes cancer, when the weight of evidence is that glyphosate does not cause cancer"].) No similar evidence existed in *Echeverria*. And unlike in *Echeverria*, no properly adjusted epidemiological study found a statistically significant association between use of glyphosate-based herbicides and a risk of cancer. (See pp. 70-74, *post*.)[8]

Plaintiffs argue, without citing any evidence, that if Monsanto had only conducted its own mouse studies at the time Roundup was registered, instead of purportedly relying on fraudulent mouse studies prepared by Industrial Bio-Test Laboratories (IBT), Monsanto would have learned of glyphosate's potential to cause cancer. (RB/X-AOB 95.)[9] Plaintiffs, however,

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[8] While the facts here compel a reversal of the failure-to-warn claim, at a minimum, this court must reverse the punitive damages as did the court in *Echeverria*, despite facts to support the failure-to-warn claim. (See pp. 102-114, *post*.)

[9] Plaintiffs' argument shows that on appeal, as in the trial court, they are improperly trying to attribute the fraudulent mouse data to Monsanto, even though the trial court barred them from making

(continued...)

ignore the fact that the studies performed by IBT were repeated by Monsanto and reported to EPA, and the results did not change the prevailing scientific view. (See AOB 89.)

Plaintiffs next argue that the mouse studies Monsanto conducted in the 1990s show a link between glyphosate exposure and tumors, and that Monsanto did not make the data from those studies available to the scientific community. (See RB/X-AOB 95-96.) The assertion that Monsanto hid the data from the scientific community is demonstrably false, and is representative of the wholesale lack of support for Plaintiffs' unfounded claim that Monsanto suppressed and interfered with the scientific data on glyphosate. (RB/X-AOB 96-99.) The evidence cited by Plaintiffs is the testimony of their expert who served on the IARC committee reviewing the mouse data. He did not say that the data was withheld; he said that the committee "didn't have adequate amount of time to adequately evaluate" that data because "[f]or whatever reason," it was not made available to them until after their meetings. (14 RT 2182:3-2183:15.) In fact, the expert acknowledged he had already reviewed laboratory reports of that very data. (*Ibid.*) And although the IARC Monograph states that the data was not made available in the "open literature," the Monograph acknowledges that the data was made available to regulatory agencies. (7 AA 8809-8810.) In short, there is no evidence that Monsanto hid anything, and it is undisputed that

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that very argument, and why a new trial is required as a result of the improper admission of the fraudulent mouse data, and Plaintiffs' counsel's improper use of that evidence at trial. (See pp. 80-83, *post*.)

the data was considered by the regulatory agencies worldwide that unanimously found no real-world, potential risk of cancer to humans. (See *ante*, pp. 23-24, 46-47.)

Plaintiffs also point to Monsanto's purported decision to conceal Dr. Parry's review of the science on genotoxicity. (RB/X-AOB 95.) But as explained in the opening brief, the evidence showed that, in fact, when Dr. Parry suggested follow-up studies on genotoxicity, Monsanto conducted the relevant studies that Dr. Parry recommended in accredited labs and submitted them to EPA and/or published their results. (AOB 60-61; 6 AA 7024-7031.) After Monsanto conducted and provided additional studies, Dr. Parry ultimately agreed that glyphosate is not genotoxic and that some of the additional studies he had initially recommended were not necessary. (AOB 61.) These events hardly provide evidence of Monsanto suppressing scientific information or of a prevailing scientific view that Roundup had the potential to cause cancer in humans.

Plaintiffs next point to epidemiology studies, which they claim show a statistically significant increased risk of NHL in users of glyphosate-based herbicides. (RB/X-AOB 96-97.) But the largest, best regarded, and most comprehensive epidemiology studies, including the Agricultural Health Study, as well as the pooled study funded by the National Institutes of Health, have consistently concluded both before and after IARC's Monograph that there is "no association between glyphosate use and NHL overall or any of its subtypes." (16 RT 2627:9-11; see 18 RT 2959:16-2961:17, 2982:6-11; 29 RT 4877:4-11; see also 6 AA 6649,

6666-6667.) Those studies were adjusted for other pesticides and reported odds ratios close to 1.0, meaning that those who were exposed to glyphosate had no higher risk of developing NHL than those who were not exposed. (18 RT 2959:2-9; 27 RT 4444:21-4446:24, 4452:22-4453:3, 4556:24-4557:6; 29 RT 4861:5-17.) By contrast, the studies relied upon by Plaintiffs' experts rely in large part on data that is not properly adjusted for other pesticides. (16 RT 2606:10-2609:25; 17 RT 2834:4-9; see also pp. 70-74, *post*.) That is precisely the reason why regulators worldwide have consistently concluded, based on all of the data, that glyphosate-based herbicides present no potential risk of cancer to humans.

In sum, Plaintiffs ask this court to ignore the requirements of California law, as spelled out in the CACI instruction, that a plaintiff must prove that a risk was supported by the "generally recognized and prevailing best scientific and medical knowledge" at the relevant time, and instead to replace that requirement with some lower threshold that can be met whenever a litigation expert can cobble enough together to make an argument for causation. The watered-down approach proposed by Plaintiffs would run counter to California law and effectively make manufacturers no-fault insurers of users of their products. Because a risk that Roundup causes cancer in humans was not a generally recognized, prevailing scientific view, and did not represent the best scholarship available at the time Plaintiffs used Roundup, the risk was not "known" or "knowable," and Monsanto had no duty to warn.

B. The jury's design defect findings based on the consumer expectations test and negligence are both legally and factually unsupported.

The consumer expectations test for establishing design defect applies to "res ipsa-like cases" in which the failure of a product is obvious to consumers based on expectations formed by their everyday use of the product. (*Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1484; see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 566-567 & fn. 3 (*Soule*); AOB 64-66.) As Plaintiffs acknowledge, where that test applies, no expert testimony is required to establish the complex balance of risks and benefits that go into a product's design or that the product could have been designed more safely. (RB/X-AOB 72.)

What Plaintiffs fail to acknowledge is the corollary of that rule: the consumer expectations test *does not apply* where expert testimony is needed to establish the complex nature of the product's defect in order to demonstrate that the product fell below the consumer's reasonable safety expectations. (*Soule*, *supra*, 8 Cal.4th at pp. 568-569; see *Morson v. Superior Court* (2001) 90 Cal.App.4th 775, 792 (*Morson*) ["Under *Soule* the consumer expectations test can be applied even to very complex products, but only where the circumstances of the product's failure are relatively straightforward"].) Thus, the test applies where the alleged defect is some aberrant behavior of the product as perceived by a reasonable consumer, such as when a product spontaneously explodes, and not where the alleged defect is based on complex biochemical mechanisms related to the product's use that allegedly

affect a consumer's health. (Compare *Soule*, at pp. 566-567, fn. 3 ["the ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights"] with *Trejo*, *supra*, 13 Cal.App.5th at pp. 160-161 [consumer expectations test does not apply where "[t]he circumstances of [the product's] failure involve technical details and expert testimony regarding 'the effect of the product upon an individual plaintiff's health' "]; *Morson*, at pp. 792-793 [to same effect]; AOB 64-72.)

This case falls squarely in the latter group of cases in which the test does *not* apply because no consumer could have perceived the alleged defect in the product without relying on the opinions of scientists and physicians. Plaintiffs' only allegation of product defect is that Roundup causes cancer and the label does not warn of this risk of harm. (See AOB 70.) The consumer expectations test does not apply and should never have been submitted to the jury on this allegation because the alleged defect in Roundup is anything but "straightforward" and has nothing to do with how the product performed as would be expected by an ordinary consumer. Instead, the product defect is based entirely on the lack of a cancer warning and the opinions of multiple experts that exposure to the product causes cancer. (See AOB 68-69.) Under *Soule*, *Trejo*, and *Morson*, a consumer expectations theory is unavailable in this case. (See *Pankey*, *supra*, 2020 WL 3445816, at pp. *13-*14 [consumer expectations theory does not apply where "a consumer's ordinary experiences do not introduce it to the potential complexities of designing a" product without the alleged defect].)

Plaintiffs argue the consumer expectations test applies even if " ' "expert testimony is required to prove that . . . a condition of the product as marketed was a 'substantial,' and therefore 'legal,' cause of injury." ' " (RB/X-AOB 75, quoting *Soule*, *supra*, 8 Cal.4th at p. 569, fn. 6.) That misses the point. The purpose of the expert testimony in this case was not just to establish causation, but was essential to establishing that the product was defective in the first place. Plaintiffs' theory of defect was that Roundup causes cancer and was not as safe as it could have been because of the use of a particular surfactant, and as a result, Monsanto should have warned consumers of the risk of cancer. These theories *required* extensive, complex expert testimony about the chemical composition of the product and the effects those chemicals had on the health of consumers, and nowhere in the respondents' brief do Plaintiffs deny that obvious fact. In other words, if all expert testimony is removed from this case, where is the evidence that Roundup failed to perform as an ordinary consumer would expect? There is none.

The fact that Plaintiffs did not establish any alleged product failure other than one based on extensive expert testimony is confirmed by their counsel's pitch to the jury in closing argument: " '[d]id Roundup fail to perform as safely as an ordinary consumer would have expected?' Of course it did. It causes cancer." (32 RT 5607:12-14.) That is all they argued on the consumer expectations issue. But it is well settled that the consumer expectations theory cannot be based solely on consumers' claims that they did not expect to be injured by the product. (AOB 49, 54.) Indeed, "[i]f this

were the end of the inquiry, the consumer expectation[s] test always would apply and every product would be found to have a design defect." (*Trejo*, *supra*, 13 Cal.App.5th at p. 159.) After all, "any injury from the intended or foreseeable use of a product is not expected by the ordinary consumer." (*Id.* at pp. 158-159.) Where, as here, complex expert testimony is necessary to describe the nature of the product's alleged defect and how it could cause the plaintiff's injury, the consumer expectations test does not apply, and should not be submitted to a jury. (See *Soule*, *supra*, 8 Cal.4th at pp. 556, 570; *Trejo*, at p. 159; *Morson*, *supra*, 90 Cal.App.4th at pp. 779, 788.)

Plaintiffs cite *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365 (*Mansur*) to support their contention that the consumer expectations theory applies here. But *Mansur* supports Monsanto's position. There, the trial court refused to give a consumer expectations instruction in a vehicle rollover case that involved " 'a number of areas of expert opinion testimony dealing with roof crush design, the safety restraint systems in place, [and] forces at various locations on the vehicle at various times during the roll of the vehicle.' " (*Id.* at pp. 1372-1373.) The Court of Appeal affirmed because "it is well settled that expert testimony is not relevant in a consumer expectations theory of liability" and the plaintiff failed to introduce non-expert testimony of objective safety features of the product that would have formed an ordinary consumer's safety expectations. (*Id.* at pp. 1377-1379.)

Plaintiffs do not rely on the holding of *Mansur*, which found that evidence that the Ford vehicle was a "family vehicle" was "too

vague to provide any meaningful insight into the vehicle's features." (*Mansur*, *supra*, 197 Cal.App.4th at p. 1378.) Instead, Plaintiffs rely on dicta in a "hypothetical" positing that if Ford had disseminated an advertisement showing a family walking away from a rollover unscathed, that could have been evidence of an objective feature forming a consumer's expectation of what might happen in a rollover. (*Ibid.*) According to Plaintiffs, Monsanto's marketing materials, which did not include a cancer warning and showed photographs of Roundup users who were not wearing protective equipment, could provide the objective evidence lacking in *Mansur*. (RB/X-AOB 73-75.) This argument fails for several reasons.

First, this argument highlights why Plaintiffs' consumer expectations claim is preempted: it relies entirely on the contention that Monsanto should defy EPA by providing a cancer warning that the agency has found to be unwarranted. (See *Taylor*, *supra*, 54 F.3d at p. 561 [a claim based on marketing materials or "for inadequate point-of-sale warnings is preempted because the[ ] claim is premised ultimately upon the inadequacy of the product label"]; *Etcheverry*, *supra*, 22 Cal.4th at p. 335 [a "claim, however couched" may be preempted under FIFRA if it "boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered"]; *Pankey*, *supra*, 2020 WL 3445816, at pp. *14-*17 [discussing "interplay" between consumer expectations and failure-to-warn theories]; *ante*, pp. 21-22.)

Second, even if the consumer expectations claim were not preempted, the claim is founded on a failure-to-warn theory.

Importantly, to establish a failure-to-warn claim, Plaintiffs were obliged but unable to prove that the potential risk was known or knowable based on the best available science. (See *ante*, pp. 41-42; AOB 52-64.) However, under Plaintiffs' formulation of the consumer expectations test, in which a consumer's expectation is founded entirely on a failure to warn, that important limitation on liability is tossed aside.

Third, Plaintiffs provided no evidence that a consumer could form an expectation, based on Monsanto's marketing materials, about the circumstances in which the use of Roundup could or could not cause cancer. In *Mansur*, the plaintiff did not need expert testimony to demonstrate that the product failed (the roof caved in), but did need expert testimony to show that a consumer would form an expectation as to what conditions should or should not cause a roof to collapse. (*Mansur*, *supra*, 197 Cal.App.4th at pp. 1377-1380.)

Here, by contrast, no matter how much evidence Plaintiffs identify purportedly establishing that Monsanto told consumers Roundup was safe, Plaintiffs cannot demonstrate that there was a defect in the product without presenting complicated expert testimony that Roundup caused cancer and therefore required a warning. For that reason, the consumer expectations test does not apply as a matter of law. (See *Trejo*, *supra*, 13 Cal.App.5th at pp. 160-161 [consumer expectations fails as a matter of law if it requires "expert testimony regarding 'the effect of the product upon an individual plaintiff's health' "]; *Morson*, *supra*, 90 Cal.App.4th at p. 793 [consumer expectations test must "give rise

to simple consumer expectations of safety that have nothing to do with the chemical composition of the material from which the product is manufactured, or any other design characteristics for which specialized knowledge is required for understanding or taking appropriate precautions"]; *Verrazono v. Gehl Company* (May 22, 2020, A152318) ___ Cal.App.5th ___ [2020 WL 3249089, at pp. *6-*7] (*Verrazono*) [consumer expectations test does not apply where jurors could not evaluate "in the absence of expert testimony" whether the lack of design features in a forklift rendered the product defective].)

Plaintiffs argue *Trejo* and *Morson* are distinguishable (RB/X-AOB 75-77), but they are wrong. Both cases involve ubiquitous products more commonly used than Roundup: latex gloves and Motrin. In both *Trejo* and *Morson*, like this case, there was no apparent defect in the product's performance other than the plaintiffs' allegation that the products defied their expectations because they caused adverse health effects that were not the subject of a warning. Despite these obvious similarities, Plaintiffs argue that *Trejo* and *Morson* apply only to "esoteric" or "idiosyncratic" circumstances related to a particular plaintiff. (RB/X-AOB 76-77.) Not so. In *Morson*, the plaintiffs developed allergic reactions to latex gloves that allegedly affected 5 to 12 percent of the population. (*Morson*, at p. 780.) A reaction to a product that affects such a broad portion of the population cannot be characterized as "idiosyncratic," and certainly not when compared to the incidence of NHL. Nothing in the record suggests that the incidence of NHL among individuals exposed to Roundup

is anything close to the 5 to 12 percent of the population affected in *Morson*. And although the allergic reactions alleged in *Trejo* were more rare than those alleged in *Morson*, there is no evidence that such reactions are any more "esoteric" or "idiosyncratic" than the cancer diagnoses alleged in this case. Certainly, there is no evidence to suggest that NHL is a common reaction to Roundup exposure, even if one were to fully credit the testimony of Plaintiffs' causation experts.

Plaintiffs further argue that *Trejo* and *Morson* must be limited to "essential" products that have benefits to human health because such products require a "complex weighing of risks and benefits," as opposed to "non-essential" products like those containing asbestos or Roundup. (RB/X-AOB 76.) That argument is sophistry. Those cases posit no such distinction between essential and non-essential products. In any event, a complex weighing of the risks and benefits of products is precisely what EPA and other government agencies do when they evaluate the safety of highly regulated products like Roundup, which serves the "essential" function of helping to maintain the world's food supply.[10] Indeed, the very fact that Plaintiffs posit a distinction

[10] There is no logic to Plaintiffs' contention that the asbestos cases can be distinguished based on the "essential" nature of the products at issue in *Morson* and *Trejo*. Asbestos was required to be used on Navy warships, and was essential to the functioning of warships during World War II. (See *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 343-344.) Thus, some might say that asbestos was at least as "essential" as Motrin, if not more so: asbestos was necessary to fight a war, while Motrin was designed primarily to alleviate a headache.

between essential and non-essential products—a distinction that requires weighing the benefits of a product—is precisely why the consumer expectations test (as opposed to a risk-benefit test) was inappropriate here. (See *Verrazono*, *supra*, ___ Cal.App.5th ___ [2020 WL 3249089, at p. *6] [consumer expectations test does not apply where " 'ultimate issue of design defect' called 'for a careful assessment of feasibility, practicality, risk, and benefit' " (quoting *Soule*, *supra*, 8 Cal.4th at p. 562)].)

In essence, Plaintiffs contend that the purpose of the consumer expectations test is not to lighten the burden of providing costly expert testimony in obvious cases of product failure, but to impose absolute (as opposed to strict) liability for what they believe to be "non-essential" products that cause injury. Their contention has no foundation in the underpinnings of strict liability, and only serves to demonstrate how far off the rails the application of the consumer expectations test has gone. (See *Anderson*, *supra*, 53 Cal.3d at p. 994 [" 'strict liability has never been, and is not now, absolute liability' "].)

Plaintiffs' reliance on the asbestos cases is also unavailing. As explained in the opening brief, the application of the consumer expectations test in asbestos cases is founded on the premise that a product fails to meet minimum safety assumptions if it is manufactured in a way that releases a *known* toxin. (See, e.g., *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1229, 1232-1233, 1238 [observing that "it was well known by the 1970's that asbestos was a health risk" such that an ordinary consumer in 2005 could rely on their "everyday experience" to

conclude that products exposing persons to asbestos are unreasonably dangerous]; *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 474-475 [concluding a jury could determine whether insulation "made of friable material that had to be cut and shaped to perform its insulating function" and thereby released known toxins violated a user's minimum safety expectations].) While a product containing a known carcinogen like asbestos may justify use of the consumer expectations test, a product containing an ingredient like glyphosate determined by scientific and regulatory authorities across the world to pose no cancer risk does not.

Plaintiffs' reliance on *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698 is similarly misplaced. (RB/X-AOB 73.) As explained in the opening brief, the primary issue in *Arnold* was federal preemption; the discussion of consumer expectations was limited to a single paragraph without any analysis and unsupported by the cases it cited. (*Arnold*, at p. 702; AOB 71-72.) In any event, to the extent *Arnold* or the asbestos cases suggest the consumer expectations test can be applied to the complex technical and medical issues in this case, they are inconsistent with the Supreme Court's binding decision in *Soule* and should not be followed. Plaintiffs' case is not within the realm of ordinary consumer expectations. Expert testimony is the only way a jury can determine whether Roundup is "defective." That is precisely why Plaintiffs came to trial with multiple experts. The consumer expectations theory therefore does not apply as a matter of law. (See *Trejo*, *supra*, 13 Cal.App.5th at pp. 160-161; *Morson*, *supra*,

90 Cal.App.4th at p. 793; accord, *Verrazono*, *supra*, ___ Cal.App.5th ___ [2020 WL 3249089, at pp. *6-*7].)

Finally, in the opening brief, Monsanto explained why there is no evidence to support the negligent design claim. (See AOB 72-73.) Plaintiffs provide no response to this discussion, and for good reason. There is no evidence that any alleged negligence in the product's design, as opposed to the alleged failure to warn, played a role in causing Plaintiffs' NHL. (See *ante*, pp. 35-36.) For that reason, as well as Plaintiffs' failure to establish the basis of either a failure-to-warn or consumer expectations claim, this court should reverse the judgment and direct the trial court to enter judgment in favor of Monsanto.

III. The court should reverse the judgment because the jury's causation findings are legally flawed.

A. The court should reverse the judgment with directions because there is no reliable and substantial evidence of causation.

Plaintiffs were required to prove with reliable and substantial evidence that "but for" their exposure to Roundup, they would not have developed their injuries. (See CACI No. 430 ["Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct"].) Plaintiffs assert they met this burden because their experts performed differential etiologies and relied on epidemiological evidence showing a risk ratio above 2.0. (AOB 101-105.) But in opining that Roundup was more likely than not the cause of Plaintiffs' cancers,

Plaintiffs' experts used unreliable data and inconsistent methodologies that did not meet the standards set forth in *Sargon Enterp., Inc. v. Univ. of S. Cal.* (2012) 55 Cal.4th 747 (*Sargon*). As a result, their opinions are not competent evidence of causation. (See *id.* at pp. 771-772.)

Because the vast majority of NHL cases are of unknown origin, any expert opinion purporting to determine the specific cause of a particular plaintiff's NHL based on a differential etiology is suspect from the outset. (See, e.g., *Bland v. Verizon Wireless, (VAW) L.L.C.* (8th Cir. 2008) 538 F.3d 893, 897 [expert cannot properly conclude, based upon differential etiology, that exposure to defendant's product was the " 'most probable cause' " of plaintiff's illness where the cause of the illness is unknown in the majority of cases]; see also *Echeverria*, *supra*, 37 Cal.App.5th at p. 331 ["a differential [etiology] alone may be insufficient as the sole basis for an opinion on the etiology of a largely idiopathic disease."].) Moreover, in this case, there was undisputed evidence of numerous alternative causes, including a host of alternative risk factors for NHL that had risk ratios far greater than 2.0. Plaintiffs' experts either ignored these alternative risk factors or purported to rule them out based on unsupported and conclusory rationales. Under these circumstances, Plaintiffs did not meet their burden of proving causation with reliable evidence.

Mr. Pilliod was 69 when he was diagnosed with NHL, and he had a complex prior medical history: he had more than 20 bouts of skin cancer, multiple episodes of meningoencephalitis, herpes simplex virus, recurrent genital warts, an autoimmune disease

(ulcerative colitis), a family history of cancer, a 20-year history of smoking, multiple brain injuries, a history of stroke, sleep apnea, high blood pressure, and congenital hemochromatosis. (AOB 37, 79-80.) Mrs. Pilliod was 71 when she was diagnosed with NHL. (AOB 38.) Her prior medical history included a 20-year history of smoking cigarettes, recurrent bladder cancer, obesity, diabetes, and an autoimmune condition (Hashimoto's disease). (AOB 37-38, 78-79.) The cause of NHL is unknown in the majority of cases, but because of their advanced age and many prominent risk factors described in more detail below, Plaintiffs were at a much higher risk of developing NHL than the average person. (See AOB 35, 37-38, 78-82.)

Plaintiffs rely principally on *Cooper v. Takeda Pharm. Am., Inc.* (2015) 239 Cal.App.4th 555 (*Cooper*) and *Echeverria*, *supra*, 37 Cal.App.5th 292, but those cases support reversal here. In *Cooper*, the Court of Appeal confirmed that " '[p]roffering an expert opinion that there is some theoretical possibility the negligent act *could have been* a cause-in-fact of a particular injury is insufficient to establish causation,' " and that JNOV would be appropriate if "the existence of an alternative explanation, supported by substantial evidence and not mere speculation, as a matter of law *defeated* the explanation proffered by [plaintiff]." (*Cooper*, at p. 578.) *Cooper* thus establishes that an expert must provide a reasoned explanation for ruling out alternative causes for which there is substantial evidence. In that case, however, there was no actual evidence presented of alternative causes, only speculation. Specifically, the defendant speculated that the plaintiff *might* have

been exposed to other known carcinogens, but there was no proof that he actually had, and the appellate court disagreed with the trial court for "speculating that some *unknown exposure* could be lurking in the unexamined records." (*Id*. at pp. 584-585, emphasis added.)

In *Echeverria*, the court agreed with prior cases that "a differential [etiology] alone may be insufficient as the sole basis for an opinion on the etiology of a largely idiopathic disease." (*Echeverria*, *supra*, 37 Cal.App.5th at p. 331, citing *In re Diet Drugs Products Liability Litigation* (E.D.Pa. 2012) 890 F.Supp.2d 552, 563 and *Henricksen v. ConocoPhillips Co.* (E.D.Wa. 2009) 605 F.Supp.2d 1142, 1162-1163.) But the court found that there was enough evidence to support specific causation in *Echeverria* because the expert's opinion was supported by more than just a differential etiology—it was also supported by (1) epidemiological literature, including multiple studies showing the risk of ovarian cancer among genital talc users to be *over three to four times* greater than the risk in the unexposed; (2) testimony regarding the biological mechanism in general; (3) the presence of talc in the plaintiff's ovarian tissue and other areas where the cancer was present; and (4) evidence of a chronic inflammatory process in the plaintiff's tissues. (*Echeverria*, at pp. 331-332.) Moreover, as in *Cooper*, the court in *Echeverria* noted that the defendant could not point to any substantial evidence that the plaintiff's specific

causation expert overlooked other possible causes supported by substantial evidence.[11]

In short, *Cooper* and *Echeverria* both differ from this case because, in those cases, there was no evidence of alternative causes supported by substantial evidence. Here, by contrast, there was ample evidence of alternative causes. (See AOB 78-82; pp. 67-70, *post*.) Furthermore, the plaintiffs in *Cooper* and *Echeverria* presented evidence of *both* (1) reliable epidemiology studies that controlled for other relevant risk factors and still found risk ratios that averaged well above 2.0; *and* (2) a differential etiology, in which the experts were able to reliably rule out alternative causes supported by substantial evidence, to the extent there were any. Here, Plaintiffs' experts did not reliably present either of these types of evidence, let alone both.

1. The differential etiologies of Plaintiffs' experts were insufficient to prove specific causation.

The respondents' brief hardly addresses Monsanto's main point on appeal—that is, Monsanto presented substantial evidence of numerous alternative risk factors known to be highly associated

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[11] Also, in *Echeverria*, the court noted that the defendants had not argued there was no substantial evidence of general causation. (*Echeverria*, *supra*, 37 Cal.App.5th at p. 331.) Here, Monsanto contends that Plaintiffs' experts had no basis to consider Roundup as a potential cause in the first place. (See AOB 75-76.)

with NHL, and Plaintiffs' experts provided no reliable basis for ruling those out. While admitting that the vast majority of NHL cases are idiopathic, Plaintiffs' experts concluded that Roundup was the most likely cause of Plaintiffs' cancers based on a handful of flawed studies (see pp. 70-74, *post*) that purportedly showed risk ratios slightly above 2.0.[12] Yet they simultaneously dismissed alternative risk factors that were shown to have statistically significant risk ratios *much higher* than 2.0, and they did not even try to rule out idiopathy. (See AOB 79-84.) This inconsistent consideration of the various risk factors and failure to adequately consider idiopathy is a clear flaw in the experts' methodology. The only argument Plaintiffs muster in response is that Monsanto did not present evidence of alternative causes. (RB/X-AOB 104.) But this is demonstrably false.

The evidence of alternative causes was not only substantial, it was undisputed. Mrs. Pilliod had risk factors that the scientific literature demonstrated were highly associated with NHL, including a history of smoking cigarettes—a risk factor that, according to Dr. Weisenburger's own research, was associated with a doubling of the risk of NHL. (AOB 78.) In addition, Mrs. Pilliod was obese and had an autoimmune disease that was associated with a *tripling* of the risk of NHL. (AOB 78-79.) Mr. Pilliod also had numerous known risk factors for NHL, including conditions

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[12] Plaintiffs' general causation experts, however, opined that the totality of the epidemiological data supported, at most, a 1.41 risk ratio. (14 RT 2310:10-24.) Plaintiffs' experts also reviewed animal studies and mechanistic data, but that evidence was not probative of what was the most likely cause of *Plaintiffs'* cancer.

associated with a statistically significant *tripling* of the risk of NHL, and his medical history constituted substantial evidence that he had an irregular immune system. (AOB 79-80.) Finally, both Mr. and Mrs. Pilliod had a personal history of cancer, which by itself made Plaintiffs at least twice as likely to develop NHL in their lifetimes. (AOB 79.)

Monsanto did not need to present expert testimony to provide substantial evidence of alternative factors that likely caused Plaintiffs' cancers and therefore had to be ruled out. The undisputed fact that Plaintiffs had these various medical conditions was evidenced by their medical records that the experts relied upon and the testimony of Plaintiffs' treating physicians. (See, e.g., 17 RT 2871:7-11; 27 RT 4377:22-4379:7; 30 RT 5139:20-5142:15, 5163:5-5166:7; 6 AA 6789-6790, 7126-7127, 7130-7131.) The fact that these conditions are risk factors for NHL was demonstrated by the scientific literature. (See, e.g., 17 RT 2813:2-2815:18; 27 RT 4388:22-4389:13.) Thus, unlike *Cooper*, Monsanto did not present a "[b]are conceivability of another possible cause" (*Cooper*, *supra*, 239 Cal.App.4th at pp. 585-586), it presented substantial evidence of the statistical probability that Plaintiffs' cancers were caused by something *other* than Roundup. In order to rely upon a differential etiology, Plaintiffs' experts were obliged to rule out these alternative causes supported by substantial evidence. (*Id.* at pp. 578, 585-586.)

In sum, NHL is a predominantly idiopathic cancer for which both Plaintiffs had numerous risk factors. Many of these risk factors are, by themselves, more highly associated with NHL than

Plaintiffs claim Roundup is. And when several of these individual risk factors are present, as they were for Plaintiffs, it becomes even more probable that the person will develop NHL over their lifetime. Consequently, even using Plaintiffs' cherry-picked epidemiological data points, it was more statistically probable that Plaintiffs' NHL was caused by something other than Roundup. Plaintiffs' experts' only response to this statistical fact was ipse dixit and speculation. Such testimony is insufficient to uphold the verdict.

2. The epidemiological evidence was not sufficient to support specific causation.

Plaintiffs' argument that the epidemiological data was sufficient, by itself, to support a finding on causation should be rejected for two reasons.

First, the fundamental premise of Plaintiffs' argument (that the epidemiology studies for glyphosate support a risk ratio above 2.0) is not supported by the evidence. The largest epidemiology studies conducted to date show no increased risk of NHL from exposure to Roundup. (See AOB 24-26, 76.) And neither Dr. Nabhan nor Dr. Weisenburger identified statistically significant data that reported a risk ratio above 2.0 when fully adjusted for other pesticides. Instead, they cited unreliable data points cherry-picked out of the vast epidemiological data to support their outcome-driven opinions.

As the court emphasized in *Cooper*:

> All studies have limitations and flaws, and it is entirely valid to interpret each study's results by

> taking into account these limitations and flaws. However, it is essential that the results of other studies by other scientists on the same subject, that aim to correct for the limitations and flaws in prior studies, be taken into account, and the body of studies be considered as a whole.

(*Cooper*, *supra*, 239 Cal.App.4th at 589.)[13] Plaintiffs' experts in this case did not heed this admonition. Rather, they emphasized small studies with serious methodological flaws because the results suited their opinions, while dismissing out of hand larger, more reliable studies because their conclusions were inconvenient. (AOB 24-26, 75-76.) Such a methodologically flawed approach does not comport with *Sargon* or *Cooper*.

Not one of the four epidemiological studies cited in the respondents' brief provides support for the proposition that Plaintiffs' NHL was more likely than not caused by Roundup:

- The McDuffie and Eriksson studies, for example, were not adjusted for other pesticides, and when they were, the risk ratios dropped below 2.0. (17 RT 2908:4-2910:10, 2911; 18 RT

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[13] Notably, in *Cooper*, the plaintiff's experts testified "that the results of the individual studies *considered as a whole*, including in the meta-analyses, was what really persuaded them that Actos® causes bladder cancer." (*Cooper*, *supra*, 239 Cal.App.4th at p. 589, emphasis added.) They found that the studies supported risk ratios ranging from 2.54 to 6.97. (*Id.* at p. 593.) And a meta-analysis conducted by the defendant itself showed a statistically significant hazard ratio *above 4.0*. (*Id.* at p. 569.) By comparison, here, Plaintiffs' *best* evidence demonstrated, *at most*, a risk ratio of about 1.4 when considering the data as a whole. (See 17 RT 2732:17-2733:4.)

2980:7-2982:12; 25 RT 4097:12-4099:7.) Indeed, McDuffie did not account for the effect of exposure to other pesticides at all. (16 RT 2607:24-2608:3.) And while Eriksson did provide some adjusted results, the adjusted results did not show a statistically significant link between glyphosate and NHL, demonstrating that—despite Plaintiffs' protestations to the contrary—other pesticides do, in fact, confound the results in glyphosate/NHL studies. (16 RT 2606:10-14, 2643:10-15; 17 RT 2911:2-6.)

- The DeRoos (2003) study is unreliable because it did not control for all pesticides (17 RT 2712:21-24), and according to the authors of that study, the more accurate measurement of the odds ratio resulted in a not statistically significant odds ratio of 1.6 (27 RT 4434:7-19). Furthermore, the DeRoos (2003) study captured only 36 exposed Roundup cases, resulting in "sparse data bias" (29 RT 4860:7-24), and when those cases were combined with other data to increase the study's power and reliability (25 RT 4100:17-4101:7), no association was found (18 RT 2959:7-15). Indeed, Dr. Nabhan admitted that such smaller studies have greater potential for error. (25 RT 4094:5-15.) When compared with the vast epidemiological data available, which in totality includes tens of thousands of exposed cases, one flawed study consisting of 36 exposed cases cannot support causation as a matter of law. (See 29 RT 4860:7-24; *In re Bextra and Celebrex Mktg. Sales Pracs. & Prod. Liab. Litig.* (N.D.Cal. 2007) 524 F.Supp.2d 1166, 1176 [excluding expert who cherry-picked studies that supported his conclusion "while rejecting or ignoring the great weight of the evidence that contradicts his conclusion"]; *Hall v.*

Baxter Healthcare Corp. (D.Or. 1996) 947 F.Supp. 1387, 1405-1406 [excluding opinion testimony that causation was " 'more likely than not' " where only one of 16 epidemiology studies supported a causal link].) By comparison, the Agricultural Health Study involved roughly 44,000 exposed cases and found no association between Roundup and NHL. (16 RT 2621:16-25.) Even the Zhang meta-analysis, which Plaintiffs' general causation experts touted to support their opinions about the overall risk ratio for Roundup, showed, at most, a 1.41 risk ratio in highly exposed groups. (14 RT 2310:10-24.)

- Finally, contrary to Plaintiffs' assertions, the North American Pooled Project (NAPP) data as a whole does not support any "increased risk or increased association with use of glyphosate in development of [NHL]," let alone an increase over 2.0. (27 RT 4441:18-20.) Plaintiffs appear to be relying on just one data point from an outdated and unpublished version of NAPP, which showed a risk ratio of 2.49 for the DLBCL subtype (and a risk ratio below 2.0 for NHL generally). But, as Dr. Weisenburger admitted during trial, that data was superseded by subsequent and more robust data. (17 RT 2835:6-15; 18 RT 2951:8-2955:17.) Indeed, despite incorporating the positive results from McDuffie and DeRoos (2003) into its analysis, the later and more reliable data from NAPP shows no statistically significant increased risk of NHL from exposure to glyphosate and no dose response. (16 RT 2605:16-2606:1.) That Plaintiffs must resort to relying on outmoded and superseded data to support their arguments is telling. Relying on such data to support biased opinions, when

more recent data directly contradicts it, strikes at the heart of *Sargon*'s reliability requirement.

Second, even when epidemiological data does reliably demonstrate a risk ratio higher than 2.0 (which is not the case here), such data cannot support a finding of specific causation where the plaintiff has risk factors that are more highly associated with the outcome. This is why, in *Cooper*, the court found it important that the studies relied upon by the plaintiff's expert had controlled for all of the other factors that the defendant had pointed to as alternative causes. (*Cooper*, *supra*, 239 Cal.App.4th at pp. 564, 568, 586, fn. 18 [" '*So whatever his risk may be* for being Caucasian, for smoking, or even if he was in a high risk occupation, or even if he had a severe A1C, that's been accounted for when we talk about this increased risk?' [The expert] replied in the affirmative with regard to the Takeda meta-analysis [showing a risk ratio of 4.6]." (emphasis added)]; see *In re Silicone Gel Breasts Impl. Prod. Liab. Lit.* (C.D.Cal. 2004) 318 F.Supp.2d 879, 894 (*Silicone Gel Breasts*) ["[T]his approach of proving specific causation assumes that the plaintiff is comparable to the subjects of the epidemiology study *and that there were no other causal agents present in the plaintiff's case not accounted for by the study*" (emphasis added)].)

A relative risk higher than 2.0 implies a greater than 50 percent probability that the agent at issue was responsible for a particular individual's disease, as opposed to some other cause. (*Silicone Gel Breasts*, *supra*, 318 F.Supp.2d at 894.) In other words, the rationale behind this manner of proving specific

causation is entirely statistical. This statistical rationale disappears entirely, however, when—as here—the plaintiffs have alternative risk factors with much higher relative risks than the agent at issue and that are not controlled for in the epidemiological literature. Then, it becomes more statistically probable that something else caused the disease.

At bottom, Plaintiffs assert that a handful of studies (which are a mere fraction of the epidemiological data available) are substantial evidence—by themselves—to prove that their cancers were caused by Roundup as opposed to something else. The methodology of Plaintiffs' experts required them to turn a blind eye to all of the other data in order to support their conclusions. Not only are each of the studies Plaintiffs rely upon flawed, the "analytical gap" between the findings of those few and small studies and the conclusion that Roundup more likely than not caused *Plaintiffs'* cancer is so vast that such an opinion cannot be permitted as a matter of law. (See *Sargon*, *supra*, 55 Cal.4th at p. 771.)

In sum, the experts' specific causation opinions were not supported by reliable differential etiologies or epidemiological data. What is left in the record is nothing more than the experts' subjective opinions. This is not substantial evidence of causation.

B. Alternatively, the court should reverse and remand for a new trial because the trial court's refusal to sever Plaintiffs' cases for trial fatally infected the jury's consideration of the causation issue.

This case involved the relatively uncommon coincidence of a husband and wife who were both diagnosed with similar (though not the same) types of a common cancer. Plaintiffs exploited this coincidence by weaving throughout their case the unsupported—yet powerful, and therefore prejudicial—theme that the odds of both a husband and wife developing cancer was extremely low, and therefore, the only possible explanation for this uncommon occurrence was Plaintiffs' common exposure to Roundup. Under these unique circumstances, a joint trial was highly prejudicial to Monsanto, and the trial court abused its discretion in refusing to order severance in "the interests of justice" under Code of Civil Procedure section 379.5.

Plaintiffs argue that joinder was proper because the trial involved " 'common question[s] of law or fact.' " (RB/X-AOB 106-107, citing Code Civ. Proc., § 1048.) But the heart of Monsanto's defense at trial was that each Plaintiff could not prove that Roundup was the cause of his/her specific cancer. As discussed in Monsanto's opening brief, the facts relating to the cause of *Mr. Pilliod's* cancer bore virtually no resemblance to those relating to the cause of *Mrs. Pilliod's* cancer. (AOB 36-38, 85-86.) Plaintiffs may have used Roundup at the same locations and during the same years (RB/X-AOB 107), but not one expert relied on these

purported common facts in forming an opinion on causation. The differences in Plaintiffs' causation cases—e.g., Mr. Pilliod sprayed nearly three times as much Roundup as Mrs. Pilliod, each Plaintiff had different medical histories and risk factors, and each developed a different subtype of NHL—were far more central to the disputed issues of causation at trial. (AOB 86.)

Furthermore, the cases cited in the respondents' brief are inapposite. Not one involved plaintiffs who were married and had a common exposure to the product at issue, and so the prejudice faced by the defendants in those cases was far less than that faced by Monsanto here. In *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 978, three plaintiffs' product-defect claims were tried together, resulting in a verdict for all three plaintiffs. On appeal, the defendant argued that consolidation of the three cases for trial had led to juror confusion but the appellate court was not persuaded. (*Id.* at pp. 978, 980.) Monsanto's argument is different. Although the jury very well may have confused the facts relating to the two individual plaintiffs, the larger problem here was that Plaintiffs' counsel deliberately misled the jury to believe that it was more likely than not that each Plaintiff's cancer was caused by Roundup because of the relatively low odds of a husband and wife both developing NHL. (24 RT 3882:5-3884:1, 3957:8-3961:23.) In other words, the fact that Mrs. Pilliod had cancer was used as evidence to support causation in Mr. Pilliod's case, and vice versa. (See, e.g., 24 RT 3882:24-3883:6 [Dr. Nabhan: "[I]t goes without saying that having two people who are married who live together for four decades, when they have the

same disease, . . . there's no physician that would not ask the question: Is there a common denominator and factor between those two people? . . . [I]t's just common sense.]".) In a far more recent medical device case, *David v. Medtronic, Inc.* (2015) 237 Cal.App.4th 734, 740-741, the Court of Appeal found that joinder was *not* permissible where the only common factor was that plaintiffs were exposed to the product at issue and were allegedly harmed.

The other case cited by Plaintiffs, *Anaya v. Superior Court* (1984) 160 Cal.App.3d 228, actually supports Monsanto's position that the claims should have been severed for trial. There, the court held that joinder was authorized under Code of Civil Procedure section 378 at the pleadings stage. (*Id.* at pp. 230-231.) Yet the court recognized that "legitimate practical concerns" might necessitate separate trials, and furthermore, it reasoned that joinder was appropriate partially because Code of Civil Procedure section 379.5 provided a mechanism to sever the claims for trial. (*Id.* at pp. 233-234.)

Numerous federal courts have recognized the inherent prejudice that results when product-defect claims are joined for trial. For instance, in *Rubio v. Monsanto Co.* (C.D.Cal. 2016) 181 F.Supp.3d 746, 757-758, the district court held that any similarities in the cases of two plaintiffs who both used Roundup were outweighed by the differences in the plaintiffs' claims, and recognized the prejudice that would result, because one of the plaintiffs, "despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." (Accord,

Miller v. Bayer Healthcare Pharms., Inc. (W.D.Mo., Mar. 6, 2017, No. 4:14-cv-00652-SRB) 2017 WL 2313287, at p. *1 [severing case for trial "[d]ue to the fact-intensive and individualized nature of each cause of action, and with each Plaintiff presenting evidence that could unfairly influence the jury's liability and damages verdicts as to the other Plaintiff."]; *McGrew v. Howemedica Osteonics Corp.* (S.D.Ill., Jan. 13, 2015, No. 14-cv-430-SMY-PMF) 2015 WL 159367, at p. *3 [holding that in light of "the varied medical histories and resulting injuries and treatments, the legal and medical causation inquiries will be individualized to each . . . Plaintiff."]; *In re Accutane Prods. Liab. Litig.* (M.D.Fla. Sept. 20, 2012, No. 8:04-md-2523-T-30TBM) 2012 WL 4513339, at p. *1 [severing claims asserted by plaintiffs who alleged injuries caused by same prescription drug]; *Graziose v. American Home Products Corp.* (D.Nev. 2001) 202 F.R.D. 638, 641 [stating the concern about joinder in multi-plaintiff personal injury lawsuits "is heightened in an area of scientific inquiry such as medicine, where the science is a developing one and the scientific and legal controversies are impacted by the many individualized circumstances and conditions"].)

The trial court's refusal to sever Plaintiffs' cases for trial gave Plaintiffs a unique and overwhelming advantage. It allowed them to obscure the weaknesses in each individual case and emphasize irrelevant and misleading statistics regarding spousal concordance (see, e.g., 24 RT 3882:24-3884:1, 3888:3-8, 3957:17-3958:10; 32 RT 5580:11-15, 5580:18-21), making "it more likely that [Monsanto would] be found liable and result[ing] in

significantly higher damages awards" (*Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746). Monsanto is entitled to a new trial.

IV. The court should reverse and remand for a new trial because the trial court abused its discretion by admitting irrelevant and highly prejudicial evidence about fraud committed at IBT.

The trial court never should have permitted Plaintiffs to introduce any evidence that the IBT laboratory engaged in fraud. The trial court permitted Plaintiffs to introduce historical evidence about IBT but expressly stated that "Plaintiffs may not argue or imply that Monsanto was in any way involved" in the IBT scandal. (6 AA 6468, emphasis omitted; 3 RT 471:22-472:1; 15 RT 2409:1-16.) Yet that is precisely what Plaintiffs did. Plaintiffs' counsel stated in closing that Roundup was "literally born in fraud," which they described as the first step in "40 years of misconduct." (32 RT 5500:14-5502:20.) Counsel also suggested that Dr. Wright was involved in fraudulent *glyphosate* studies when he worked at IBT (32 RT 5501:4-21), which is not true (see AOB 89-90). And right after discussing the IBT scandal in closing, Plaintiffs' counsel told the jury, "we have mountains of evidence that *Monsanto simply fabricates scientific evidence*." (32 RT 5502:18-20, emphasis added.) Plaintiffs repeatedly brushed past the trial court's limitations and invited the jury to infer that Monsanto itself participated in IBT's fraud. This evidence tainted the trial with

testimony that was both irrelevant and highly prejudicial to Monsanto and warrants reversal and remand.

Plaintiffs do not seriously dispute that the testimony and their counsel's statements about IBT would have caused the jury to believe that Monsanto participated in IBT's fraud. Indeed, Plaintiffs do not explain what else the jury could have concluded about Monsanto's role in IBT's fraud. Plaintiffs instead argue that the IBT evidence was "only factual information" and relevant to their failure to warn claim and punitive damages. (RB/X-AOB 109.)

This argument fails. The IBT evidence was not relevant to any liability or damages issues because Monsanto was not responsible for the tainted IBT studies, Monsanto had new studies performed that reached the same results, and EPA's current registration for Roundup does not depend on IBT's tainted studies. (See AOB 89, 92.) Given these facts, Plaintiffs' argument confirms that they used evidence about IBT's fraud for the improper and prejudicial purpose of suggesting that Monsanto itself was responsible for or participated in IBT's misconduct.

In an apparent attempt to bolster their relevance argument, Plaintiffs contend that EPA relied on one of the IBT studies—Reyna and Gordon (1973)—in its current evaluation of glyphosate. (RB/X-AOB 109.) But this fact does not justify admission of evidence about IBT's fraud. For starters, the current registration for glyphosate references dozens of studies. Given that it was EPA that discovered IBT's fraud and issued a data call in 1983 for a new study to support glyphosate's registration (6 AA 6868-6869), EPA

plainly was aware of the study's provenance. Moreover, a new study was conducted that EPA accepted and used in the glyphosate registration. (6 AA 7185-7201, 7259-7267.) Under these circumstances, the agency's decision to cite Reyna and Gordon is not evidence that there is anything improper about the current glyphosate registration, much less that Monsanto was negligent in selling Roundup. This is especially so considering EPA's consistent view that glyphosate is not carcinogenic and that adding a cancer warning to Roundup would amount to misbranding.

Nor is there any merit to Plaintiffs' argument that Monsanto has nothing to complain about because it was "directly involved" in IBT's conduct and therefore the evidence Plaintiffs did introduce about IBT was "relatively mild." (RB/X-AOB 109.) Plaintiffs' argument rests exclusively on a court decision involving one of the fraud's perpetrators—Paul Wright—whose involvement in the scheme commenced while he was at IBT and before he returned to work at Monsanto. (See RB/X-AOB 56, discussing *United States v. Keplinger* (7th Cir. 1985) 776 F.2d 678, 684.) But contrary to Plaintiffs' suggestion, *Keplinger* does not state or imply that Monsanto was involved in or even knew about Wright's conduct. Rather, *Keplinger* makes clear that Wright carried out his scheme with two other IBT scientists and that it had been well under way for years before Wright returned to Monsanto. (See *id.* at pp. 683-684.) *Keplinger* also shows that the fraud of which Wright was convicted had nothing to do with glyphosate or Roundup. (See *id.*

at pp. 683-684 & fn. 2.) *Keplinger* fails to establish that Monsanto participated in IBT's fraud.

Moreover, beyond their unsubstantiated arguments about relevance, Plaintiffs have almost nothing to say about the prejudicial effect the admission of evidence about IBT's fraud had on Monsanto. Plaintiffs' "it-could-have-been-worse" argument does not address whether the evidence that was introduced, in conjunction with Plaintiffs' counsel's statements about IBT, were prejudicial. Plaintiffs' repeated suggestions to the jury that Monsanto itself was involved with IBT's fraud violated the court's ruling and infected the trial. Any evidence about IBT should have been excluded altogether to avoid this result.

V. The court should reverse and remand for a new trial because the verdict is the product of prejudicial attorney misconduct.

In its opening brief, Monsanto identified several instances of egregious misconduct by Plaintiffs' counsel throughout trial. (See AOB 93-107.) The trial court also recognized that Plaintiffs' counsel committed misconduct. (6 AA 8258:13.) Plaintiffs now admit their counsel made some "errors," but describe them as "minor." (RB/X-AOB 110.) As there is no dispute that Plaintiffs' counsel committed misconduct, and the misconduct inflamed the jury to award compensatory and punitive damages that the trial court found to be grossly excessive, a new trial is the only appropriate remedy.

A. Counsel improperly told the jury that this case is "historic" and suggested that a verdict for Plaintiffs might cause EPA to alter its conclusion on the carcinogenicity of glyphosate.

In his opening statement, Plaintiffs' counsel improperly characterized this case as a " 'historic' " fight against Monsanto, even after he was admonished for making very similar comments at the trial in *Johnson v. Monsanto Co.* (A155940 & A156706, appeal pending) (*Johnson*). (See AOB 94-95.)[14] Plaintiffs argue that Monsanto's recitation of what occurred in *Johnson* is "misleading[ ]" because their counsel was not admonished after he told the jurors that they were " 'part of history' " in his opening statement in *Johnson*. (RB/X-AOB 115; Monsanto's MJN, exh. C, p. 37:17-22.) Counsel was not admonished for making these comments in opening statement in *Johnson* only because Monsanto did not object at that time. Monsanto *did* object when counsel repeated the statements in closing argument in *Johnson*, and the trial judge agreed those comments were "really inappropriate" and gave the jury a curative instruction. (Monsanto's MJN, exh. C, pp. 39:22-41:22.) Thus, months *after* he

[14] Plaintiffs argued below that Monsanto forfeited any objections to their opening statement by making those objections after the opening statement was completed. (11 RT 1432:1-5.) Plaintiffs abandon this argument on appeal, for good reason: the trial court directed counsel not to disrupt opening statements with objections, and the court therefore deemed any objections made after opening statements to be preserved. (11 RT 1432:6-15, 1439:5-7, 1440:7-11.) Those objections are also preserved for appeal. (See *Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 158 & fn. 4 (*Garcia*).)

was admonished for making "really inappropriate" comments designed to inflame the jury, Plaintiffs' counsel decided to repeat those comments during his opening statement in this trial. (*Id.* at p. 39:22-40:1.)

Plaintiffs' counsel asserts that his comments in this case were not similar to the comments he made in *Johnson*. (See RB/X-AOB 115.) Not so. This is what he said in opening statement here: "The fact that you're here today, *part of this historic case*, means everything to [the Pilliods]. So thank you for your time." (11 RT 1429:13, emphasis added; see also 11 RT 1309:16.) And this is what he was admonished for saying in closing argument in *Johnson*: "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." (Monsanto's MJN, exh. C, p. 38:3-5, emphasis added; see *id.* at p. 37:21-22 [opening statement in *Johnson*: "each one of you, whether or not you want to be . . . , are actually *part of history*" (emphasis added)].)

Plaintiffs next claim that "such argument has been found not to be improper in other cases." (RB/X-AOB 115, fn. 18.) But the one case they cite says only that it is not improper to discuss a defendant's wealth when compensatory and punitive damages are tried together in a single proceeding. (See *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1243.) No one disputes that a defendant's wealth is relevant to the punitive damages inquiry. (See, e.g., *Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) Here, counsel's argument was improper not because it discussed Monsanto's wealth; it was improper because

it suggested that the jury should accord this case "historic[ ]" significance and, as the trial court later realized, it was "prejudicial" to "enlist [the jurors] in some sort of movement" against Monsanto. (31 RT 5432:8-20; see AOB 94-95.)

Plaintiffs' counsel also argued in opening statement that a verdict for the Pilliods might cause EPA to change its conclusion on the carcinogenicity of glyphosate, stating: "[T]he EPA hasn't issued its final ruling yet. They're still considering it. . . . But the most recent iteration of their opinion is that it doesn't cause cancer. That's where the EPA . . . stands right now. Although *they could change after -- well, after this trial. Who knows?*" (11 RT 1404:6-16, emphasis added; AOB 94.) Monsanto timely objected. (11 RT 1436:23-1437:11; *ante*, p. 84, fn. 14.) The trial judge said these comments "almost got [her] to [her] feet" and told Plaintiffs' counsel, "don't do that again." (11 RT 1438:10-18.) Plaintiffs ignore this blatant misconduct in their respondents' brief.

B. Plaintiffs' counsel repeatedly violated the trial court's rulings.

1. Counsel violated the ruling prohibiting references to the presence of glyphosate in sources other than Roundup.

Plaintiffs' counsel repeatedly violated the court's order prohibiting them from telling the jury that glyphosate is present in food and in the environment. (See AOB 96-97.) In the respondents' brief, Plaintiffs claim that the trial court "specifically ruled that the Pilliods could reference glyphosate's presence in

food and the environment if it was supported by expert testimony." (RB/X-AOB 112.) This is false.

The trial court's ruling was prompted by a defense motion in limine to exclude evidence or argument that glyphosate is present in food, breast milk, or any other sources unrelated to Plaintiffs' alleged route of exposure. (3 AA 3485:2-5, 3486:5-6, 3487:17-18.) Monsanto explained that Plaintiffs claim injury from exposure to glyphosate *only by spraying Roundup* on weeds, not from ingesting glyphosate in food, breast milk, or any other sources. (3 AA 3485:8-15, 3486:7-9.) Indeed, Plaintiffs' exposure expert, William Sawyer, based his opinions only on dermal exposures that occurred during the Roundup application process. (See 19 RT 3240:23-3250:14, 3255:18-3282:20.) Monsanto explained that references to other possible exposures were not only irrelevant but prejudicial because they could cause jurors to fear that they or their loved ones were also at risk. (3 AA 3485:19-21, 3487:1-3.)

The trial court granted the motion, stating: "References to exposure to glyphosate will be limited to those on which experts base their opinions. Opening the door to all possible exposures would be time consuming and confusing to the jury." (6 AA 6468.) The order makes clear that the court was allowing evidence of only those exposures "on which [Plaintiffs'] experts base[d] their opinions"—i.e., dermal exposures that occurred while Plaintiffs sprayed Roundup—and excluding evidence of all other "possible exposures." (*Ibid.*)

Indeed, two episodes at trial show that Plaintiffs' counsel knew the trial court had prohibited references to the presence of

glyphosate in food and the environment. First, in opening statement, counsel said that glyphosate is "ubiquitous" and "pervasive," and that "finding people who haven't been exposed . . . is actually fairly difficult." (11 RT 1331:1-13.) When Monsanto objected, counsel said he did not violate the court's in limine ruling because he did not "mention it being in food," and added, "I made sure not to cross that line." (11 RT 1433:3-7.) Second, while examining one of his experts, Plaintiffs' counsel read a statement from a report that said, "glyphosate may be considered ubiquitous in our environment." (16 RT 2559:6-14.) Monsanto objected and moved to strike the statement; the trial court sustained the objection and granted the motion to strike. (16 RT 2559:15-20.) Plaintiffs' counsel also withdrew the statement. (16 RT 2559:18.)

Thus, Plaintiffs' counsel understood that the trial court had prohibited references to the presence of glyphosate in food or in the environment. But he flouted that ruling in closing argument when he said, "[P]eople are exposed to glyphosate outside of spraying it, right? *It's in the food. It's all over the place*." (32 RT 5557:20-22, emphasis added.)

Plaintiffs argue that their lawyer "did not violate [the court's] ruling and the trial court never found such a violation." (RB/X-AOB 112.) Wrong on both counts. As explained above, Plaintiffs' counsel violated the court's in limine ruling at least three separate times during trial. (11 RT 1331:1-13 [opening statement]; 16 RT 2559:6-20 [questioning witness at trial]; 32 RT 5557:20-22 [closing argument].) And by sustaining Monsanto's

objection to the improper question posed at trial (16 RT 2559:6-20), the trial court did find that Plaintiffs' counsel violated its ruling.

Plaintiffs suggest that these comments were harmless because they were cumulative of other statements that appear in exhibits. (See RB/X-AOB 112.) But there is no evidence the jurors ever read those statements, which were buried in lengthy documents. (7 AA 8783 [92-page IARC Monograph]; 9 AA 9890 [227-page EPA Glyphosate Issue Paper].) In any event, counsel's statements that glyphosate is "ubiquitous," "pervasive" (11 RT 1331:1-13), and "all over the place" (32 RT 5557:21-22) went far beyond what those exhibits said (see 7 AA 8783 [glyphosate "[r]esidues were detected in 0.04% of 74 305 [*sic*] samples of fruits, vegetables, and cereals tested from 27 member states of the European Union," Norway, and Iceland in 2007]; 9 AA 9890 ["Oral absorption has been shown to be relatively low for glyphosate . . . with negligible accumulation in tissues and rapid excretion . . . via the urine"]).

2. Counsel violated the ruling limiting evidence and argument about IBT.

As discussed above, Plaintiffs' counsel violated the trial court's in limine ruling prohibiting Plaintiffs from arguing or implying that Monsanto "was in any way involved" in the fraud at IBT. (6 AA 6468, emphasis omitted; see *ante*, pp. 80-83; see also AOB 88-93.) We incorporate by reference that argument here. (See *ante*, pp. 80-83.)

3. Counsel violated the ruling barring references to *Johnson* and *Hardeman*.

Plaintiffs' counsel repeatedly violated a court order prohibiting any party from referring to the *Johnson* and *Hardeman* cases by name. (See AOB 98-99.) In the respondents' brief, Plaintiffs acknowledge that their references to the *Johnson* and *Hardeman* cases were "error" but suggest that this misconduct should not be considered on appeal because Monsanto did not raise it in the new trial motion. (RB/X-AOB 113.) Monsanto was not required to identify *any* instances of attorney misconduct in a post-trial motion, let alone this particular one, in order to preserve the misconduct issue for appeal. (See *Garcia*, *supra*, 204 Cal.App.4th at p. 148 ["Although it is common practice to urge that attorney misconduct is an error of law justifying the grant of a motion for new trial, a party is not required to move for a new trial before raising attorney misconduct as an issue on appeal"].)

Plaintiffs attempt to justify this misconduct by blaming Monsanto's experts for being "evasive about their prior testimony." (RB/X-AOB 113.) However, Plaintiffs' counsel easily could have referenced their prior testimony without identifying the *Johnson* and *Hardeman* cases by name, as the trial court instructed. (29 RT 4865:19-4866:21.) Counsel claim they "misunderstood the [c]ourt's previous instruction" (RB/X-AOB 113) but this claim is demonstrably false. At trial, the court expressly instructed counsel not to mention the *Johnson* or *Hardeman* cases by name. (29 RT 4865:19-4866:21 [trial court: "don't mention the *Johnson* case specifically. . . . [S]pecifically mentioning *Johnson* or

Hardeman would be inappropriate"].) Plaintiffs' counsel confirmed he understood that ruling. (29 RT 4866:9-10 ["I won't mention it by name, fine, Your Honor"].) Nonetheless, he later mentioned the *Hardeman* case by name, which the court reporter repeated. (30 RT 5106:8-12.) The trial court admonished counsel for this violation, noting that her instruction was "very clear" and she said it "more than once." (30 RT 5124:17-5127:6.)

C. Counsel made inflammatory statements about EPA and other regulatory agencies in closing argument.

In closing argument, Plaintiffs' counsel improperly argued that EPA and other regulatory agencies would have " 'blood on their hands' " if their views on glyphosate turned out to be wrong. (AOB 99-100.) The trial court sustained Monsanto's objection. (32 RT 5569:12-23.) Plaintiffs' counsel now claims he "was not implying that the jury would have blood on its hands" (RB/X-AOB 114) but the comments clearly suggest that if the jury reached the same conclusion as EPA and other regulators that have determined glyphosate is safe, the jury too would have "blood on their hands."

Plaintiffs add that even if their lawyer suggested that the jury would have "blood on their hands," that comment is not *prejudicial* error under *People v. Dunlop* (1947) 79 Cal.App.2d 207. (RB/X-AOB 114.) *Dunlop* does not assist Plaintiffs for several reasons. First, more recent cases have found similar "blood on their hands" arguments to be prejudicial. (See *United States v.*

Johnson (E.D.La. 2010) 713 F.Supp.2d 595, 634-639 [granting new penalty phase based in part on prosecutor's comment to jury that returning a verdict other than death would be like " 'wash[ing] the blood from [the defendant's] hands' "].) Second, in *Dunlop*, the defendant had forfeited his attorney misconduct argument because he did not object or request an admonition. (*Dunlop*, at pp. 211-212.) Thus, *Dunlop*'s no-prejudice determination was dicta because it was not necessary to the court's decision. (See *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 783-784.) Finally, unlike in *Dunlop*, counsel's statement here was only one of many improper comments he made throughout trial.

Moments after saying EPA would have "blood on their hands" (32 RT 5569), Plaintiffs' counsel continued to disparage EPA: "[F]rankly, EPA has a bad track record. . . . How many things have been cancer causers that it took a lawsuit to find the truth of?" (32 RT 5572:20-25). Plaintiffs do not even try to rebut Monsanto's argument that these comments were false, inflammatory, and improperly assumed facts not in evidence. (See RB/X-AOB 113-114; AOB 100-101.) Instead, Plaintiffs state that Monsanto failed to raise this point in its motion for new trial. (RB/X-AOB 114.) But Monsanto *did* raise this point in its new trial motion, even though it was not required to do so in order to preserve the issue for appeal. (See 6 AA 8118:14-16 ["Although the Court sustained Monsanto's objection [citation], counsel nevertheless proceeded with similarly improper argument: 'EPA has a bad track record . . . How many things have been cancer

causers that it took a lawsuit to find the truth of?' "]; *Garcia*, *supra*, 204 Cal.App.4th at p. 148.)

D. Counsel misstated the law in closing argument.

Plaintiffs' counsel misstated the law when he argued in closing that the law requires Monsanto alone to determine the content of the Roundup label. (See AOB 101; 32 RT 5532:1-5 [Plaintiffs' counsel: "[T]he obligation to warn rests with Monsanto, not California EPA, not the EPA. *What that label says and what it does not say is their choice and their choice alone*." (emphasis added)].) Plaintiffs respond that the trial court concluded these statements "were not false." (See RB/X-AOB 114.) But the trial court was wrong: Monsanto cannot add a cancer warning to the Roundup label without first obtaining EPA review and approval, as Plaintiffs' own expert conceded. (See AOB 22, 32-33, 41-51; *ante*, pp. 29-41; 22 RT 3617:13-22.) Indeed, "*manufacturers are not free to create labels in any manner they choose*; instead, the EPA approves the label only after careful and rigorous review of the product data and the draft label." (*Kanter v. Warner-Lambert Co.* (2002) 99 Cal.App.4th 780, 796, emphasis added.)

In the case of glyphosate-containing herbicides, EPA has for nearly 30 years consistently determined that labels should not bear a cancer warning. (See AOB 21-23, 31-33, 41, 44-45.) EPA recently confirmed that a cancer warning based on the presence of glyphosate would be misbranding under FIFRA and would not satisfy FIFRA's requirements. (EPA Aug. 2019 Letter, *supra*, at pp. 1-2.) EPA will not approve cancer warnings on the labels of

glyphosate-containing products, and has ordered that any such warnings on existing labels be removed. (*Id.* at p. 2.) Thus, it is beyond dispute that the content of Roundup's label is not Monsanto's "choice and their choice alone." (32 RT 5532:4-5.) Plaintiffs' counsel misstated the law when he told the jury otherwise, with the blessing of the trial court.

E. Counsel stoked the jury's fears by wearing gloves when handling and spraying a Roundup bottle that contained only water.

During trial, Plaintiffs' counsel put on gloves to handle and spray a Roundup bottle that contained only water, for no reason other than to scare the jury. (AOB 102-103.) Plaintiffs attempt to justify this demonstration in their brief, but their arguments lack merit.

First, Plaintiffs argue that "Monsanto's own internal documents recommend wearing gloves when handling Roundup." (RB/X-AOB 116.) They refer to a label recommendation that says, " 'Wear suitable protective gloves and face protection, face shield, when handling or applying the concentrate.' " (19 RT 3237:13-23.) But Plaintiffs' counsel was not "handling or applying the concentrate" at trial; he was holding and spraying a bottle full of water.

Second, counsel blames his expert for telling him to wear the gloves. (RB/X-AOB 116.) But expert misconduct does not justify attorney misconduct. The trial court struck the expert's improper comment, and counsel's improper response. (19 RT 3130:14-21.)

There is no evidence that an empty Roundup bottle, or a Roundup bottle filled with water, can be handled safely only by wearing gloves.

Third, Plaintiffs' counsel says he assured the jury that the bottle was "totally cleaned" so he probably didn't need to wear gloves. (RB/X-AOB 116.) These comments did not allay the concerns of the jury or the court. Shortly after he made the comments, a juror asked, "Why [did] the lawyer put[ ] on gloves if only water [was] in the Roundup container?" (6 AA 6480; see 23 RT 3805:1-7.) The trial court recognized that the juror was concerned about his own safety and told Plaintiffs' counsel: "When you came out with the gloves and everything, clearly that's a sign you need the gloves. You wouldn't put them on if you didn't think you needed them, or whatever reason you put them on." (23 RT 3804:20-24.) The court informed the jury that the bottle contained only water (23 RT 3805:13-14, 3806:14-16) and told Plaintiffs' counsel not to repeat this stunt in closing argument (31 RT 5423:7-20).

F. The misconduct was prejudicial.

1. Plaintiffs misstate the standards governing this court's prejudice analysis.

In the opening brief, Monsanto explained how the relevant factors establish that Monsanto was prejudiced by counsel's misconduct. (AOB 103-107.) In response, Plaintiffs repeatedly misstate the standards that govern the court's prejudice inquiry.

First, Plaintiffs claim that " 'the test for misconduct is whether the [attorney] has employed *deceptive or reprehensible* methods to persuade either the court or the jury.' " (RB/X-AOB 111.) Not so. This standard applies to *prosecutorial* misconduct in *criminal* cases, not attorney misconduct in civil cases.[15] Even if the standard applied here, counsel's misconduct in this case satisfies this test. (See AOB 93-107; *ante*, pp. 83-95.)

Second, Plaintiffs cite *People v. Lenix* (2008) 44 Cal.4th 602 for the proposition that this court must defer to the trial court "regarding the 'unspoken atmosphere of the trial court' because a reviewing court cannot easily ascertained [*sic*] from a 'cold reading' of the transcript." (RB/X-AOB 111.) But *Lenix* addressed the deference accorded a trial court ruling on whether a peremptory challenge in a criminal case is race-neutral under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (See *Lenix*, at pp. 626-627.) *Lenix* did *not* address whether a reviewing court should defer to a trial court's determination on the "general atmosphere" factor of the prejudice analysis in evaluating an attorney misconduct claim, as Plaintiffs suggest. (See *ibid.*; RB/X-AOB 111.) Such deference is

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[15] Plaintiffs substituted the word "attorney" for "prosecutor" in the sentence quoted above. (See RB/X-AOB 111, quoting *People v. Dennis* (1998) 17 Cal.4th 468, 522; see also RB/X-AOB 117, citing *People v. Poletti* (2015) 240 Cal.App.4th 1191, 1215-1216 (*Poletti*); *Poletti*, at p. 1217 [" '[C]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' "].)

not appropriate. (See *Martinez v. Dept. of Transportation* (2015) 238 Cal.App.4th 559, 569 (*Martinez*) [reversing judgment where "general atmosphere" factor weighed "heavily in favor of reversal" even though trial court denied new trial motion based on attorney misconduct].)

Third, Plaintiffs argue that " '[a] trial judge is in a better position than an appellate court to determine whether a verdict resulted . . . from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless . . . it is plainly wrong.' " (RB/X-AOB 71.) Again, this is not the proper standard. As explained in the opening brief, an appellate court *independently* reviews whether attorney misconduct resulted in prejudice. (AOB 103, citing *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872; see *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296, fn. 16 (*Bigler-Engler*) ["[T]he appropriate standard of review for . . . attorney misconduct is de novo, at least on the issue of prejudice. [Citation.] Although a number of earlier cases emphasized that appellate courts must defer to the trial court's finding of no prejudice [citations], the Supreme Court's more recent decision in *Decker* is determinative here and has been followed by other Courts of Appeal in recent cases."]; but see *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 794 (*Grimshaw*) [post-*Decker* case applying deferential standard], disapproved of on other grounds in *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 36-38 & fn. 6 (*Kim*).)

2. Plaintiffs' arguments do not defeat Monsanto's showing of actual prejudice.

Plaintiffs argue that the misconduct identified by Monsanto is not prejudicial because it "does not remotely approach the conduct of counsel in *Bigler-Engler* and *Poletti* found not to be prejudicial." (RB/X-AOB 116 ["unlike *Bigler-Engler*, the Pilliods[']] counsel did not 'insult[ ] opposition [*sic*] counsel' "], 117 [unlike "in *Bigler-Engler* and *Poletti*, [where] counsel were highly disrespectful to the court and opposing counsel . . . [h]ere, counsel was highly respectful of the trial court, opposing counsel, and Monsanto's experts"].) This argument is nonsensical and conflates the separate issues of whether misconduct occurred in the first place, and whether prejudice resulted. The fact that Plaintiffs' counsel did not engage in the same type of misconduct that has been deemed harmless in other cases is irrelevant to the severity of the misconduct they did commit in this case.

Plaintiffs next argue there is no prejudice because the trial court sustained some of Monsanto's objections and " '[g]enerally, there is no prejudice where an objection is made and sustained.' " (RB/X-AOB 117, quoting *People v. Trinh* (2014) 59 Cal.4th 216, 249.) Again, Plaintiffs invoke an inapplicable legal principle. When a trial court sustains an objection to a question *seeking inadmissible testimony*, there is often no prejudice because the act of sustaining the objection prevented the jury from hearing the inadmissible testimony. (See *Trinh*, at p. 249.) This principle does not apply here because all of the misconduct challenged in this appeal occurred *in the presence of the jury*.

Moreover, the trial court overruled or ignored objections to some of the most egregious misconduct alleged here. (See AOB 94 [trial court overruled objections to counsel's comments describing case as a " 'historic fight against Monsanto' " and suggesting that EPA "could change [its glyphosate classification] after this trial" (emphasis omitted)], 96-97; 11 RT 1430:14-18, 1437:19-1440:6; 32 RT 5612:16-22, 5614:7-10, 5616:14-16 [trial court overruled or disregarded objections to counsel's comments that glyphosate is "ubiquitous," "persuasive," "in the food" and "all over the place"]; AOB 101 [trial court overruled objection to counsel's statement that, " 'What that label says and what it does not say is their choice and their choice alone' " (emphasis omitted)].)

Plaintiffs also argue there was no prejudice because the misconduct fills less than four pages of the reporter's transcript. (RB/X-AOB 117.) Even if their page count is accurate, the argument fails. Courts do not count transcript pages to determine whether misconduct is prejudicial. Indeed, "a single instance of misconduct can justify reversal." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803 (*Cassim*); see *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 551-555 (*Hoffman*) [reversing judgment based on one comment that a verdict for the plaintiff would force the defendant into a home for the indigent]; *Brown v. Pacific Electric Ry. Co.* (1947) 79 Cal.App.2d 613, 614-619 [reversing judgment based on one improper question asking whether the defendant settled with a third party].) What is relevant to the prejudice analysis is the nature and severity of the misconduct, not how many transcript pages it fills.

Plaintiffs also argue that the verdict was not the product of passion or prejudice because "[a]n inflamed jury would not have taken two days to deliberate." (RB/X-AOB 16.) But "[t]he length of time that a jury deliberates has no bearing on nor does it directly correlate to the strength or correctness of its conclusions or the validity of its verdict." (75B Am.Jur.2d (2018) Trial, § 1352; see *Forrestt v. Koch* (Conn.App.Ct. 2010) 996 A.2d 1236, 1242 ["the time a jury spends in deliberation cannot form the basis of a claim that its verdict was affected by improper influences"].) Indeed, in *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525 (*Buell-Wilson*), certiorari granted, judgment vacated on other grounds *sub nom. Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931 [127 S.Ct. 2250, 167 L.Ed.2d 1087], the Court of Appeal concluded that a jury's award of noneconomic damages was the product of passion or prejudice and there, the jury deliberated for five days—three days longer than the jury deliberated here. (*Id.* at pp. 539, 547.)[16] Moreover, if an award of $2 billion in punitive damages is not evidence of passion and prejudice, it is hard to imagine what would be.

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[16] Plaintiffs' reliance on *People v. Jurado* (2006) 38 Cal.4th 72 is misplaced. (RB/X-AOB 16.) There, the Court concluded that the jury was not inflamed by victim-impact testimony in the penalty phase of a criminal trial, in part because "the jury deliberated *on penalty* for five days before reaching its verdict." (*Jurado*, at p. 134, emphasis added.) Here, by contrast, the jury spent only two days deliberating *on all issues*—liability, causation, compensatory and punitive damages—and it is impossible to know how much time the jurors devoted to each issue or the extent to which their decision-making was tainted by passion and prejudice based solely on the length of their deliberations.

Plaintiffs next argue that the law presumes the jury followed the trial court's instructions to ignore those questions to which an objection was sustained and to disregard comments that were stricken by the court. (RB/X-AOB 118.) But as discussed above, the jury was *not* instructed to disregard some of the most egregious misconduct because the trial court overruled or ignored Monsanto's objections to that misconduct. (See *ante*, p. 99.)

Plaintiffs also argue that any prejudice was cured by other standard jury instructions, such as "what 'the attorneys say during trial is not evidence' " and " '[t]he attorneys' questions are not evidence.' " (RB/X-AOB 118.) Plaintiffs fail to explain how these standard instructions, which are given in every civil case, cured any prejudice from the specific misconduct alleged here. (See *Hoffman*, *supra*, 65 Cal.2d at p. 555 ["the effect of an admonition . . . depends upon the facts of each case"]; *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 298 [recognizing that these standard instructions "may not be adequate to cure the prejudice caused by attorney misconduct in all cases"]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1207 ["the standard instruction that argument of the attorneys is not evidence [had] no palliative force" against the misconduct alleged there].) While courts presume that juries follow instructions "[a]bsent some contrary indication in the record," the record *in this case,* including the jury's outrageous $2.055 *billion* award, indicates that the jury did not follow these instructions. (See *Cassim*, *supra*, 33 Cal.4th at p. 803; *Kenworthy v. State* (1965) 236 Cal.App.2d 378, 401 ["the grossly excessive

verdict . . . argues forcefully a verdict tainted by bias and resulting from prejudice"]).

Finally, in its opening brief, Monsanto explained that the *cumulative effect* of counsel's misconduct requires reversal. (AOB 104, citing *Martinez*, *supra*, 238 Cal.App.4th at p. 570; see *Simmons v. So. Pac. Transp. Co.* (1976) 62 Cal.App.3d 341, 355 [cumulative effect of attorney misconduct "made it impossible for [the defendant] to have a fair trial"].) Plaintiffs do not address this point in their respondents' brief.

In sum, the court should reverse the judgment and remand the case for a new trial because the jury's verdict is the product of prejudicial attorney misconduct.

VI. The punitive damages award should be stricken because there was no evidence, much less clear and convincing evidence, that Monsanto acted with malice or oppression.

It is undisputed that at the time Plaintiffs used Roundup, the consensus among regulatory agencies worldwide was (and still is) that Roundup does not pose a risk of cancer to humans at real-world exposure levels. (See *National Association of Wheat Growers*, *supra*, 2020 WL 3412732, at p. *9 ["every government regulator of which the court is aware, with the exception of the IARC, has found that there was no or insufficient evidence that glyphosate causes cancer"].) The fact that Monsanto agreed with and followed that worldwide consensus by not warning of a purported cancer risk provides no evidence, much less clear and

convincing evidence, of malice or oppression. The punitive damages award should therefore be stricken.

A. California law requires clear and convincing evidence that Monsanto had actual knowledge of a probability that Roundup would cause cancer.

California law is clear: to recover punitive damages, a plaintiff must present clear and convincing evidence that the defendant was "aware" of any "*probable* dangerous consequences of [its] conduct, and that [it] willfully and deliberately failed to avoid those consequences." (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 (*Hoch*), emphasis added.) In other words, punitive damages may not be awarded in the absence of a defendant's conscious disregard of a known risk, which requires actual knowledge of that risk. (*Echeverria*, *supra*, 37 Cal.App.5th at p. 332; *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159 (*Butte Fire Cases*).) Plaintiffs' efforts to dilute that standard should be rejected.

Plaintiffs begin their punitive damages discussion by quoting trial court decisions in other Roundup cases. (See RB/X-AOB 119.) But those decisions—both of which are on appeal—lack persuasive force because neither considered *Echeverria*'s holding that a defendant cannot be held liable for punitive damages where, as here, it "refused to draw a causal connection between [the use of its product] and . . . cancer before experts in the relevant fields have done so." (*Echeverria*, *supra*, 37

Cal.App.5th at p. 335.)[17] Indeed, the trial courts in both *Johnson* and *Hardeman* made factual findings concerning Monsanto's lack of knowledge of a known risk. (See Monsanto's MJN, exh. E, p. 52 [order on post-trial motions in *Johnson*: "Before and after IARC's classification . . . , regulatory and public health agencies worldwide have reviewed and rejected claims about the carcinogenicity of [glyphosate-based herbicides]."]; *In re Roundup Products Liability Litigation* (N.D.Cal. 2019) 385 F.Supp.3d 1042, 1047 [plaintiff did not "present any evidence that Monsanto was in fact aware that glyphosate caused cancer but concealed it"].) Under *Echeverria*, these findings should have precluded liability for punitive damages.

Plaintiffs next acknowledge the heavy burden of establishing the basis for a punitive damages award—that "the defendant is aware of the probable dangerous consequences of his or her conduct and . . . willfully fails to avoid such consequences" (RB 121)—but then quickly abandon that standard. Specifically, Plaintiffs argue that a failure to warn—standing alone—" 'may be sufficient to show malice,' " and that selling a product that " 'might' " cause injury is " ' 'highly reprehensible.' ' " (RB/X-AOB 122, emphasis omitted.) Plaintiffs are wrong. They effectively concede the lack of clear and convincing evidence of despicable conduct by advocating for a standard that would permit punitive

[17] The orders denying Monsanto's motions for summary judgment and for JNOV in *Johnson* both pre-date the *Echeverria* decision, which was issued in July 2019. Judge Chhabria's order on the posttrial motions in *Hardeman* was issued six days after *Echeverria* but does not address that decision in any way.

damages in every failure-to-warn case, wholly divorced from the prevailing views of the scientific community and the actual knowledge of the defendant as to the likelihood of the product's dangers. Punitive damages can be awarded for a conscious disregard of probable harm, not possible harm. (See *Hoch*, *supra*, 24 Cal.App.4th at p. 61.) To claim otherwise, Plaintiffs ignore decisions explaining what it means for a defendant to be aware of the probable dangerous consequences of its conduct: "Put another way, the defendant must 'have *actual knowledge* of the risk of harm it is creating and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm.' " (*Butte Fire Cases*, *supra*, 24 Cal.App.5th at p. 1159.)

Relying on two decisions from other jurisdictions, Plaintiffs also argue that "[g]hostwriting" "supports an award of punitive damages." (RB/X-AOB 122.) But as explained in Monsanto's opening brief and unrefuted by Plaintiffs, Monsanto's contributions to the papers at issue were either recognized in the "acknowledgments" section or did not rise to a level warranting authorship or recognition. (AOB 60.) Moreover, there is no evidence that the so-called " 'ghostwritten' " papers were scientifically inaccurate or that the articles in any way compromised or influenced the decisions of regulatory agencies that did their own independent reviews of the science. (*Ibid.*)

Plaintiffs then argue that "[f]ailing to test a product supports punitive damages." (RB/X-AOB 123.) This assertion is both factually and legally flawed. First, the record belies Plaintiffs' suggestion that Monsanto failed to do sufficient testing. Monsanto

conducted all of the tests necessary for EPA to repeatedly approve Roundup for use. (See AOB 31-32.) Second, none of the cases cited by Plaintiffs are remotely similar to this case:

- In *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 561 (*Bullock*), the plaintiff proved that the tobacco company "knew that the consensus among scientific and medical professionals was that cigarette smoking caused lung cancer" and "[d]espite that knowledge . . . falsely asserted that there was no consensus in the scientific and medical community concerning the adverse health effects of smoking" and "assured its customers that if it learned that any cigarette ingredient caused cancer it would remove that ingredient." That case stands in stark contrast to this case, where regulators worldwide conclude to this day that Roundup is not a carcinogen and continue to approve Monsanto's sale of Roundup without a cancer warning.

- In *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1280, 1281, the plaintiff alleged he developed mesothelioma as a result of his exposures to asbestos-containing dust released from the defendant's products. There was evidence that during the time the plaintiff used those products, "it was widely accepted that asbestos dust was carcinogenic" and the defendant was aware of that danger. (*Id.* at pp. 1300-1302.) Again, in this case, there was—and is—no such consensus about glyphosate.

- In *Romo v. Ford Motor Company* (2003) 113 Cal.App.4th 738, called into doubt by *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1205-1206, an automobile manufacturer ignored its own safety standards by selling a car with a roof made

largely out of fiberglass and failing to install a steel roll-bar. (*Id.* at pp. 744, 755.) There is no such evidence here.

- In *In re Prempro Products Liability Litigation* (8th Cir. 2009) 586 F.3d 547, 557-558, the defendant "was well aware of the FDA's position" that there was insufficient data establishing the safety of the drug. Here, by contrast, EPA has consistently confirmed that Roundup is not a carcinogen.

In short, California law does not permit Plaintiffs to recover punitive damages unless they can show that Monsanto had actual knowledge of a probability that Roundup would cause cancer. Because Plaintiffs failed to present evidence that Monsanto had such knowledge, they are not entitled to recover punitive damages under California law.

B. Plaintiffs can point to no evidence that Monsanto had actual knowledge of a probability that Roundup would cause cancer.

None of the 11 purported examples of misconduct cited by Plaintiffs support their claim for punitive damages. (RB/X-AOB 124-125.) They do not, individually or collectively, rise to the level of despicable conduct necessary to establish a basis for punitive damages. And the allegations of despicable conduct untethered to evidence of Monsanto's knowledge of probable dangerous consequences of Roundup cannot, as a matter of law, support an award of punitive damages given the backdrop of the worldwide regulatory consensus finding no such probable dangers. (See AOB 115.)

For example, some of the alleged instances of misconduct involve Monsanto's alleged reactions to IARC's decision, or other conduct that occurred after Plaintiffs were diagnosed with cancer. But as the court explained in *Echeverria*, "[s]cientific evidence developed post-injury [does] not create a reasonable inference that [the defendant] was acting with malice, pre-injury, in failing to warn of probable dangerous consequences of the product." (*Echeverria*, *supra*, 37 Cal.App.5th at p. 334.) Such "post-injury" conduct "fall[s] short of establishing clear and convincing evidence of malice." (*Ibid.*; see *id.* at p. 333 [mounting defense against studies suggesting risk of cancer not a basis for punitive damages where risk of cancer not universally accepted in scientific or medical community].)

Many of the other instances involve Monsanto's purported attempts to influence regulatory agencies. But again, similar evidence of a "strategy" to "influence or persuade" regulatory agencies was offered in *Echeverria*. (See *Echeverria*, *supra*, 37 Cal.App.5th at pp. 300, 333.) Nevertheless, the Court of Appeal barred punitive damages because there was no evidence that the defendant acted despicably in not providing a warning given the absence of a consensus in the scientific community as to whether the defendant's product causes cancer. (*Id.* at pp. 333-335.) Defending a product that the defendant believes is safe, with substantial scientific and regulatory authority rendering that belief reasonable, is not evidence of despicable conduct. (See *id.* at pp. 333-335.)

Here, even more than in *Echeverria*, the evidence is undisputed that Monsanto had none of the requisite knowledge that could lead a jury to find clear and convincing evidence of malice or oppression. EPA has approved the sale of glyphosate without a cancer warning since 1974 and repeatedly determined that glyphosate does not cause cancer, and that view is shared by regulators worldwide, including regulators for the European Union, Canada, Australia, New Zealand, and Japan. (See AOB 21-23; see also *National Association of Wheat Growers*, *supra*, 2020 WL 3412732, at pp. *2, *8-*9.)

This is not a case where there was simply a disagreement among experts as to the purported dangers of a product. This is a case where there was a prevailing view in the scientific and regulatory community that Roundup posed no real-world health risks, and the only evidence to the contrary was the post-hoc opinions of paid experts, relying on other opinions formed after Plaintiffs were diagnosed with cancer. Even Plaintiffs' expert Dr. Nabhan conceded that at the time of trial, "[r]easonable people can disagree" on whether glyphosate causes NHL. (25 RT 4072:20-4073:2; see also 6 AA 8271:10.) Plaintiffs nonetheless argue that the jury could have simply disregarded the undisputed, prevailing scientific view that glyphosate-based herbicides do not pose a real-world cancer risk, but cite no decision supporting that novel proposition.

Plaintiffs further argue that the punitive damages question cannot come down to Monsanto's actual knowledge because, according to one unpublished trial court opinion from Louisiana,

" '[i]f the sole opinion(s) of one biased actor within the complex system can govern and control the nature, timing, and dissemination of information, and warning, the system breaks down.' " (RB/X-AOB 126-127, quoting *In re Actos (Pioglitazone) Products Liability Litigation* (W.D.La., Oct. 27, 2014, No. 6:11-md-2299) 2014 WL 5461859, at p. *47 (*Actos*).) But it is Plaintiffs, not Monsanto, who ask this court to accept the post-hoc opinions of their own paid experts over the consensus of regulatory agencies throughout the world. Whatever the law is in Louisiana, a California Court of Appeal has held that punitive damages are unavailable where a putative link to cancer "remains under scientific investigation" by regulators. (*Echeverria*, *supra*, 37 Cal.App.5th at p. 335.) Punitive damages plainly cannot be allowed here, where Monsanto's knowledge of the scientific evidence was confirmed by the studied opinions of the regulatory agencies tasked with determining the potential hazards of glyphosate.

Thus, even if Plaintiffs were correct that punitive damages could be awarded based on something less than actual knowledge of probable harm (they are not), there would still be no basis for an award of punitive damages because there is no evidence that Monsanto acted with malice or oppression. Worldwide regulatory approval of Monsanto's sale of Roundup without a cancer warning is simply incompatible with a finding that Monsanto acted despicably. Monsanto's reliance on the scientific determinations and approvals made by regulators worldwide weighs against any finding that there is clear and convincing evidence of malice or

oppression. (See *Echeverria*, *supra*, 37 Cal.App.5th at p. 335 [while a defendant's "compliance with, or actions consistent with, governmental regulations or determinations about a product do not necessarily eviscerate a claim for punitive damages," no reasonable jury could conclude that the defendant engaged in " 'despicable conduct' " by failing "to draw a causal connection between" the use of the defendant's product and cancer "before experts in the relevant fields ha[d] done so"]; see also *Kim*, *supra*, 6 Cal.5th at pp. 36-38 & fn. 6 [disapproving "older" Court of Appeal cases such as *Grimshaw*, *supra*, 119 Cal.App.3d 757, cited by Plaintiffs (RB/X-AOB 122), and holding that a defendant's compliance with industry standards is probative of the appropriateness of its conduct]; *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 548; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 579 [116 S.Ct. 1589, 134 L.Ed.2d 809] ["BMW could reasonably rely on state disclosure statutes for guidance" in determining "the appropriate line between presumptively minor damage [to vehicles] and damage requiring disclosure to purchasers"]; *Nader v. Allegheny Airlines, Inc.* (D.C. Cir. 1980) 626 F.2d 1031, 1035 [reversing punitive damage award related to an airline's overbooking practice because the governing federal agency "had publicly and formally expressed its approval of the practice"]; *Stone Man, Inc. v. Green* (Ga. 1993) 435 S.E.2d 205, 206 [defendant's "compliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages"]; Prosser & Keeton, Torts (5th ed. 1984) § 36,

p. 233, fn. 41 ["In most contexts . . . compliance with a statutory standard should bar liability for punitive damages"].)

Monsanto's reliance on the views of regulators worldwide is particularly incompatible with a finding of malice or oppression here because Monsanto did not merely "comply" with regulations; rather, regulators throughout the world have expressly and repeatedly reviewed the body of scientific literature and concluded there is no evidence of the exact risk Plaintiffs allege Monsanto should have warned of. Thus, the evidence does not just show that Monsanto complied with regulations, but that these expert regulators were expressing the prevailing scientific view of the alleged dangers of Roundup. And here, Monsanto simply could not change the label to warn of this alleged risk without the prior approval of EPA, which had repeatedly determined that the risk did not exist. (See *ante*, pp. 23-24, 29-41.)

Plaintiffs finally argue that *Echeverria* involved a substance that IARC designated as having a " 'possible association' " with cancer, instead of the "probable association" designation in this case. (RB/X-AOB 125.) But nothing in *Echeverria* turned on that distinction. The key question was whether there was uncertainty in the scientific community about carcinogenicity, not the precise ranking that IARC had assigned to the substance at issue. (See *Echeverria*, *supra*, 37 Cal.App.5th at p. 333 [noting that "it [was] not universally accepted in the scientific or medical community" that talc was carcinogenic].) And on that question, Monsanto's position is stronger than the defendant in *Echeverria* because the

consensus at the time of Plaintiffs' exposures supported the view that glyphosate was not carcinogenic.

C. The clear and convincing evidence requirement makes the applicable standard of review especially rigorous.

Plaintiffs argue the court should review their punitive damages award using the same substantial evidence standard of review that governs their warning and design claims, even though they were required to prove their punitive damages claims by clear and convincing evidence. (RB/X-AOB 120-121.) As explained in Monsanto's opening brief, the issue of which standard governs is now pending before the California Supreme Court. (AOB 110, fn. 20.)

The better reasoned position is that the clear and convincing evidence standard heightens the appellate standard of review, and the appropriate question on appeal should be " 'whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*.' " (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1239.) The reasons for requiring punitive damages to be proven by clear and convincing evidence are thwarted if, on appellate review, the "substantial evidence" test is not adjusted to take into account this heightened evidentiary requirement. Under the proper and stricter review standard, an appellate court should review the whole record to determine whether a reasonable jury could find by clear and convincing evidence that the defendant was

guilty of malice, oppression, or fraud. (See, e.g., *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 482 ["[T]he trial court properly viewed the evidence presented by [the plaintiff] with that higher burden in mind. In our review of the trial court's order granting the nonsuit, we can do no differently."(footnote omitted)]; see also *Butte Fire Cases*, *supra*, 24 Cal.App.5th at p. 1159; *T.J.*, at pp. 1238-1240; *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 762; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971; *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1048-1049; *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 891-892; *Hoch*, *supra*, 24 Cal.App.4th at pp. 59-60.)

In any event, under either standard, Monsanto did not engage in " 'despicable conduct' " while having " '*actual knowledge* of the risk of harm it [was] creating and, in the face of that knowledge, fail to take steps it [knew would] reduce or eliminate the risk of harm.' " (*Butte Fire Cases*, *supra*, 24 Cal.App.5th at p. 1159.) There was an undisputed prevailing scientific view favoring Monsanto's position and the most Plaintiffs could be said to establish is a reasonable disagreement among experts, with regulatory agencies around the world sharing Monsanto's view of the science. As a result, there is no basis for any award of punitive damages as a matter of law.

VII. The court should grant a new trial or reduce the punitive damages award because that award is constitutionally excessive and violates due process.

A. The punitive damages award is constitutionally excessive; the constitutional maximum is a one-to-one ratio between punitive and compensatory damages.

Plaintiffs do not seriously dispute that the jury's award of punitive damages—one *billion* dollars each for both Mr. and Mrs. Pilliod—was excessive under the United States Constitution. (See RB/X-AOB 147 [conceding that a lower ratio of punitive to compensatory damages "would be more in line with legal precedent"].) But the evidence presented to the jury does not support the trial court's decision to reduce the punitive damages only to a four-to-one ratio with the compensatory damages. Indeed, if the court concludes upon review of the entire record that a reasonable jury could find malice by clear and convincing evidence, the court should also conclude that federal due process requires that the punitive damages be reduced to an amount equal to the compensatory damages, as remitted by the trial court.

The parties agree that the three "guideposts" for evaluating the constitutionality of a punitive damages award are the degree of reprehensibility of the defendant's conduct, the ratio of punitive to compensatory damages, and the type of civil or criminal penalties that could be imposed for comparable misconduct. (See AOB 118; RB/X-AOB 143.) A proper consideration of these

guideposts compels the conclusion that the trial court's four-to-one ratio of punitive to compensatory damages is grossly excessive and that due process allows no more than a one-to-one ratio between punitive and compensatory damages in this case.

First, Monsanto's conduct was not reprehensible. As discussed above, there is no evidence that Monsanto knew or believed that Roundup or glyphosate was carcinogenic. There is also no evidence that Monsanto used " 'trickery' " or " 'deceit' " in working with scientists to author literature or to respond to an IARC determination with which Monsanto—and most regulators and scientists worldwide—disagree. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 713 (*Roby*).) Further, there is no evidence that Monsanto hid any scientific study from regulators or the scientific community. Indeed, Plaintiffs' general causation expert Dr. Portier admitted that before 2015, he did not believe glyphosate was carcinogenic (13 RT 1902:2-9), and Plaintiffs' specific causation expert Dr. Nabhan acknowledged that, even as of the time of trial, whether glyphosate is a carcinogen is a question about which reasonable people can disagree (13 RT 1902:6-9; 25 RT 4072:20-4073:2).

In short, this is not a case involving reprehensible conduct or reckless indifference to public health: it is, at most, a case about disputed science. The evidence shows that Monsanto advocated a view of the scientific evidence on glyphosate that it believed in good faith and that was supported by the scientific determinations of regulators worldwide who for decades have concluded that glyphosate does not cause cancer. (See *National Association of*

Wheat Growers, *supra*, 2020 WL 3412732, at pp. *2, *8-*9.) That some scientists may disagree with this conclusion does not render Monsanto's conduct reprehensible. (See *Echeverria*, *supra*, 37 Cal.App.5th at pp. 333-335 [evidence that defendant advocated its view of the science and opposed contrary views amidst a genuine dispute in the scientific community as to whether defendant's product was carcinogenic does not establish clear and convincing evidence of malice]; *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1316-1317 [punitive damages were inappropriate where there was a genuine dispute in the scientific community about the benefit of the proposed safety measure and there were no definitive conclusions about its effectiveness].)

Despite the evidence, Plaintiffs claim that Monsanto engaged in conduct that was worse than two pharmaceutical companies that were "aware of the possibility [their product] posed an increased risk of bladder cancer" and "ha[d] information that drove other competitors . . . out of the . . . market" yet still conspired to sell the product without any cancer warning after withholding information from the FDA. (See *Actos*, *supra*, 2014 WL 5461859, at p. *24; RB/X-AOB 143.) But the evidence here shows nothing similar. There is no evidence that, despite a worldwide regulatory consensus that glyphosate is not carcinogenic, Monsanto possessed actual knowledge that Roundup is carcinogenic and sought to conceal that knowledge from the public or EPA. Nor is there credible evidence that other pesticide manufacturers have stopped selling glyphosate-based herbicides due to such a belief. Indeed, with full knowledge of the scientific evidence, including the IARC

Monograph, EPA just this year re-affirmed its determination that glyphosate is not carcinogenic. (See EPA, Jan. 2020 Glyphosate Interim Registration Review Decision, *supra*, at p. 10.)

Second, Plaintiffs fail to meaningfully distinguish controlling authorities that demonstrate why a one-to-one ratio is the constitutional maximum here. Because noneconomic damages "may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent," due process requires ratios perhaps no greater than one-to-one between "punitive damages and a substantial compensatory award for [noneconomic damages]." (*Simon v. Sao Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1189 (*Simon*); see *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425 (*State Farm*) ["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"].)

In *Roby*, *supra*, 47 Cal.4th at pages 719-720, for example, the California Supreme Court held that a one-to-one ratio between punitive and compensatory damages was "the maximum punitive damages . . . in light of the constraints imposed by the federal Constitution," where there is a "relatively low degree of reprehensibility" and a "substantial award of noneconomic damages." In *Roby*, the $1.9 million compensatory award consisted of $1.3 million in noneconomic damages, which "may have reflected the jury's indignation at [defendant's] conduct, thus including a punitive component." (*Id.* at p. 718.) The noneconomic damages in *Roby* comprised about 68 percent of the total

compensatory award. Here, Mr. Pilliod's $6.1 million noneconomic award (as remitted by the trial court) comprises more than 99 percent of his total compensatory award, and Mrs. Pilliod's $11 million noneconomic award (as remitted) comprises about 98 percent of her total compensatory award. (See 6 AA 8277-8278.) As such, this case presents an even more compelling basis than *Roby* for concluding that the constitutional maximum is a one-to-one ratio between punitive and compensatory damages.

The cases cited by Plaintiffs to support a higher ratio are easily distinguishable because they involve relatively small compensatory awards and highly reprehensible conduct. (See RB/X-AOB 148-149.) Tobacco companies are defendants in four of the seven cases cited by Plaintiffs, and in each of those cases, the compensatory award was smaller—often substantially smaller—than the compensatory awards here. (See *Bullock*, *supra*, 198 Cal.App.4th at p. 566 [$850,000 compensatory award]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1650 (*Boeken*) [$5.5 million compensatory award]; *Williams v. Philip Morris Inc.* (Or. 2006) 127 P.3d 1165, 1171 (*Williams I*) [$521,485 compensatory award], judg. vacated on other grounds in *Philip Morris USA v. Williams* (2007) 549 U.S. 346 [127 S.Ct. 1057, 166 L.Ed.2d 940]; *Burton v. R.J. Reynolds Tobacco Co.* (D.Kan. 2002) 205 F.Supp.2d 1253, 1255, 1263-1264 [$196,416 compensatory award], affd. in part & revd. in part on other grounds (10th Cir. 2005) 397 F.3d 906.)

Moreover, in the tobacco cases, the evidence showed that the defendants knew about but disregarded a scientific consensus that

tobacco causes cancer. The cases generally "involved the same defendant, same theories of recovery and much of the same conduct" that reviewing courts consistently find highly reprehensible. (*Bullock*, *supra*, 198 Cal.App.4th at p. 567.) Plaintiffs in those cases proved that the tobacco company "knew that the consensus among scientific and medical professionals was that cigarette smoking caused lung cancer" and "[d]espite that knowledge . . . falsely asserted that there was no consensus in the scientific and medical community concerning the adverse health effects of smoking" and "assured its customers that if it learned that any cigarette ingredient caused cancer it would remove that ingredient." (*Id.* at p. 561; accord, *Boeken*, *supra*, 127 Cal.App.4th at p. 1692; *Williams I*, *supra*, 127 P.3d at pp. 1177-1178; *Schwarz v. Philip Morris USA, Inc.* (Or.Ct.App. 2015) 355 P.3d 931, 940-941.) The tobacco cases stand in stark contrast to the facts of this case, where regulators worldwide conclude to this day that Roundup is not a carcinogen and continue to approve Monsanto's sale of Roundup without a cancer warning. (See *Echeverria*, *supra*, 37 Cal.App.5th at pp. 333-335.)

The other cases Plaintiffs cite are also inapposite. (See RB/X-AOB 148-149.) *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368, involved a comparatively small $35,000 compensatory award. *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 222-223, upheld a six-to-one ratio against an employer who ignored sexual harassment by its store director, and involved a $75,000 compensatory award. *Yung v. Grant Thornton, LLP* (Ky. 2018) 563 S.W.3d 22, 30, 71, affirmed an award of $20

million in compensatory damages and $80 million in punitive damages because the company continued marketing a tax shelter product to customers even though it "knew very early on [the product] would likely implode with the I.R.S., causing serious financial and business consequences."

Finally, Plaintiffs' selective citation to outlier mega-verdicts in dissimilar cases outside California does not establish that Plaintiffs' $69 million punitive awards are reasonable or constitutional.

Plaintiffs cite *Actos* for the proposition that a jury's $9 billion punitive award against two defendants was reasonable. (RB/X-AOB 143, citing *Actos*, *supra*, 2014 WL 5461859, at pp. *33-*35, *55.) But in *Actos*, the trial court found that the punitive award was excessive under the due process clause and reduced the $6 billion and $3 billion awards to $27.7 million and $9.2 million. (*Actos*, at p. *55.) Further, unlike here, *Actos* did not involve a defendant that acted in accordance with the repeated findings of regulators the world over.

Plaintiffs also rely on *Motorola Credit Corp. v. Uzan* (2d Cir. 2007) 509 F.3d 74 and *In re New Orleans Train Car Leakage Fire* (La.Ct.App. 2001) 795 So.2d 364, 388, both of which are distinguishable. (See RB/X-AOB 142-143.) *Motorola* involved a $1 billion punitive award against six defendants, jointly and severally, and a degree of reprehensibility absent here—an "enormous" fraud, "both in amount and in the defendants' brazen resort to all kinds of reprehensible misconduct to achieve their ends," including numerous misstatements to the court. (*Motorola*,

supra, 509 F.3d at p. 81.) And the $850 million punitive damages verdict in *New Orleans* was awarded in a class action under a Louisiana statute that authorizes punitive damages for " 'gross negligence' " and " 'constructive knowledge' " of a hazard (*New Orleans*, at pp. 374, 377-379), neither of which warrants punitive damages in California (see *Butte Fire Cases*, *supra*, 24 Cal.App.5th at p. 1159, 1170).

Third, Plaintiffs correctly concede that the third guidepost is not applicable in this case. (RB/X-AOB 147; see also AOB 119-120.) Because it is not misconduct to sell Roundup without a warning when manufacturers, scientists, and regulators all agree it is safe for public use, it is impossible to compare the punitive damages award to civil or criminal penalties, further highlighting why punitive damages are not appropriate here.

B. The punitive damages award violates due process by punishing Monsanto multiple times for the same conduct.

Plaintiffs ignore the fact that their suit is merely one of thousands of pending cases alleging that Roundup causes NHL. As explained in Monsanto's opening brief, a court reviewing the constitutionality of a due process award must consider the implications of affirming awards of this size in all of them. (AOB 120.) Setting a precedent that potentially thousands of litigants are each entitled to nearly $70 million in punitive damages based on the same conduct would result in a series of awards so grossly excessive that they would threaten the solvency of the company.

Such a result would "further[ ] no legitimate purpose and constitute[ ] an arbitrary deprivation of property." (*State Farm*, *supra*, 538 U.S. at p. 417.)

Plaintiffs' response, focusing on Monsanto's net worth in seeking to increase the punitive damages award, is improper and lacks context.[18] Moreover, while a defendant's financial condition is a factor that may be considered in assessing punitive damages, it "cannot justify an otherwise unconstitutional punitive damages award." (*State Farm*, *supra*, 538 U.S. at p. 427.)

Finally, Monsanto has not waived its argument that punitive damages violate due process here by punishing Monsanto

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[18] Plaintiffs assert that "[c]ourts have held that a punitive damage award amounting to 23% of net worth strikes an appropriate balance of deterrence and financial devastation." (RB/X-AOB 142, citing *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1540.) In *Vallbona*, the court approved a punitive award of $200,000 that was three times greater than the compensatory award. (*Ibid.*) The court did not hold that 23 percent of net worth was a bright line rule, but merely found that $200,000 was not excessive in light of the ratio to compensatory damages and the reprehensibility of the defendant's conduct in intentionally defrauding persons seeking medical treatment. No similar factors are present in this case.

Plaintiffs also argue that an award that is less than 3.2 percent of a defendant's net worth would be a legally impermissible "slap on the wrist." (RB/X-AOB 142, citing *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967, called into doubt on another ground in *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724, fn. 7.) In *Century Surety*, the court merely declined to reduce a punitive award that was 3.2 percent of the defendant's net worth. (*Century Surety*, at p. 967.) Again, context is key, as the court also observed that the defendant's conduct was "moderately high" on the reprehensibility scale and that the punitive-to-compensatory ratio was less than four-to-one. (*Id.* at p. 965.)

multiple times for the same conduct. (See RB/X-AOB 149-150.) *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661, erroneously held that evidence of punitive damages awarded in other cases must first be presented to the jury. Like other due process challenges to punitive damages awards, the question whether punitive damages violate due process by punishing a defendant multiple times for the same conduct may be resolved by an appellate court in the first instance. (See AOB 121, fn. 21.)

CONCLUSION

The court should reverse with directions to enter judgment for Monsanto because all of Plaintiffs' theories of liability are preempted by federal law and because there is no substantial evidence to support any liability theory or finding of causation. Alternatively, the court should reverse and remand for a new trial on all issues because the trial court abused its discretion by denying severance, by admitting irrelevant and prejudicial evidence, and because Plaintiffs' counsel engaged in pervasive and prejudicial misconduct throughout trial. Finally, the court should strike the punitive damages award because there is no evidence to support the jury's finding of malice or oppression and because Monsanto has already been punished multiple times for the same alleged misconduct. Alternatively, the court should grant a new trial or reduce the punitive damages award to an amount equivalent to the compensatory damages award, which must be the constitutional maximum.

CROSS-RESPONDENT'S BRIEF

INTRODUCTION

The trial court did not abuse its discretion by reducing the noneconomic damages awarded to Plaintiffs, and Plaintiffs' argument to the contrary is based entirely on a flawed account of the trial court's decision. The trial court did not, as Plaintiffs suggest, create a "preference assumption" by which individuals who are granted a preference trial are automatically entitled to less damages. The court instead correctly concluded that the jury's noneconomic damage verdicts—which awarded the same per annum amount for past and future damages even though both Plaintiffs were in remission at the time of trial—were not supported by the evidence. The Court of Appeal has previously made clear that such awards "strongly suggest[ ] the jury was influenced by improper factors." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 302.) Moreover, the trial court here made an individualized assessment of the evidence pertaining to both Plaintiffs before concluding that the jury's noneconomic damages awards were not supported by the evidence.

Separately, as explained in Monsanto's opening brief, the punitive damages award of nearly $70 million—four times the amount of compensatory damages following remittitur—was constitutionally excessive and should be stricken or reduced, not increased. The Court of Appeal's decision in *Echeverria* confirms that the punitive damages verdict here should be set aside in its entirety. (*Echeverria*, *supra*, 37 Cal.App.5th at pp. 333-335.)

Where a defendant has relied on a uniform, worldwide regulatory consensus that its product does not pose a cancer risk to humans at real-world exposure levels, the court can quickly dispose of Plaintiffs' challenge to the trial court's decision to reduce the outsize punitive award. At a minimum, the court should reduce the punitive damages award to an amount equivalent to Plaintiffs' compensatory damages award—i.e., a one-to-one ratio between punitive and compensatory damages.

LEGAL ARGUMENT

I. The trial court did not abuse its discretion by reducing the compensatory damages awards.

This court reviews for an abuse of discretion a trial court's reduction of a compensatory damages award. (See *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299.) "[A]ll presumptions are in favor of the decision of the trial court." (*Ibid.*)

Plaintiffs' argument that the trial court abused its discretion by reducing the compensatory damages award is based entirely on a mistaken premise: that the trial court created a " 'preference assumption.' " (RB/X-AOB 134.) According to Plaintiffs, the trial court incorrectly "created a presumption that older plaintiffs are entitled to less damages than similarly situated younger plaintiffs." (*Ibid.*) The court did no such thing. Instead, the trial court correctly concluded that the noneconomic damage awards of $34 million (for Mrs. Pilliod) and $18 million (for Mr. Pilliod)—which represent $2 million and $1 million per year, respectively, for both past and future damages—could not be sustained under

California law. The court did not conclude that Plaintiffs were entitled to less damages simply because they received a preference trial.

Rather, consistent with California law, the trial court conducted an individualized review for each Plaintiff and found that the awards for noneconomic loss were not supported by the evidence. (6 AA 8266.) The court found that "[t]he record reflects that Mr. Pilliod went through a one-year period of intense medical care related to his NHL, but that his situation stabilized." (*Ibid.*) The court further found that "[a]lthough 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." (*Ibid.*) As such, the court found that the reasonable noneconomic damages supported by the evidence were "$1,000,000 per year for the one past year of intense medical care . . . $300,000 per year for each of the other several past years . . . and $300,000 per year for each of the future ten years" for a total of $6.1 million. (*Ibid.*)

Turning to Mrs. Pilliod, the court explained that "[she] went through a longer period of intense medical care and that her health has been more impaired by the NHL." (6 AA 8266.) The court therefore found that the reasonable noneconomic damages supported by the evidence were "$1,000,000 per year for the two past year[s] of intense medical care . . . , $600,000 per year for each of the other two past years . . . , and $600,000 per year for each of the future 13 years" for a total of $11 million. (*Ibid.*) Contrary to Plaintiffs' suggestion, the trial court did not "create[ ] a

presumption that older plaintiffs are entitled to less damages." (RB/X-AOB 134.)

The trial court's decision to reduce Plaintiffs' noneconomic damages is supported by the record and consistent with California law. Despite citing *Bigler-Engler*, 7 Cal.App.5th 276 throughout their brief, Plaintiffs ignore its direct applicability to this issue. (See, e.g., RB/X-AOB 71, 111, 116-118.) As *Bigler-Engler* instructs, where a plaintiff's condition improves over time, a jury's identical *per annum* award for past and future economic damages "strongly suggest[s] the jury was influenced by improper factors" and warrants remittitur. (*Bigler-Engler*, at p. 302.) That is the case here. At the time of trial, both Plaintiffs' cancer was in remission. Mr. Pilliod underwent treatment for his cancer more than seven years ago and has been in full remission ever since. (24 RT 3974:3-24; 30 RT 5217:4-5; 6 AA 7124-7125, 7140.) While Mrs. Pilliod's condition and treatment were more serious, she too was in remission at the time of trial. (6 AA 6786, 7104-7106; 27 RT 4392:23-24.) Yet, despite these differences, the jury awarded each Plaintiff the exact same annual sum in both past and future noneconomic damages. The court correctly applied *Bigler-Engler* in concluding that the identical *per annum* awards for both past and future noneconomic damages reflected the influence of improper factors on the jury and warranted remittitur. No one disputes that Plaintiffs experienced pain, suffering, reduced quality of life, diminished activities, and emotional injuries; but, given Plaintiffs' remission at the time of trial, the trial court

properly found that the noneconomic damage awards were excessive. (*Bigler-Engler*, *supra*, 7 Cal.App.5th at pp. 299, 302.)

Plaintiffs cite to a 2006 review of cases showing "a range between $1 million and $66 million in compensatory damages awards" to support their claim that "the Pilliods' damages are not out of line with verdicts in other cases." (RB/X-AOB 135-136, citing *Buell-Wilson*, *supra*, 141 Cal.App.4th at p. 552.) The court should not be misled. Even if those other cases—which Plaintiffs do not cite or explain in their brief—were similar or relevant, the "range" given is for *total compensatory* damage awards, *not* noneconomic damages alone. (See *Buell-Wilson*, at pp. 551-552 [noting that the $66 million award included "combined economic, noneconomic, and loss of consortium damages"].)

Plaintiffs also claim that "[t]he highest courts of three states have approved similar non-economic damages." (RB/X-AOB 136, citing *Reckis v. Johnson & Johnson* (Mass. 2015) 28 N.E.3d 445; *Munn v. Hotchkiss School* (Conn. 2017) 165 A.3d 1167, 1191; *Meals ex rel. Meals v. Ford Motor Co.* (Tenn. 2013) 417 S.W.3d 414, 428.) But none of those cases involved plaintiffs with similar injuries or life expectancies: the injuries suffered in those cases were far more debilitating than the Pilliods' injuries, and the plaintiffs' projected life expectancies in those cases were *several decades* longer than the Pilliods' projected 10 and 13-year life expectancies. (See *Reckis*, at pp. 448, 450-451, 468 & fn. 44, 469 [seven-year-old girl with life expectancy of 66 more years lost more than 95 percent of the top layer of her skin, suffered heart and liver failure, a stroke, a cranial hemorrhage that caused seizures, underwent brain

surgery and more than 12 eye surgeries, and was legally blind]; *Munn*, at pp. 1172, 1186-1188, 1190 [15-year-old girl with 66-year life expectancy suffered permanent brain damage, could not speak or sign, had limited use of arms, hands, and legs, and limited control over facial muscles, resulting in profuse drooling]; *Meals*, at pp. 417-418, 423-425, 428 [six-year-old boy with a roughly 56-year life expectancy suffered permanent paralysis below the waist, a closed head injury, collapsed lung, internal bleeding, and severe abdominal and intestinal injuries].)[19] In short, the trial court did not abuse its discretion in reducing the noneconomic damages awarded to Plaintiffs.

II. The punitive damages award violates due process and should be stricken or reduced, not increased.

This court reviews de novo whether a punitive damage award is excessive as a matter of federal due process. (*Simon*, *supra*, 35 Cal.4th at p. 1172.) De novo review is "intended to ensure punitive damages are the product of the ' "application of [due process], rather than a decisionmaker's caprice." ' " (*Ibid.*, quoting *State Farm*, *supra*, 538 U.S. at p. 418.) Plaintiffs are incorrect in arguing that the amount of any punitive damages

[19] Plaintiffs argue that "[t]he verdicts are also in line with the compensatory damages in *Johnson v. Monsanto*." (RB/X-AOB 136.) But the noneconomic damages awarded in *Johnson* were excessive and remain on appeal. And in any event, Plaintiffs have not explained how they are similarly situated to Mr. Johnson. Plaintiffs further cite *A.Y. v. Janssen Pharmaceuticals Inc.* (Pa.Super.Ct. 2019) 224 A.3d 1, but fail to explain how that case—involving a 16-year old—is remotely similar to their own.

award is " 'exclusively the function of the trier of fact.' " (RB/X-AOB 141.) A jury may not levy a punitive award that violates due process. (See *State Farm*, *supra*, 528 U.S. at pp. 416-417.) And it is the obligation of the court, not the jury, to ensure the amount awarded is not excessive. (Code Civ. Proc., § 657(5).)

As discussed in the reply brief, the punitive damages award is excessive, in violation of due process, and should be vacated or, at the very least, reduced to the constitutional maximum, which is a one-to-one ratio with the compensatory damage award. (See *ante*, pp. 115-124.) We incorporate by reference those arguments here. Because a one-to-one ratio is the maximum amount allowable under the federal constitution, the court should reject Plaintiffs' bid for a ten-to-one ratio between punitive and compensatory damages. (See RB/X-AOB 147-149.)

CONCLUSION

This court should affirm the trial court's remittitur of the Plaintiffs' noneconomic damages. The court should vacate the punitive damages awards but, at a minimum, it should reduce the punitive damages to an amount equivalent to Plaintiffs' compensatory damages.

July 1, 2020

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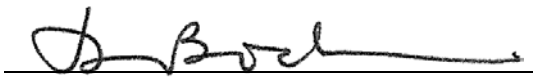

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PROOF OF SERVICE

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

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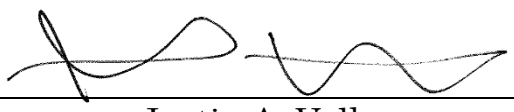

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