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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

PILLIOD, et al.
Plaintiffs,

vs.

MONSANTO COMPANY,
Defendant.

Case No.: RG17862702

PLAINTIFFS' COMBINED OPPOSITION TO MONSANTO'S MOTION FOR NEW TRIAL AND JNOV

Honorable Winifred Smith

Hearing Date: July 19, 2019
Time: 11:00 a.m.
Department: 21
Reservation No. R-2087954; R-2087958
Trial Date: March 18, 201

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MEMORANDUM OF POINTS AND AUTHORITY

I. INTRODUCTION

The jury's verdicts in this case were evidence-based. These verdicts are the result of Monsanto's misconduct in deliberately and maliciously misleading the public and the Pilliods by falsely claiming for years that Roundup has no human safety risks. Monsanto is not the victim here. Monsanto made the decision to engage in reprehensible conduct, and Plaintiffs' counsel presented the evidence and did so appropriately. After three separate juries found that Roundup causes non-Hodgkin's lymphoma ("NHL") and held Monsanto liable for substantial punitive damages, there is no credibility to Monsanto's worn-out arguments that there is no evidence to support these verdicts.

In light of the severity of the injuries suffered by the Pilliods from Monsanto's deceit, Monsanto's reprehensibility in this case is high. "Cancer is a disease that strikes fear into the heart of its victims, can leave the body ravaged and a shadow of its former self, and often, as with [plaintiff], necessitates painful, debilitating, medical treatment and reduction of control over and the enjoyment of one's life." *In re Actos (Pioglitazone) Products Liability Litigation* (W.D. La., Oct. 27, 2014) 2014 WL 5461859, at *28. Mrs. Pilliod was told the cancer in her brain would kill her within 18 months; and it nearly did. Mr. Pilliod's metastatic cancer was so severe it fractured his bones and was so painful that morphine didn't work. Mr. Pilliod continues to suffer from chemo brain. Monsanto having inflicted the ravages of cancer on Mr. Pilliod seeks to belittle his drastically altered life by reducing to damages to an inability to go sailing. Mtn. at 22.

As noted by Judge Chhabria, "...there is strong evidence from which a jury could conclude that Monsanto does not particularly care whether its product is in fact giving people cancer, focusing instead on manipulating public opinion and undermining anyone who raises genuine and legitimate concerns about the issue." *In re Roundup Products Liability Litigation* (N.D. Cal. 2019) 364 F.Supp.3d 1085, 1087. Monsanto's behavior won't change until the juries' verdicts are enforced and Monsanto understands that such "behavior will not be tolerated." *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26. "The ultimately proper level of punitive damages is an amount not so low that the defendant can absorb it with little or no discomfort, nor so high that it destroys, annihilates, or cripples the defendant." *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1308. The award must be large enough to "sting."

Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal.4th 1159, 1186 fn. 9. Here, each of the two verdicts for $1 billion amount to only 12.8% of Monsanto's net worth and accomplishes the appropriate balance of deterrence without destroying Monsanto's financial well-being. *Motorola Credit Corp. v. Uzan* (2d Cir. 2007) 509 F.3d 74, 84 (affirming $1 billion in punitive damages at 20% of net worth).

Monsanto received a fair trial in this case and an independent assessment by a sophisticated, impartial jury who found ample evidence that Plaintiffs proved all elements of their case. Monsanto's request to vacate the jury verdicts or reduce the verdicts runs counter to Alva and Alberta's "constitutional right to a jury trial" and California's "policy of judicial economy against willy-nilly disregarding juries' hard work." *Cooper v. Takeda Pharm. Am., Inc*. (2015) 239 Cal. App. 4th 555, 572 ; Cal. Const. art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all.").

This jury devoted eight weeks of their lives paying close attention and taking copious notes of the evidence presented by both sides. There is not a scintilla of evidence to suggest that the jury did anything but faithfully execute its duties in following the Court's instructions to give Monsanto fair and impartial consideration. Indeed, Monsanto stated it would move for a new trial based on juror misconduct in its notice of intention to move for new trial but was forced to abandon that claim in its memorandum. There was substantial evidence to support each and everyfinding by this jury. It is not the Court's role to simply substitute its judgment for the judgment of the jury, rather the Court "should respect the jury's verdict" and only grant new trials where the jury was "obviously and clearly wrong" Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.56. Simply put, it is impossible to say this jury verdict was "obviously and clearly wrong."

II. LEGAL STANDARD:

A. Legal Standard for JNOV

The "trial court's discretion in granting a motion for judgment notwithstanding the verdict is severely limited." *Teitel v. First L.A. Bank,* (1991) 231 Cal. App. 3d 1593. The trial judge must not invade the province of the jury and reweigh the evidence. *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159; *Simmons v. Ware* (2013) 213 Cal. App. 4th 1035, 1047. Neither should the trial judge disturb the jury's determination on the credibility of witnesses. *Knight v. Contracting Engineers Co.* (1961) 194 Cal.App.2d 435; *Simmons,* 213 Cal. App. 4th at 1047.

B. Legal Standard for New Trial.

The California Constitution only allows for a new trial to be granted if the verdict constitutes a "miscarriage of justice." Cal. Const., Art. VI, §13. The authority for a court to grant a new trial is further "circumscribed by statute." *Oakland Raiders v. Nat'l Football League*, (2007) 41 Cal. 4th 624, 633. A new trial cannot be granted on the grounds of insufficiency of the evidence unless the "jury clearly should have reached a different verdict or decision." Cal. Civ. Proc. Code § 657. If a trial court could simply disagree with the jury in vacating a verdict then that would render meaningless the two-month disruption of the lives of sixteen people who carefully listened to and weighed the evidence.

The Court in reviewing a motion for a new trial must be "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it." *Ryan v. Crown Castle NG Networks Inc.*, (2016) 6 Cal. App. 5th 775, 785. For these reasons:

> Most judges grant a new trial on this ground only after finding that the verdict was *obviously* and *clearly* wrong. In other words, most judges give great deference to the jury's verdict and rarely interfere with it. They find that juries generally reach the right result ... [and] judges should respect the jury's verdict, unless it cannot be supported by the evidence.

Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.56.

The trial judge should therefore "decline[] to substitute its own judgment for that of the jury" where "there was sufficient credible evidence to support the verdict, and that the jury was reasonable in believing the witnesses it apparently had believed in." *Kelly-Zurian v. Wohl Shoe Co.*, (1994) 22 Cal. App. 4th 397, 414 ; *Ryan*, 6 Cal. App. 5th at 786; *see e.g. Cty. of Riverside v. Loma Linda Univ.*, (1981) 118 Cal. App. 3d 300, 323 (Appropriate for trial judge who disagreed with verdict to deny motion for new trial in part because "he thought the jury was an intelligent one and did a fine job.").

III. ARGUMENT

A. The Evidence Supports a Finding of Punitive Damages.

Three juries have now concluded that, under California law, Monsanto's conduct amounted to malice. Monsanto cannot now credibly claim this jury was obviously and clearly wrong when it returned a verdict for punitive damages. "If a company intentionally proceeds with conduct which will expose a person to a serious potential danger known to the company in order to advance the company's own pecuniary interest, punitive damages may be assessed based on a finding that the company has shown a

conscious disregard for the person's safety." *Ford Motor Co. v. Home Ins. Co*. (Ct. App. 1981) 116 Cal. App. 3d 374, 381-82; *Boeken v. Philip Morris Inc*. (2005) 127 Cal.App.4th 1640, 1690 (intentionally marketing a defective product knowing that it might cause injury and death is highly reprehensible). "Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences." *Pfeifer*, 220 Cal. App. 4th. at 1299

Punitive damages remain the most effective remedy for consumer protection against defectively designed mass-produced articles precisely because "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection." *Buell–Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 562; *Pfeifer,* 220 Cal. App. 4th at 1301 ("the existence of governmental safety regulations does not bar an award of punitive damages for egregious misconduct that they are ineffective in preventing."). Punitive damages are available even where "there was a 'reasonable disagreement' among experts" *Buell–Wilson*, 141 Cal.App.4th at 559-560. In a pre-*Bates* decision, California has held that punitive damages were permissible even where the EPA approved the safety of a pesticide. *Arnold v. Dow* (2001) 91 Cal.App.4th 698, 724; *see also Daniel v. Wyeth Pharm., Inc.* (2011) 2011 PA Super 23, ('a jury could reasonably find that Wyeth knew that additional studies were required to understand the possible association between its products and breast cancer...In this regard, we also find that the trial court's reliance on Wyeth's compliance with the FDA's testing and labeling requirements was misplaced."). The jury is "entitled to" reject the claims of Monsanto's experts in reaching a verdict on punitive damages. *Id.* Monsanto has a duty to "warn of the potential risks" of Roundup and not just the ones its scientists agree with. "If the sole opinion(s) of one biased actor within that complex system can govern and control the nature, timing, and dissemination of information, and warnings, the system breaks down." *Actos*, 2014 WL 5461859, at *47 (rejecting contention that defendant's subjective believe that product does not cause cancer precludes a finding of punitive damages).

Plaintiffs provided substantial evidence of reprehensible conduct by Monsanto in its conscious disregard of the safety of consumers. *See* Plaintiffs' Opp. to Nonsuit at 11-13; Hoke Decl. The fact that some small portion of this despicable conduct occurred following Plaintiffs' diagnoses is immaterial given that Plaintiffs continued to expose themselves to the product after being diagnosed (see *infra*) and specifically due to Monsanto's efforts in suppressing the scientific evidence and advertising Roundup

as safe notwithstanding knowledge within the company regarding the carcinogenicity of GBFs. *See Yates v. Ford Motor Co.* (E.D.N.C. 2015) 2015 WL 2189774, at *3; *O'Gilvie v. International Playtex, Inc*. (10th Cir. 1987) 821 F.2d 1438, 1449 (defendant's subsequent acts admissible for the purpose of helping the jury to decide the defendant's state of mind when the defendant engaged in acts which harmed the plaintiff).

Moreover, California law broadly construes "officers, directors, or managing agents" for the purposes of inferring punitive intent. *See, e.g., Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822 ("[P]rior cases have not ascribed to … the narrow interpretation proposed by Mutual[.]"). "Managing agents" are employees who "exercise[] substantial discretionary authority over decisions that ultimately determine corporate policy." *Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 366 (quoting *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573). "The scope of a corporate employee's discretion and authority under our [managing agent] test is therefore a question of fact for decision on a case-by-case basis." *Id.* at 567. "***If there exists a triable issue of fact regarding whether a corporate employee is a managing agent*** under the *White* test, that factual question must be determined by the trier of fact and not the court[.]" *Davis*, 220 Cal.App.4th at 366 (emphasis added). Furthermore, a "corporate defendant cannot shield itself from liability through layers of management committees and the sheer size of the management structure." *Romo v. Ford Motor Co.*, 99 Cal 1115, 122 Cal.2d 139 (2002) *overruled in part on other grounds*.

B. The Punitive Damages Awards are Supported by the Evidence and Are Constitutional

1. The Punitive Damage Awards are not Excessive

In tort actions the Legislature has deemed that punitive damages may be assessed by a jury against a Defendant for the "sake of example and by way of punishing the defendant." Civ. Code, § 3294. "In order to serve these aims, a punitive damages award must send a message to the offender and others in similar positions that this sort of behavior will not be tolerated." *Bardis*, 119 Cal.App.4th at 26. A jury's punitive damage award therefore must be large enough to "sting" in light of the Defendant's net worth and the reprehensibility of its conduct. *Simon*, 35 Cal.4th at1186 fn. 9. "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damages award." *Gagnon v. Cont'l Cas. Co.* (1989) 211 Cal. App. 3d. 1602. CACI 3945 instruction correctly states: "There is no fixed formula for determining the amount of punitive damages."

The Court properly instructed the jury on punitive damages using the standard jury instructions and Monsanto does not argue that the jury failed to follow those instructions.

The U.S. Supreme Court allows California its "constitutional freedom to use punitive damages as a tool to protect the consuming public, not merely to punish a private wrong." *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1206. In fact "[n]othing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to the plaintiff in isolation." *Id.* at 1207. To serve California's interests in deterrence a jury should award damages sufficient to "deter and punish unacceptable conduct" but not so much as to result in "financial devastation." *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1291. "The ultimately proper level of punitive damages is an amount not so low that the defendant can absorb it with little or no discomfort [citation], nor so high that it destroys, annihilates, or cripples the defendant." *Pfeifer,* 220 Cal.App.4th at 1308 (quoting *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621–622). Therefore, "[w]ealth is an important consideration in determining the excessiveness of a punitive damage award. Because the purposes of punitive damages are to punish the wrongdoer and to make an example of him, the wealthier the wrongdoer, the larger the award of punitive damages." *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77–78.

"[T]he calculation of punitive damages does not involve strict adherence to a rigid formula. It involves, instead, 'a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants.'" *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 390; *Adams v. Murakami* (1991) 54 Cal.3d 105, 112 ("The determination of whether an award is excessive is admittedly more art than science."). One common method of determining wealth is net worth.

Courts have found that punitive damage awards smaller than 3.2% of a Defendant's "net worth" are only a "slap on the wrist" where conduct is even only moderately reprehensible. *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967. Therefore, based upon Monsanto's stipulated net worth of $7.8 billion, a punitive damage verdict of 3.2% or $249 million for either plaintiff would be a mere slap on the wrist and thus impermissible by law. Courts have held that a punitive damage award amounting to 23% of net worth strikes an appropriate balance of deterrence and financial devastation because it

leaves a Defendant with 77% of their net worth intact. *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1540. 23% of Monsanto's stipulated percent of net worth is $1,794,000,000.00 and therefore that is the due process limit for a one plaintiff verdict. A higher net worth also supports a Defendant's ability to pay a higher proportion of that net worth. In approving a punitive damages award of $1 billion that amounted to 20% of a Defendant's net worth the U.S. Court of Appeals for the Second Circuit noted:

> All of this suggests that the individual defendants, jointly and severally, remain billionaires and should be able to satisfy a very substantial punitive damages award. Given the reprehensibility of the individual defendants' concerted conduct, the size of their fraud, and their seeming ability to pay, and taking account the goals of punishment and deterrence, the Court finds that an award of $1 billion in punitive damages is necessary and permissible under Illinois law.

Motorola Credit Corp. v. Uzan (2d Cir. 2007) 509 F.3d 74, 84. A Louisiana appellate court upheld an $850 million dollar punitive damages award stating:

> The question is, in effect, how much will *this defendant* be punished or deterred by an $850 million punitive damages award? The record reflects that CSX has a net worth of about $4.8 billion. The $850 million punitive damages award is about 18% of CSX's net worth. We do not find that percentage to be an abuse of discretion in this case because we cannot say that 18% is indisputably more than necessary to effectuate the *Billiot* purposes of punishment and deterrence.

In re New Orleans Train Car Leakage Fire Litigation (La. Ct. App. 2001) 795 So.2d 364, 388.

"In this day and age it is becoming more and more commonplace for settlements, civil fines, and penalties imposed on such large corporations to range in the billions of dollars, when dealing with billion dollar corporations." *Actos*, 2014 WL 5461859 at *35. Therefore, "[w]hile punitive damages in the amounts of $6 billion and $3 billion still loom large in the public imagination, they are no longer as shocking in the context of settlements, sums of money, fines, penalties, and sales of today's multi-national and multi-billion dollar corporations..." *Id.* In *Actos*¸ the Court found that the jury was reasonable in awarding punitive damages totaling $9 billion against two companies who manufactured a carcinogenic pharmaceutical, noting that "If the goal is to punish and deter, when faced with companies of this size who generated sales, in the billions, off of the very product they hid the risk of, over the very period they hid that risk, was the jury unreasonable to fashion its award reflecting those realities? This Court finds they were not." *Id.* at *33. The trial court however, felt it necessary to reduce the award to a ratio of 1 to 25 based on the proportionality prong of the punitive damage analysis. *Id.*at *55.

In this third trial against Monsanto involving claims of NHL caused by Roundup, it has become

clear that punitive damage awards in the amount awarded by the jury are necessary to send a message to Monsanto that its conduct will not be tolerated. *Bardis*, 119 Cal.App.4th at 26. The punitive damage awards in the first two trials, *Johnson* and *Hardeman*, have had zero deterrent effect on Monsanto (now a subsidiary of Bayer). Bayer's CEO held an investor phone conference on August 23, 2018 after the Johnson verdict awarding $250 million in punitive damages to assure stockholders state that the verdict has no effect on its profits and stated "nothing has changed concerning our strategy...and longer-term growth and margin expectations for our combined Crop Science business." Hoke Decl. at Ex. A. In fact, Bayer and Monsanto have stated they have no intention of changing their corporate "conduct related to a) glyphosate..." *Id.* After the *Hardeman* verdict awarding $75 million in punitive, Bayer stated the verdict has "no impact" on future cases and that it "stands behind these products and will vigorously defend them." Hoke Decl. at Ex. B. Even after the Pilliod jury returned punitive damages verdicts of one billion dollars for each plaintiff, Bayer boldly announced in a full page ad in the Washington Post and other major media outlets that "Glyphosate will continue to play an important role in agriculture and in our portfolio." Hoke Decl. at Ex. C. Punitive damages are in part to future conduct and apparently more, not less, punitive damages will be required to fulfill that requirement.

Monsanto complains punitive damages in prior cases have not been this large. Monsanto misses the point – Monsanto's profit, net worth and malicious conduct demand a substantial punitive damage award regardless if that number is larger than past verdicts. "If the goal is to punish and deter, when faced with companies of this size who generated sales, in the *billions, off of the very product they hid the risk of, over the very period they hid that risk,* was the jury unreasonable to fashion its award reflecting those realities? This Court finds they were not." *Actos*, 2014 WL 5461859, at *33.

2. The Amount of Punitive Damages Awarded Does Not Violate Due Process

Under federal and state due process analyses the size of the punitive damage award is viewed in light of "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" *Simon*, 35 Cal.4th 1159 at 1172 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418). The "scale and profitability" of a defendant's wrongful conduct "remain

relevant to reprehensibility and hence to the size of award warranted, under the guideposts, to meet the state's interest in deterrence." *Johnson*, 35 Cal.4th at 1207.

a. Monsanto's Decision to Hide the Cancer Risk for Profit was Highly Reprehensible

When determining a defendant's reprehensibility, courts must consider whether: (1) "the harm caused was physical as opposed to economic;" (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) "the target of the conduct had financial vulnerability;" (4) "the conduct involved repeated actions or was an isolated incident;" and (5) "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id*. Additionally, courts should consider whether the wrongdoing was "hard to detect" or profit-motivated, as these circumstances may justify more severe punitive-damage awards. *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 494. A court may also consider harm to others in determining the reprehensibility of a Defendant's conduct. *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355. The *Actos* court held that a punitive damage award of $9 billion was not unreasonable for a plaintiff under the reprehensibility prong where:

> [T]he evidence supports that from the beginning of their commercial alliance, Takeda and Lilly were aware of the possibility that Actos® posed an increased risk of bladder cancer. ...Takeda and Lilly chose to move forward and acted to avoid full disclosure of that and other relevant information to the FDA; to refuse to include adequate warnings on the label, .. to carefully avoid creating or acknowledging any evidence that might draw attention to the bladder cancer risk; ….The facts support that Takeda's and Lilly's willingness to callously allow their customers to ignorantly increase their risk of dying prematurely or significantly negatively impacting their health and well-being

Actos 2014 WL 5461859, at *24 (the award was reduced based on the ratio prong of punitive damages to a ratio of 25:1).

Defendants' Monsanto's tortious conduct evinced a total indifference to, and a reckless disregard of, the health and safety of individuals using Roundup.

Monsanto has actively prevented consumers from learning of the safety risks of using Roundup. Monsanto scientists were "all about winning the argument" and were instructed to "let nothing go." P-Exh. 95. Monsanto scientists joked about playing "whack-a-mole" with safety issues involving Roundup. P-Exh. 4 at *1. Monsanto scientists were instructed to "hold firm" on the "no cancer hazard" position even after employees raised concerns. Hoke Decl. Ex. D., Goldstein Tr. at 142:2-6.

Monsanto was aware that for the first 8 years of Roundup being on the market (*when the Pilliods were spraying the product*), the company had no valid carcinogenicity test on the active ingredient,

glyphosate, (Monsanto using the fraudulent IBT data for registration with the EPA) and to this day Monsanto has not conducted a carcinogenicity study on the formulated Roundup product. *See* Hoke Decl. Ex. E, Reeves Dep. at 183:1-196:15; Ex. F, Trial Tr. at 3525:15-23. In 1985, EPA scientists explained to Monsanto that "a prudent person would reject the Monsanto assumption that glyphosate dosing has no effect on kidney tumor production" because the EPA's viewpoint at that time was "one of protecting the public health when we see suspicious data." Reeves at 220:5-236:23, 238:21-22. Monsanto was specifically told in 1999, by the renowned genotoxicity expert Dr. Parry, that its formulations were genotoxic and caused oxidative stress. P-Exhs. 37, 38. Parry advised Monsanto to conduct a battery of tests to further examine Roundup's genotoxicity. *Id.* Monsanto refused and instead buried the Parry reports. P-Exh. 35; Tr. at 3491:10-23. Dr. Goldstein stated that in 2007 a study showing Roundup genotoxic in exposed humans, was an old issue. Goldstein Dep. at 97:10-99:24

Monsanto was well aware of the hazardous nature of the formulated product sold to the Pilliods. P-Exh. 471 (Dr. Heydens admitting "there are non-hazardous formulations, so why sell a hazardous one?"); P-Exh. 21 (noting in 2003 that "[i]t looks like NHL ...continue to be the main cancer epidemiology issues [] for glyphosate.") In fact, Dr. Heydens acknowledged in 2015 that the surfactant in the Roundup formulation "played a role" in the George (2010) tumor promotion study. P-Exh. 565. Dr. Martens, in 2002, determined that surfactants "can be toxic and this must be addressed." P-Exh. 75 at 27. When Monsanto received the results of a study demonstrating that surfactants increased the dermal absorption of glyphosate to a degree three times higher than regulatory requirements, it terminated the program. Tr. 3224:15-3225:9. Monsanto scientists internally concede that "you cannot say Roundup is not a carcinogen. We have not done the necessary testing on the formulation to make that statement," yet still tells the world that Roundup is not carcinogenic. Hoke Decl. Ex G. Koch Dep. at 149:10-150:2.

Based on all of Monsanto's knowledge, it knew that IARC would conclude that glyphosate was carcinogenic because it had "vulnerabilities" in all the areas considered by IARC, "namely epi, exposure, genotox and mode of action." P-Exh. 339. Despite all this knowledge, Monsanto thought it was "good news" that the "the safety of residential Roundup is not a top-of-mind concern for today's consumer." P-Exh. 3106 at 13. Monsanto encouraged people to engage in unsafe use of Roundup through T.V. ads, relied on by the Pilliods, that showed customers using Roundup without any gloves or any other

protective gear.[1] Tr. at 3729:9-3731:14.

The targets of Monsanto's tortious conduct were physically vulnerable. The Pilliods were at increased vulnerability to Roundup because they did not wear protective gear (due to Monsanto's representations) and used Monsanto's equipment which increased exposure. *See id*. at 3240:12-19 (Sawyer testifying that the sprayer used by the Pilliods, supplied by Monsanto, significantly increased exposure).

Monsanto's conduct was the result of intentional malice, trickery, and deceit. Rather than publish Dr. Parry's findings that Roundup was genotoxic Monsanto instead ghostwrote an article in 2000 that stated that Roundup was not genotoxic. P-Exh. 41. Monsanto employee, Michael Koch acknowledged that this ghostwriting practice was unethical. Koch Dep. at 207:11-14 *Torkie-Tork v. Wyeth*, No. 1:04CV945, 2010 WL 11431846, at *2 (E.D. Va. Nov. 17, 2010) (ghostwriting evidence is relevant to corporations disregard of human safety).

Monsanto scientists were instructed to "discomfort our opposition" in relation to public perception of Roundup's safety. P-Exh. 621. One month before IARC even came to a decision on glyphosate Monsanto initiated a campaign to "orchestrate outcry over IARC decision" knowing that the evidence supported that glyphosate was a possible or probable carcinogen. P-Exh. 522; P-Exh. 8. Monsanto's attacks were meant to "invalidate the relevance of IARC" and provide "litigation support." Ex. 621. In 2015, prior to commencement of litigation, Monsanto scientists advised its legal department that Monsanto would draft a paper to be "authored" by third-party scientists to provide regulatory "air cover" and "litigation support" in light of IARC. Monsanto's legal department advised, "Appealing; best if use big names..." P-Exh. 74. In addition to ghostwriting scientific papers, Monsanto regularly ghostwrote op-eds in newspapers to attack IARC. Goldstein Dep. at 136:13-137:2. Behind the scenes, Monsanto hired the same organization that defended tobacco companies to attack IARC. *Id.* at124:18.

Monsanto's conduct was profit-motivated. Monsanto's success in manipulating the results of the 1983 study "had a very direct effect on the market potential for future Roundup sales." *Id*. at 3541:3-14. Monsanto was concerned that any adverse decision by IARC would cost Monsanto money, with Dr. Heydens characterizing the situation as "the $1B Question." P-Exh. 516. Monsanto's top goal in

[1] Internally, Monsanto scientists stated that protective gear was necessary and that dermal exposure was the greatest risk to users. Tr. at 3214:8-9; 3229:1-3238:15. P-Exh.34-2.

demonstrating the safety of glyphosate after the IARC decision was to "protect global sales;" not to ensure the safety of consumers using Roundup or even warning about a cancer risk. P-Exh. 621.

Monsanto's conduct was not an isolated incident; it involved repeated action over many years. The evidence presented at trial demonstrates that Monsanto's conduct in obscuring the risk of cancer dates back to a least 1985 when Monsanto first pushed back on the EPA's recommendation to put a cancer warning on the Roundup label. P-Exh. 73; P-Exh. 72 at 1; Reeves Dep. at 283:4-293:17. In the ensuing decades, Monsanto engaged in a continued campaign to obscure the risks of Roundup.

Monsanto's conduct was "hard to detect." It took a mass tort litigation with the consolidated resources of many law firms and enormous financial resources to bring Monsanto's conduct to light. Ordinary consumers did not, and could not, know that Monsanto was deliberately deceiving the world regarding the safety of Roundup.

Potential Harm to Others. Glyphosate is the most heavily used pesticide in history and millions of people are exposed to it, potentially leading to tens of thousands of victims.

b. Comparable Civil Fines are not Applicable in this Case.

The comparative civil fine[2] guidepost requires only a comparison to civil fines imposed by state government (not to other verdicts). However, "The third guidepost is less useful in a case like this one, where plaintiff prevailed only on a cause of action involving common law tort duties that do not lend themselves to a comparison with statutory penalties" *Simon*, 35 Cal. 4th at1183–84. *Boeken*, 127 Cal. App. 4th at 1700 ("finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not impossible, undertaking.").

c. The Ratio Between Compensatory and Punitive Damages is Constitutional

[2] Monsanto cites two statutes providing for fines for the sale of misbranded products. However, those statutes do not help Monsanto, because they allow for a fine for each violation, which means a fine for each Roundup bottle sold; a potential fine of billions. *See e.g. Boeken*, 127 Cal. App. 4th 1640. Monsanto would also be liable under California's False Advertising Law ("FAL"). Cal. Bus. & Prof. Code § 17500.113. Violators of the FAL are subject to civil penalties not to exceed $2,500 for each violation. *Id.*; § 17536. Each false advertisement or bottle disseminated by Monsanto would constitute "'a minimum of one violation with as many additional violations as there are persons who read the advertisement or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning such product or service." *People v. JTH Tax, Inc.*, 151 Cal. Rptr. 3d 728, 754–55 (2013). Both FIFRA and Prop 65 use the same "each violation" language. See e.g. Martex Farms, S.E. v. U.S. E.P.A. (1st Cir. 2009) 559 F.3d 29, 34; Health & Saf. Code, § 25249.7(b)

The ratio of compensatory to punitive damages awarded by the jury in this case was 55:1 for Mr. Pilliod and 27:1 for Mrs. Pilliod. These ratios are permissible in light of Monsanto's reprehensibility. "[T]here are no rigid benchmarks that a punitive damages award may not surpass..." *State Farm*, 538 U.S. 408 at 425. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* The U.S. Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between" the amount of compensatory and punitive damages. CACI 3945 Sources and Authority (quoting *State Farm*, 538 U.S. 424). Awards significantly greater than 10:1 have been upheld in cases with high reprehensibility. *Bullock v. Philip Morris USA, Inc*. (2011) 198 Cal. App. 4th 543, 566 (16:1 ratio appropriate); *Burton v. R.J. Reynolds Tobacco Co*. (D. Kan. 2002) 205 F. Supp. 2d 1253, 1263-64, (75:1 ratio) *Williams v. Philip Morris Inc.*, (2006 Or.) 127 P.3d 1165, 1182.

Plaintiffs acknowledge that the Court does need to examine the reprehensibility of Monsanto's conduct if it approves a multiplier above 10:1. The California Supreme Court notes that the *State Farm* decision finds only ratios "**significantly greater** than 9 or 10 to 1 are suspect." *Simon* 35 Cal. 4th at1182, (10:1 ratio justified for purely economic injury) (emphasis added); *Nickerson v. Stonebridge life Ins.* (2013) 219 Cal.App.4th 188, 194, 206-11 (10:1 ratio) *Boeken* 127 Cal. App. 4th at1703, (9:1 ratio).

The 1:1 ratio advocated by Monsanto has been rejected in California. As stated in *Bullock:*

> Philip Morris argues that there is an emerging consensus that "six-figure damage awards are more than 'substantial' enough to trigger this 1:1 upper limit." We cannot discern any emerging consensus in this regard relevant to the extremely reprehensible conduct at issue in this case. Moreover, we do not regard the amount of compensatory damages as a fixed upper limit where damages are "substantial," as we have stated. Instead, the constitutional limit depends on the facts and circumstances of each case

(2011) 98 Cal. App. 4th at 569; *Id.* at 567. "...nothing in State Farm suggests that the high court, while declining to impose a bright-line limit in other cases, imposed the amount of compensatory damages as a bright-line limit in cases where the compensatory damages are 'substantial.'" *Id.* "Furthermore, whether the compensatory damages are 'small' or 'substantial' within the meaning of *State Farm*, [538 U.S. at 425], depends, in substantial part, on the defendant's financial condition." *Id.* at fn. 11.

Monsanto's reprehensibility is also far worse than the defendant's in *Roby v. McKesson Corp.* (2010) 47 Cal. 4th 686, 717 which was determined to fall at the "low end of the range of wrongdoing that can support an award of punitive damages" and involve only emotional distress arising from

economic harm with no physical injury. . In the case at bar, neither the jury's verdict not the Court are bound by the 1:1 ratio even if compensatory damages claim "contain[] a punitive element." *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 223 (approving 6:1 ratio despite punitive element); *Yung v. Grant Thornton, LLP* (Ky. 2018) 563 S.W.3d 22, 69 (court erred in reducing punitive damages from 4:1 to 1:1 ratio even where "$20 million compensatory damage award is indisputably substantial.").

d. Monsanto Waived any Arguments about Repetitive Punitive Damages by Failing to Introduce such Evidence at Trial

The issue of repetitive punitive damage awards is not an issue of prejudice or due process; it is an evidentiary issue relevant to mitigation that must be presented to the jury. "[O]nce the plaintiff has introduced evidence of the defendant's financial condition, it is for the defendant to decide whether to introduce evidence of other punitive damage awards in mitigation." *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661, 1666 ("[We conclude that evidence of punitive damages imposed in other cases must be presented to the jury in the first instance."). Monsanto therefore cannot raise the issue of other punitive damage awards for the first time on post-trial motions when it "made the strategic decision not to introduce into evidence before the jury information concerning other punitive damages awards assessed against it." *Id.* "Had it done so, the jury might have made a smaller award. We thus conclude that [Defendant] has failed to prove that the jury's verdict, admittedly quite large, reflected such passion and prejudice as to mandate a new trial." *Id.* (quoting *Kochan v. Owens-Corning Fiberglas Corp., supra,* 610 N.E.2d at pp. 694-695). Monsanto had a statutory right to bifurcate the trial for a separate finding on the amount of punitive damages, but it decided not to do so.

There is also no due process issues with repeated punitive damages:

> To consider the defendant's entire course of conduct in setting []a punitive damage award, even in an individual's lawsuit, is not to punish the defendant for its conduct towards others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one.

Johnson, 35 Cal. 4th at 1206 (internal citation omitted).

Furthermore, Monsanto has refused to date to pay the punitive damage awards in *Hardeman* and *Johnson*. In *Johnson,* Monsanto has opted to drag a dying man through an extended appeal and attempted to delay at every turn. Monsanto's intent to use its vast legal resources to frustrate laintiffs'

recovery does not call for mitigation.

e. In the Event the Court Finds Punitive Damages Excessive the Proper Remedy is Remittitur.

If in its due process review of the punitive damage award the Court believes the amount awarded one or both Plaintiffs exceeds due process considerations the Court should reduce that Plaintiff's punitive damage award as little as is required to comply with due process considerations. *Gober*137 Cal.App.4th at 214. To reduce anymore than that minimal reduction fails to respect the jury's function in awarding damages in the process and disregards the Plaintiffs' Seventh Amendment right to a trial by jury. *Id.* Remittitur and not a new trial is the appropriate remedy for a punitive award that exceeds due process considerations. ***Id.*** Once that amount has been determined "a new trial on punitive damages would be futile.... If, on a new trial, the plaintiff was awarded punitive damages less than the constitutional maximum, he would have lost. If the plaintiff obtained more than the constitutional maximum, the award could not be sustained...'" *Id.* (quoting *Simon*, 35 Cal.4th at p. 118);

It is Plaintiffs' position that the jury's verdict for both Mr and Mrs. Pilliod is constitutional. However, should the Court disagree then other ratios have been accepted and survived due process analysis. The below chart indicates the ratios between punitive and compensatory damages; the authority for those ratios; the awards to the Pilliods under those ratios; and the percentage of net worth for the two verdicts combined. Under any scenario, Monsanto remains a wealthy company and the Pilliods remain emotionally and physically scarred.

Ratio	Authority	Punitive Damage Award for Mrs. Pilliod	Punitive Damage Award for Mr. Pilliod	Total Percentage of Net Worth
25:1	*In Re Pioglitazone*	$925 million	$450 million	17.6%
16:1	*Bullock*	$592 million	$288 million	11.3%
10:1[3]	*Simon*	$370 million	$180 million	7%

3. The Compensatory Damages are not Excessive.

There is a presumption that the amount of damages awarded by the jury is proper. "**A new trial shall not be granted upon the ground of ... excessive...damages, unless** after weighing the evidence

[3] These numbers would be slightly less than 10:1 due to rounding down the compensatory damages. As noted in *Simon*, "one could also argue a 'single-digit' ratio includes anything less than 10 to 1...The question is of little or no importance, however, as the presumption of unconstitutionality applies only to awards exceeding the single-digit level 'to a significant degree.'" 35 Cal.4th at 1182 (quoting *State Farm*, 538 U.S. at 425.)

the court is convinced from the entire record, including reasonable inferences therefrom, that the ... **jury clearly should have reached a different verdict or decision."** Code Civ. Proc. § 657. (emphasis added). "'The judge is not permitted to substitute [her] judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper." *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 406. "A damages award is excessive only if the record, viewed most favorably to the judgment, indicates the award was rendered "as the result of passion and prejudice on the part of the jurors." *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 (quoting *Bertero v. Nat'l Gen. Corp.* (1974) 13 Cal.3d 43, 65, n. 12).

The amount of compensatory damages is a fact question that is decided by the jury. *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078-80. The primary focus on determining whether a verdict is excessive is whether or not the verdict is so "out of line with reason that it shocks the conscience." *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508 "The mere fact that the judgment is large does not validate an appellant's claim that the verdict is the result of passion or prejudice of the jury. Each case must be determined on its own facts." *Dirosario v. Havens* (1987) 196 Cal.App.3d 1224, 1241. "The fact that an award may set a precedent by its size does not in and of itself render it suspect." *Buell-Wilson* 141 Cal.App.4th at 548. A finding of an excessive verdict predicated on "what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Rufo,* 86 Cal.App.4th at 615–16 (the "vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale."). The 9th Circuit, in approving a $31 million verdict for a spinal cord injury has held "California courts emphasize that each case must ultimately be resolved on its own unique facts." *Gutierrez ex rel. Gutierrez v. United States,* (9th Cir. 2009) 323 F. App'x 493, 494.

The Pilliods' damages are not out of line with verdicts in other cases. "A [2006] review of all of these cases shows a range between $1 million and $66 million in compensatory damages awards and substantial differences in the facts of each case." *Buell-Wilson,* 141 Cal.App.4th at 552 ($22 Million verdict awarded in 2004 not excessive). The highest courts of three states have approved similar non-economic damages. *Reckis v. Johnson & Johnson* (Mass. 2015) 471 Mass. 272, 301–03 ($50 Million); *Munn v. Hotchkiss Sch.* (Conn. 2017) 165 A.3d 1167, 1191 ($31.5 Million); *Meals ex rel. Meals v. Ford*

Motor Co., (Tenn. 2013) 417 S.W.3d 414, 428 ($39.5 Million). A search for California verdicts in the last few years shows the Pilliods' verdicts for non-economic damages are not uncommon.[4] The verdicts are also in line with the compensatory damages in *Johnson v. Monsanto* ($39,253,209.32).

The jury in this case awarded no more compensatory damages than what Plaintiffs' counsel suggested was a reasonable amount. Monsanto's counsel strategically abdicated its responsibility to argue to the jury in closing argument that the compensatory damages suggested by Plaintiffs was unreasonable. It cannot now complain that the jury found the damages suggested by Plaintiffs were reasonable. "One of the most difficult tasks imposed on a factfinder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." *Pearl v. City of Los Angeles* (Cal. Ct. App., June 18, 2019) 2019 WL 2511941, at *10 (affirming $10 million dollar non-economic damage award in workplace harassment suit.)

a. The Evidence Supports the Pilliods' Verdicts for non-Economic Damages

Alva Pilliod: Mr. Pilliod has suffered and will continue to suffer severe physical and emotional suffering as well as a severe loss of his enjoyment of life. Before cancer, Mr. Pilliod had a sharp mind, and an incredibly rich, active life. Tr. at 3673:17-25. He earned three college degrees while working full-time. 3765:1-17. He had a long career with Goodyear working in sales and as a financial analysist. 3767:6-17. Mr. Pilliod was an adventurer. He went skydiving, bungee jumping, scuba diving, and at one point was a pilot. 3691:9-15.

In the six months leading up to his cancer diagnosis in 2011, Mr. Pilliod was experiencing "Lots of pain. Back pain, upper leg pain, hip was really bad, the right hip." 3772:15-23 His doctors couldn't figure out what was wrong and pain killers weren't working. *Id.* Even so, Mr. Pilliod stayed active, and at the age of 69, was chain-sawing a fallen tree to assist his neighbor, when his hip bone fractured. 3773:4-16. It turned out that the hip fracture was caused by an aggressive Stage IV metastatic cancer growing throughout his bones. 3774:1-6; Hoke Decl. Ex. I, Raj Dep. at 139:12-16. Dr. Nabhan showed

[4] Exhibit H to Hoke Decl. ($45 million for a sexual abuse victim, at 1; $50 million for a couple where one spouse is in a vegetative state, at 6; $36 million for child hit by a bus, at 11; $42.5 million for adult hit by truck; $45 million for shooting victim, at 16; $31 million for couple hit by truck; $25 million for sexual abuse victim at 27; $30 million for relatives in wrongful death case, at 31; $15 million for loss of right leg beneath the knee, at 41; $23.5 million for wrongful death, at 53. $20 million in non-economic damages for wrongful death, at 57.

PET scans evidencing the enormous extent of cancer throughout his bones. Tr. at 3970:1-3974:18.

Eight years later, Dr. Raj still "remembers very well" Mr. Pilliod's case due to the severe pain. Raj Dep. at 134:6-14. Dr. Raj took the rare step of sending Mr. Pilliod to the hospital due to the pain. *Id.* Dr. Raj put Mr. Pilliod on morphine, and even that powerful narcotic did not ease the pain. 142:6-24. As Dr. Raj noted "when there's [] cancer destroying the bone, there's always a tremendous amount of pain." *Id.* Mr. Pilliod had "a thoracic spine T7 fracture because of the cancer." 144:12-13.

Mr. Pilliod describes this period as miserable. Tr. at 3774:3-13. He was pretty sure he would die, he "went from a single cane to walking sticks to a wheeled walker to a wheelchair to a gurney. And I thought that was it for me." *Id.* To add on to his mental and physical suffering, he experienced financial stress. 3774:15-3775:15. He had to empty out his checking accounts and max out his credit cards; and Mrs. Pilliod had to stop working to take care of him. *Id.* To go from an active person to "[t]o have somebody else take care of me, do the bedding, get my legs propped up, help me get to the bathroom, doing all the things that I normally would do myself. It was miserable." *Id.*

Cancer caused Mr. Pilliod's physically active life to come to a stop because he had to avoid further damage to his back hips and brain. 3775:7-25. Due to the financial, physical and mental injury caused by Monsanto, the Pilliods can no longer travel. 3749:13-16. The long-term effects of chemotherapy continue to impact his life and he is now at increased risk of leukemia. Raj Dep. at 153:7-18; Tr. at 3975:7-25 (Nabhan testifying that long-term side effects include heart damage, cancer, and neuropathy). Chemotherapy causes enormous strain and damages heart muscles. Raj. Dep. at 215:9-24. Mr. Pilliod now must wear a medical device to help him speak. Tr. at 3776:23-25.

Chemotherapy impacts the mind and causes neurological problems often called chemo-brain. 5289:5-11. As Dr. Levine explained chemotherapy can "affect neurological function" where people go goofy, don't think properly, and have a sense that they are not the same. *Id.* This brain damage doesn't show up on scans. As Dr. Raj explained Mr. Pilliod "would be able to tell us more about his symptoms than anybody else. A lot of times when you talk about neurologic disorders, there's more subjective, like, symptoms than what we can elicit in, like, scans and whatnot. So, yes, usually patients tell us more." Raj Dep. at 216:12-217:3. As Mr. Pilliod explained:

> Well, when I first started getting the chemo treatment, I was getting what's called mini seizures. I would wake up in the morning, and I couldn't use nouns or numbers. I couldn't read; I couldn't

> write. Then after a day or two, it would disappear, and I would be fine. Three or four weeks later, it would happen again. I was going to cancer support group meetings, and some days I couldn't go to the meetings because I couldn't drive there. And I would have to get transportation there and transportation home. And when I would get there, I couldn't remember anybody's names or what day it was. And this went on for quite a while. And it got more and more that it started happening to me. Tr. at 3776:8-22.

Fortunately, following months of agonizing chemotherapy, Mr. Pilliod beat the cancer. But he is not the same. 3808:6-3809:9. His son described how active he was before cancer and now after cancer "[h]e hasn't been the same guy in quite a while." *Id.* Mrs. Pilliod testified that Mr. Pilliod was "never completely the same" after cancer. 3739:15-17. Mr. Pilliod may be 77 years old, but his age does not lessen the severe and continuing emotional and physical damage caused by Monsanto's conduct. *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 980 (affirming award of future non-economic damages of $2 million to 86-year-old-man who had "2 to 3 years" left of life expectancy" even where he was not "not terribly expressive about the effect of his diagnosis and disease."). Based on Mr. Pilliod's suffering, it cannot be said that the jury's non-economic verdict "shocks the conscience."

Alberta Pilliod: Alberta Pilliod's pain, suffering and loss of enjoyment of life is even more severe than Mr. Pilliod. By all medical expectations, Alberta Pilliod should be dead by now. Dr. Raj testified that "I d[idn't] think she would be alive today. That's how bad this cancer was." Raj. Dep. at 118:8-9. When Mrs. Pilliod was first diagnosed, she was told she would die in 18 months with or without treatment. Tr. at 3741:19-3742:10. Mrs. Pilliod decided to undergo an extreme chemotherapy treatment anyway "[b]ecause I wanted to live. I had grandkids that were grown up at that time. I had -- I think I had a great grandson by then and more to follow. But I just felt I had reasons to live." *Id.*

Like Mr. Pilliod, Mrs. Pilliod also had a very active and fulfilling life prior to cancer. Her son testified that she was "[o]ne of the nicest people you'll meet. She was very active in different ways. She wasn't huge into boats like my dad. But she was very social, she was a teacher, an administrator and principal or vice principal, and just very social.... They used to go to the gym and walk a lot. snorkel and ski, back in the long ago time. Just a very social, happy person." 3810:10-17.

When Mrs. Pilliod semi-retired from her long career in education in 2004, (she continued working part-time), she was intent on enjoying retirement. She embarked on a trip with her husband around the world in 88 days. 3688:11-14. Mrs. Pilliod would travel to Hawaii every year to visit her son. 3693:22-3694:4. Mrs. Pilliod explained that before she developed cancer her and Mr. Pilliod:

> ...were able to enjoy each other's company quite a bit because at that time we were both retired. We liked working on the properties up in Valley Springs and maintaining our home. We didn't have any kids at home, so we were pretty much free to go as we wanted. When I substituted as an administrator, then I got money enough to travel to places like the Canadian Maritime Provinces and Turkey because we both really liked traveling.

In the spring of 2015 when Mrs. Pilliod saved up some money to visit her son in Hawaii, she started feeling dizzy and vertigo. 3740:17-24. The feeling worsened throughout her trip and upon return she immediately went to see a doctor. 3741:11-18. It took a month of poking and prodding, including drilling into her brain, before they diagnosed her with NHL in the central nervous system. *Id.*; 3979:10-13. After her diagnosis, a doctor pulled Mr. Pilliod out to the hallway and said she was only expected to live "12 to 18 months, quite a bit less if she doesn't go through extreme chemotherapy." 3792:4-5.

The chemotherapy regime was extreme and Mrs. Pilliod described having to go through eight cycles of methotrexate which involved five days in the hospital for each cycle. 3741:13-25. The administration of the chemotherapy involves a painful injection directly into the spinal fluid. Raj. Dep. at 55:13-25. Dr. Raj noted the effects of the chemotherapy on Mrs. Pilliod were severe, causing "low blood count" leading to "a very immunocompromised state...that has resulted in the kidney infection and pneumonia." *Id.* at 77:4-20. This treatment continued until the chemotherapy caused her kidneys to start failing and she was placed on a milder chemotherapy regime. *Id.* The cancer returned in 2016, and Mrs. Pilliod was devastated. 3743:1-10. Mrs. Pilliod had to restart the methotrexate. *Id*. at 3746:16-22. Mr. Pilliod described Mrs. Pilliod's suffering during this second round of treatment. Mr. Pilliod called the hospital one day and that Mrs. Pilliod could not be revived. 3793:1-7. He rushed to the hospital thinking she was dead. *Id.* When, he got there, she was alive, but Mr. Pilliod testified "I saw her through the window. "She didn't have a hair on her head. And she was just staring into nothing. She didn't know who I was, who her friends were. No knowledge of her own existence." *Id*. at 3794:24-3795:3.

Mrs. Pilliod's life is not the same after cancer. Dr. Raj testified that cancer caused her to become depressed which necessitated anti-depression medication. Raj Dep. at 57:4-12; 79:12-21. Mr. Pilliod testified that "She had changed quite a bit. Her outlook on life, her sadness was greatly increased" and that she continues to get "weaker by the day." Tr. at 3792:9-10; 3794:7-9. Her son testified that "Her balance, her vision, her hearing, her memory, to some level. Just -- just not there, you know. There was a lot of hope that she would get back to where she was, but I don't know if that's going to happen or

not." 3811:13. Mrs. Pilliod is no longer active, she is "not able to do much anymore" because she "wear[s] out really quickly." 3749:5-23. Mrs. Pilliod states that:

> I haven't been able to work, which I would still be doing if it wasn't for the cancer. I haven't been able to travel for two reasons. One is I didn't have the money anymore because I wasn't working, and the other is just that my health would prevent me from traveling. I ended up seeing a counselor, just because I got very depressed because Al and I both had, you know, non-Hodgkin's lymphoma. It's kind of embarrassing to walk the way I walk now. I don't -- my sense of balance, I guess it's scar tissue, but the doctors say that that sense of balance will never come back. So I really just wobble all the time.

Id. As a result of cancer, Mrs. Pilliod now has double vision, hearing loss, she gets dizzy all of the time and falls frequently. 3749:24-3750:25. Mr. Pilliod often has to catch her and right before trial she had a fall injuring her head and breaking her glasses. *Id.* Based on Mrs. Pilliod's past and future suffering, and her very real risk of recurrence, it cannot be said that the jury's verdict "shocks the conscience."

b. There Was Sufficient Evidence Supporting the Award of Economic Damages to Mrs. Pilliod.

For the rest of her life, Mrs. Pilliod will be required to take the prescription medication Revlimid to treat her NHL. Hoked Decl. Ex. J, Rubenstein Dep. at 29:7-13; 30:11-31:5. This evidence is undisputed. And yet Monsanto argues that Mrs. Pilliod cannot recover damages for the cost of Revlimid because she cannot prove, with certainty, the exact cost that she will pay in the future. The requirement of certainty is not required under California law. Mrs. Pilliod introduced sufficient evidence for the factfinder to determine "the reasonable cost of reasonably necessary medical care that she is reasonably certain to need in the future." CACI 3903A; Tr. at 5489:10-13. Dr. Nabhan testified that the cost of a 21-day supply of Revlimid is $14,000 to $16,000 per month. Tr. at 3981:9-3982:2. Plaintiffs' expert economist calculated the future cost of Revlimid for Mrs. Pilliod over the rest of her lifetime at a value of $2,957,710. Tr. at 4198:6-4200:1. Monsanto did not bring in any witness, expert or otherwise to challenge these future medical needs or their costs.

"The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery." *Garcia v. Duro Dyne Corp.*, (2007) 156 Cal. App. 4th 92, 98. The "requirement of certainty ... cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award." *Cuevas v. Contra Costa Cty.*, (2017) 11 Cal. App. 5th 163, 182; quoting *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 533. Indeed, the appellate courts have upheld future economic damage awards even when the medical experts could not

state that the plaintiff's cancer would recur, no less give a precise figure as to amount of future damages. *Garcia*, 156 Cal. App. 4th at 99. As one court recently advised:

> At the time of trial, the precise medical costs a plaintiff will incur in the future are not known. Nor is it known how a plaintiff will necessarily pay for such expenses. It is unknown, for example, what, if any, insurance a plaintiff will have at any given time or what rate an insurer will have negotiated with any given medical provider for a particular service at the time and location the plaintiff will require the medical care. The fact finder is entrusted with the tasks of evaluating the probabilities based on the evidence presented and arriving at a reasonable result.

Cuevas, 11 Cal. App. 5th at 182. Although "[i]t is desirable ... that there be definiteness of proof of the amount of damage as far as is reasonably possible, [i]t is even more desirable...that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered." *Garcia*, 156 Ca.App.4th at 98-99; Rest.2d Torts, § 912, com. a.).

c. Non-Economic Damages do not have to be Proportionate to Economic Damages

Monsanto's argument that economic damages must be proportionate to non-economic damages is baseless. In personal injury cases there is "no authority establishing limits upon a general damage award based upon a small amount of special damages. In fact, there is no specific requirement that any special damages be awarded before general damages may be awarded." *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078–1079. "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss." *Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664.

Monsanto cites as authority for its fabricated standard a bad faith insurance coverage case. However, "in the insurance bad faith setting, emotional distress is not recoverable as a separate cause of action, but only as 'an aggravation of the financial damages' " *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1216. It has no application to the present matter involving personal injury claims. *Gourley v. State Farm Mut. Auto. Ins. Co*. (1991) 53 Cal.3d 121, 127 ("... the nature of an insurance bad faith action is one seeking recovery of a property right, not personal injury.") In *Buell-Wilson*, the Court reduced the non-economic damages to 4 times economic damages only because that is what Plaintiff's counsel asked the jury to award as a reasonable amount, not because there is some fixed ratio. 141 Cal.App.4th at 553. ("...counsel was requesting the jury award noneconomic damages to Mrs. Wilson in an amount three to four times the amount they awarded in economic damages").

C. The Evidence Supports a Finding of Causation Under Either the JNOV or New Trial Standard.

To support a jury finding on causation in cancer cases "the plaintiff must offer an expert opinion

that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* the negligent act was a cause-in-fact of the plaintiff's injury." *Cooper*, 239 Cal.App.4th at 578. Under the applicable substantial factor test, "it is not necessary for a plaintiff to establish the negligence of the defendant as the proximate cause of injury with absolute certainty so as to exclude every other possible cause of a plaintiff's illness, even if the expert's opinion was reached by performance of a differential diagnosis." *Id.* It is defendant's burden to proffer "the existence of an alternative explanation, supported by substantial evidence and not mere speculation..." to defeat Plaintiff's claims as a matter of law. *Id.* "The court does not resolve scientific controversies." *Sargon Enterprises v. University of Southern California* (2012) 55 Cal.4th 747, 772.

Monsanto attacks the testimonies of Drs. Weisenburger and Nabhan merely because they acknowledged, in accordance with what is generally known about the risk of cancer in populations, that it is *possible* for individuals to develop NHL absent exposure to Roundup. Mtn at 2. As Dr. Nabhan clarified in the portion of his testimony omitted in Monsanto's brief, "all of us could develop cancer at any time. ***Our risk does change based on other factors***." Tr. at 4168:15-16 (emphasis added). Next, Monsanto asserts that Drs. Weisenburger and Nabhan's differential diagnoses were inconsistent with WHO guidelines by citing to the testimony of Monsanto's expert, Dr. Levine, who merely testified that immunodeficiency is the only known cause of NHL, but stopped short of saying that it was the cause of either Pilliods' NHL. Mtn. at 2. Such re-hashed attacks on Plaintiffs' differential diagnosis methodology were rejected by the Court at the *Sargon*/summary adjudication stage, and there is no basis for a different conclusion following a jury verdict in favor of Plaintiffs. *See* Hoke Decl. Ex. 4. Pilliod *Sargon* Order at 11-12 ("Nabhan and Weisenburger considered the possibility of idiopathic…causes for the illness…The case law suggests that an expert can opine that a substance caused an injury even when idiopathic causes are responsible for most of the similar injuries."); *Cooper,* 239 Cal.App.4th at 585

Wendell v. GlaxoSmithKline LLC, concluded that "[w]here, as here, two doctors who stand at or near the top of their field and have extensive clinical experience with the rare disease or class of disease at issue, are prepared to give expert opinions supporting causation, we conclude that Daubert poses no bar based on their principles and methodology." (9th Cir. 2017) 858 F.3d 1227, 1234.

1. Drs. Weisenburger and Nabhan Properly "Ruled In" Roundup

As an initial matter, there is no requirement in California that specific causation be proven using a minimum risk ratio of 2.0, and *Cooper* does not stand for this proposition. "There is no such requirement [for a relative risk of 2.0] in California." *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 493.. *Cooper* held only that studies showing a risk ratio of 2.0 were sufficient in themselves to prove specific causation, even in the absence of other evidence, not that such studies were required. 239 Cal.App.4th at 587. As Judge Chhabria noted "California law does not categorically require a study showing a doubling of the risk ..." *In re Roundup*, 358 F.Supp.3d at. 962

Here, Plaintiffs experts relied on epidemiological, toxicological and genotoxicological data for their opinions, and accounted for dose-response. *See* Tr. at 2694:25-13, 2729:13-24 (Dr. Weisenburger explaining reliance on all three pillars of science, and that the dose-response data in the epi studies demonstrates a doubling of the risk); Tr. at 3921:2-21 ("what this shows is that if you are exposed to glyphosate more than two days per year, you…double the risk of developing non-Hodgkin's lymphoma. And that's what you see, the odds ratio of 2.12… It applies to [the Pilliods] and others."); Hoke Decl. Exh. 4, Pilliod Sargon Order at 10 ("The McDuffie and Erickson studies suggests a relative risk of 2.0."). Indeed, as Dr. Weisenburger explained, the NAPP study demonstrates a statistically significant risk ratio of 2.42 for DLBCL following more than 2 days/year of exposure and after adjusting for exposure to other pesticides. Tr. at 2985:24-2986:9.[5] And, with respect to the unadjusted 2.1 risk ratio in McDuffie (2002), and 2.36 for more than 10 days of use in Eriksson (2008), Monsanto did not present any evidence that these results were in fact confounded, and Dr. Ritz testified that it is improper to adjust for variables which are not actual confounders as this dilutes true risk estimates. *See* Tr. at 2485:10-25 ("In order for a variable to have to adjust for…it has to be a risk factor for the outcome. If this factor is not a risk factor for the outcome, it should not bias my results. Only things that actually cause the disease can be confounders."). That said, De Roos (2003) controlled for exposure to over 40 different pesticides and

[5] This contradicts Monsanto's argument that none of the pooled studies relied upon by Plaintiffs' experts show an OR greater than 2.0. *See* Mtn at 3. Monsanto contends that one of the iterations of the NAPP reports an OR of 1.36 for DLBCL, ignoring the fact that: 1) that result was for the less reliable "ever/never" analysis as opposed to dose-response; and 2) as an author of the study, Dr. Weisenburger is most competent to testify—as he did—why he relied upon the June NAPP presentation. *See* Tr. at 2986:22-23 ("this is the unadjusted data. That's the reason I didn't show this data."). However, Monsanto attempts to atomize the data by pointing out the lower than 2.0 ORs in Leon (2019) and Zhang (2019). This ignores the basic epidemiological principle of evaluating the pattern of results across studies and settings, as explained by Dr. Ritz: "we like to look at patterns. And when we see a pattern like this across a lot of different studies from different continents, from Canada, from the U.S., from Sweden, then we start thinking, hmm, there might be something here…the pattern is pretty clear"). Trns. at 2565:5-10.

still observed a more than doubling (2.1) risk ratio for overall NHL. Tr. at 3927:2-13.

2. Plaintiffs' Experts Explained Why Other Risk Factors Likely Did Not Cause Plaintiffs' NHLs

Mrs. Pilliod: Monsanto claims that Plaintiffs' experts ignored Mrs. Pilliods' negative t(14;18) translocation. Mtn at 4. However, Dr. Weisenburger explained he "would not make big decisions based on this data because it's what I would consider preliminary data based on small numbers...that has not been confirmed" and the jury agreed. Tr. at 3020:18-3121:5; 3016: 25-14, 3019:8-3021:14.[6] Moreover, Plaintiffs' experts provided exhaustive explanations for why they considered and/or ruled out Mrs. Pilliods other risk factors, such as Hashimoto's disease,[7] bladder cancer,[8] and obesity. Tr. at 3965:13-3967:12, 2778:8-15, 2777:11-2778:7, 3943:17-21. The jury resolved these scientific controversies.

Mr. Pilliod: Mr. Pilliods' treating physician, Dr. Raj, does not believe ulcerative colitis ("UC") or skin cancer are by themselves associated with Mr. Pilliods' NHL. *See* Raj Dep. at 210:19-22, 208:21-209:8. Such evidence supports Dr. Nabhan's opinion that it is "not always the ulcerative colitis that is associated with the higher risk of non-Hodgkin's lymphoma; it's the medications that you give somebody to treat the ulcerative colitis." Tr. at 3950:11-15. Consistent with Dr. Raj's testimony, Dr. Weisenburger also testified that it is not biologically plausible for skin cancer to transition to NHL in the bones: "if having multiple skin cancers actually was an important risk factor for non-Hodgkin's lymphoma, you should not just see it in the first few years, but you should see it out many more years." 3010:12-15, 4157:8-12 ("Basal skin cancer and squamous cell cancer, in my opinion, are not a risk factor for developing non-Hodgkin's lymphoma. They occur with sun exposure. If you're in the sun enough, you're going to get these cancers."). Monsanto falsely states that neither expert discussed Mr. Pilliods' recurrent genital warts, ignoring Dr. Nabhan's testimony that "HPV by itself does not cause non-Hodgkin's lymphoma." 3946:4-11. Monsanto's counsel failed to cross-examine Nabhan on the issue.

3. Plaintiffs' Experts Explained Why the Cause Here is Not Idiopathic

Dr. Nabhan aptly summarized the basic logical flaw with Monsanto's argument regarding the potential idiopathy of Plaintiffs' cancers: "So you rule out idiopathy by the fact that you have actual risk

[6] It is not within the province of the Court to resolve Monsanto's qualm with Weisenburger's interpretation of his own study. The jury resolved this question of fact. "If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for [JNOV] should be denied." *Hauter v. Zogarts* (1975) 14 Cal. 3d 104, 110.

[7] Mrs. Pilliod's treating physician, Dr. Raj, also saw no evidence of Hashimoto's. *See* Raj Dep. 96:20-23

[8] Dr. Raj also ruled out bladder cancer as a potential cause of Mrs. Pilliod's NHL. Raj Dep. at 218:5-7

factors. You can't rule out something that doesn't exist. If you couldn't find anything, you would say, okay, I believe this is idiopathic[.]" Tr. at 3953: 20-24. Similarly, Dr. Weisenburger explained: "if you know what the cause is, if there's an obvious cause like Roundup, you don't call it idiopathic. You say, it must have been the Roundup, more likely than not. It's just like the analogy of cigarette smoking. In a lady that gets lung cancer, and she smoked two packs a day for 30 years, you don't say, well, Mrs. Smith, we don't know what caused your lung cancer. We say that it was probably the smoking for 30 years." *Id*. at 2779:8-17. And, the Court previously concluded that Plaintiffs' experts' differential diagnoses are reconcilable with the case-law's interpretation of idiopathy: "*Cooper* indicates that an expert can testify to specific causation and a jury can find causation even if there is evidence that the injury might have had idiopathic (unknown) causes." Hoke Decl. Exh. K, Pilliod *Sargon* Order at 13.

D. The Jury's Finding on Plaintiffs' Warnings Claims was Proper

At the motion *in limine* stage, Monsanto contended that any evidence post-dating the *onset* of the Pilliods' respective NHLs should be excluded as irrelevant, and the Court rightly rejected this proposition. And, at nonsuit, Monsanto reckoned 2012 as the date beyond which Monsanto's failure to warn could not be judged. Now, Monsanto attempts to shift the goalpost again by arguing that its duty to warn should not be judged after the Pilliods' dates of diagnoses, 2011 and 2015, respectively. Mtn. at 7. Regardless of when exposure was deemed *sufficient* for the Pilliods' cancers to develop, the reality is that Mrs. Pilliod was initially diagnosed in 2015, suffered a recurrence of NHL in 2016, and Mr. Pilliod continued to spray until late 2016 / early 2017 because Monsanto has to this day not warned of a cancer risk. *See* Tr. at 3790:22-25, 3791:11-13, 3796:11-16, 3730:16-21. The Pilliods continued to expose themselves to the carcinogen even after diagnosis due to a lack of warning from Monsanto, thereby exacerbating their injuries given that exposure to GBFs has been shown to result in both tumor incidence and promotion, as Dr. Sawyer testified with reference to the George (2010) study: "they used a dose of Roundup similar to what the Pilliods were exposed to…And what it shows is that Roundup has a tremendous ability to ***promote*** malignancy from a carcinogen." Tr. at 3243:17-3244:3 (emphasis added). Monsanto's request to limit liability up to the point when the Pilliods had sufficient exposure to cause their injuries, but to exclude the period when the Pilliods continued to put themselves in harm's way due to Monsanto's failure to warn does not comport with the law. *See Anderson v. Owens-Corning*

Fiberglas Corp. (1991) 53 Cal.3d 987, 1003 ("the user of the product must be given the option either to refrain from using the product at all or to use it in such a way as to minimize the degree of danger.").[9]

Monsanto argues that it's express knowledge regarding glyphosate dating back to 1983—based on animal studies which Plaintiffs' experts testified are adequate for assessing causation —cannot be deemed "generally recognized" because Monsanto refused to make the results publically available. *See* Mtn. at 8. Monsanto is attempting to shield itself against liability because it hid the critical facts of cancer risk which the jury found to constitute wrongful conduct. This does not make sense as a matter of law or policy, given that "reasonably scientifically knowable…refers to knowledge obtainable 'by the application of reasonable, developed human skill and foresight….the manufacturer is…presumed to know the results of all such advances.'" *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, fn. 3 (quoting *Anderson,* 53 Cal.3d at 1002, fn. 13). And, here, Monsanto did know what the results of the early rodent studies showed, but refused to warn anyone, much less Plaintiffs' regarding the risk, even when the EPA classified glyphosate as oncogenic based on the same bioassays. *See* Tr. at 1668:10-19, 1669:3-4; at 3536:19-23. Monsanto's novel argument would permit corporations to harm the public, conceal the risk, and escape liability precisely because they successfully obfuscated the dangers of a product. This pretzel logic has no authority in modern law.

Dr. Ritz testified that the recent Zhang (2019) meta-analysis, combining the results of epidemiological, animal, and genotox studies published from the 80s to the present day, support her opinion that Roundup causes NHL in humans. Tr. 2557:17-2559:5; *see also* Portier Tr. at 1656:12-1664:3, 1670:21-1671:1. Indeed, the jury heard substantial evidence that Monsanto has long been aware of such risks presented by the data. *See* Oppo. to Nonsuit at 4. Dr. Parry informed Monsanto in 1999 that Roundup is genotoxic and can cause oxidative stress, a precursor to cancer, based on the toxicological data published throughout the 1990s. P-Exh. 37 at 10, 5 P-Exh. 38 at 11; Hoke Decl. Ex. L Martens Dep. at 65:3-6, 20-25; 72:3-12; P-Exh. 75 at 27. Any proper review of these materials should have prompted Monsanto to warn consumers that Roundup was carcinogenic. Indeed, "There is

[9] Monsanto argues that Plaintiffs are "bound" by the time-periods of exposure in the complaint. Mtn at 7, n. 4. Monsanto never raised this argument at any point during the pre-trial proceedings or even during trial, which necessarily means that this Court cannot now consider it when ruling on JNOV based on a trial record devoid of such supposedly "found" facts. *Waller*, 170 Cal. App. 2d at 757 (trial court must "take the record as we find it."). Monsanto's proposition holds little weight in jury trials as California courts have treated facts in the pleadings as "found" largely in the context of bench trials. *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271, *as modified* (Dec. 3, 2002)

sufficient evidence for the plaintiffs to argue that Monsanto could have reached this conclusion on its own had it investigated the issue responsibly and objectively." *In re Roundup,* 364 F.Supp.3d at1089.

E. The Pilliods' Claims Are Not Preempted By Federal Law

In arguing that Plaintiffs' claims are pre-empted, Monsanto presents the same arguments that this Court (and every court that has reviewed the issue) has rejected at the summary judgment stage. *See In re Roundup,* 364 F. Supp. 3d 1085; *Beyond Pesticides v. Monsanto Co*. (D.D.C. 2018) 311 F. Supp. 3d 82, 92; *Blitz v. Monsanto Company* (W.D.Wis. 2018) 317 F.Supp.3d 1042*; Hernandez v. Monsanto* (C.D. Cal. 2016) 2016 WL 6822311; *Sheppard v. Monsanto* (D. Hawaii, 2016) 2016 WL 3629074*; Mendoza v. Monsanto* (E.D. Cal. 2016) 2016 WL 3648966*; Giglio v. Monsanto* (S.D. Cal. 2016) 2016 WL 1722859; *Carias v. Monsanto Company* (E.D.N.Y., Sept. 30, 2016) 2016 WL 6803780, at *2; Johnson v. Monsanto Co., 2018 WL 2324413, at *21 (Cal.Super.) ("*Wyeth* and its progeny do not apply.") There is no basis for the Court to reverse its prior ruling.

FIFRA's express preemption clause provides that a State "may regulate the sale or use of any federally registered pesticide or device in the State," but it "shall not impose or continue in effect any requirements for labeling or packaging ***in addition to or different from*** those required" under FIFRA. 7 U.S.C. § 136v(a) and (b)(emphasis added). In *Bates v. Dow Agrosciences LLC,* the Supreme Court explained that a state-law requirement is not preempted if it is "fully consistent" with the federal requirement even if it is not "phrased in the *identical* language as its corresponding FIFRA requirement" *Bates v. Dow Agrosciences, LLC,* (2005) 544 U.S. at 452. California law does not impose labeling requirements "in addition to or different from" the misbranding provision of FIFRA. Monsanto's argument is predicated on a requirement that is not derived from FIFRA's misbranding provision and "nothing in the statute suggests that warnings should be limited to those relevant to 'widespread and commonly recognized uses of a product.'" *In Re Roundup* 364 F. Supp. 3d 1085.

Monsanto has no answer to the plain language of the express preemption clause in FIFRA and accordingly retreats to implied preemption. However, *Bates* considered and necessarily "rejected the possibility of implied preemption." *Id.* at 1085; Bates, 544 U.S. at 458 (Thomas, J., concurring in part and dissenting in part)(commending the majority for "rightly declin[ing] to address …other types of pre-emption."); *Ansagay v. Dow Agrosciences LLC* (D. Haw. 2015) 153 F.Supp.3d 1270, 1282. "When

Congress has made its intent known through explicit statutory language, the court's task is an easy one." *Am. Meat Inst. v. Leeman* (2009) 180 Cal.App.4th 728, 746. Monsanto's impossibility preemption arguments are impossible to square with *Bates* and simply do not apply to this case. *In re Roundup*, 364 F. Supp. at 1087. The MDL court correctly recognized that impossibility preemption is inapplicable because FIFRA expressly permits states to ban the sale of federally approved pesticides. If "California can stop Monsanto from selling Roundup entirely, surely it can impose state-law duties that might require Monsanto to seek EPA approval before selling an altered version of Roundup in California. By contrast, nothing in the FDCA allows a state to ban a drug." *Id.* at 1088. Furthermore, Monsanto does not need EPA approval to warn the public about the risk of NHL through means other than the label; such as through its website, social media, the media, or through retailers. Tr. at 3636:4-6; Murphy 83:19-90:20; Hoke Decl. Ex. M., Guard 675:16-676:2; *see also Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941, 947 (cancer warning on Point-of-sale signs required under Prop 65 are not preempted because FIFRA only regulates the label affixed to the product.)

Nevertheless, Monsanto asserts that EPA's Proposed Interim Registration Review Decision ("PID") for *glyphosate* constitutes "clear evidence" that EPA would have rejected a more stringent warning for Roundup. But even if the clear evidence standard applicable to the FDA prescription drugs preemption cases were applicable to pesticides, Monsanto could not meet its burden.

First, Monsanto cannot establish the "demanding" clear evidence defense because it cannot show that it "***fully informed*** the [EPA] of the justifications for the warning required by state law and that the [EPA], in turn informed [Monsanto] that the [EPA] would not approve a change in [Roundup]'s label to include that warning." *Merck Sharp & Dohme Corp. v. Albrecht* (May 20, 2019) 139 S. Ct. 1668, 1672 (emphasis added). There is nothing in the record to suggest that Monsanto fully informed EPA of the justifications for a more stringent warning on Roundup. Rather, the uncontroverted evidence suggests the opposite—that Monsanto ***withheld*** information from EPA.

Second, there is no indication in *Wyeth* and its progeny that an agency's decision as to a component part insulates the final product from liability. In fact, virtually every pharmaceutical case concerning "clear evidence" turns on the evidence and warnings submitted for the product at issue, not component parts. Here, Monsanto presented no evidence to the Court or jury that it "attempted to give

the kind of warning required by [state law] but was prohibited from doing so," for Roundup or glyphosate. *Bates,* 544 U.S. at 572, *see also* n. 5.

Finally, as encouraged by *Bates* "tort suits" like the Pilliods' "can serve as a catalyst" in identifying risks of pesticides not yet recognized by the EPA. 544 U.S. at 451. "[A]state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products…*" Id. (*quoting *Ferebee v. Chevron Chemical Co.,* (C.A.D.C.1984) 736 F.2d 1529).

E. There were no Prejudicial Irregularities in the Trial Proceedings

The Court maintained a tight ship at trial and ensured that there was no undue prejudice to either party. There were certainly no prejudicial errors in the proceedings that would constitute a "miscarriage of justice" sufficient to warrant a new trial. *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800. Even if there were irregularities at trial there is no "presumption of injury" and such irregularities must be examined within the context of the entirety of the trial record and "the ameliorating effect of the trial court's instructions to the jury to guide its decision making." *Id;* Code Civ. Proc., § 475 ("There shall be no presumption that error is prejudicial") "Absent some contrary indication in the record, we presume the jury follows its instructions." *Cassim,* 33 Cal.4th at 803.

Here, there is absolutely no indication that the jury failed to follow the Court's instructions. Monsanto claimed that there was juror misconduct in its notice of intention to move for a new trial but lacked any evidence to raise that issue in its in memorandum. In fact, there is every indication that the jury followed the Court's instructions. During deliberations, the jury even asked for clarification as to whether certain testimony by Dr. Benbrook was stricken indicating their intention to heed the Court's instructions. Hoke Decl., Ex. N. The jury's other questions during deliberation demonstrated a focus on the science and a careful consideration of the evidence highlighted by Monsanto. They asked for testimony regarding the AHS study from both Dr. Bello and Dr. Ritz. They also asked to review Exhibit 1629, the 2005 AHS study; Exhibit 1676, a paper by Dr. Aaron Blair on methodological issues in occupational epidemiology studies. *Id.* The Court told the jurors after the verdict, "I'm sure I also speak on behalf of the lawyers in terms of your being the jury that I think anybody would want which is to promise to be fair and impartial, and I think you've delivered on that promise." Tr. at 5767:13-17.

1. There was no Attorney Misconduct by Plaintiffs' Counsel in Closing Statements.

Counsel has an undisputed right to characterize admitted evidence in a light most favorable to Plaintiff. *Cassim* 33 Cal.4th at 795. Even if there was misconduct it was certainly not prejudicial. In determining prejudice a Court must "evaluate the following factors: '(1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial; (3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances." *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296. The ultimate question is whether misconduct was so egregious and pervasive that it "prevented the jury from rationally considering the evidence admitted at trial." *Id.* at 297. Although Monsanto "singles out words and phrases, or at most a few sentences, to demonstrate misconduct, [the court] must view the statements in the context of the argument as a whole… Ultimately, the test for misconduct is whether the prosecutor has employed *deceptive or reprehensible* methods to persuade either the court or the jury." *People v. Dennis* (1998), 17 Cal.4th 468, 522. (italics added and bolded); *Cassim*, 33 Cal.4th at 803 (no prejudice where alleged misconduct constituted "a miniscule part of the entire 10–week trial.").

In *Bigler-Engler,* the Court found no prejudicial misconduct even where the attorney "insulted opposing counsel, ignored in limine rulings and admonishments from the court, persisted in asking objectionable questions despite sustained objections, and improperly suggested that additional evidence of defendants' liability existed (blaming the court for his inability to offer it at trial)." *Id.* at 295. The Court noted that the attorney's conduct "did not undermine the court's authority in the eyes of the jury or cause the jury to disobey the court's instructions;" the "violations of pretrial in limine orders were relatively minor in the context of the lengthy, contentious trial" and "were simply variations on, or more detailed descriptions of, evidence that was already properly admitted." *Id.* 297; and that "the court's instructions addressed many of the potential sources of prejudice." *Id.* at 298.

Here, there was no attorney misconduct and certainly no conduct that arises to the level found not prejudicial in *Bigler-Engler.* The Court maintained an atmosphere of order, respect, and civility facilitating a jury deliberation based on the law and the evidence. Counsel's colloquy with the Court, cited by Monsanto, about the proper confines of closing statement evidences respect for the Court, not misconduct. 5424:7-5436:3. Counsel in previewing his closing argument for the Court stated:

what I mean by getting them angry is we have mountains of evidence of rampant corporate

> malfeasance. And I'm going to go through all that evidence with them tomorrow. I'm going to walk them through the documents that are in evidence one by one, showing them what they have and making reasonable inferences from that. But, at the end of all that, I'm going to say,"I need you to take action. I need you to hold them accountable for what they've been doing for 45 years and make sure that this doesn't happen in the future."

Tr. 5430:10-21. The Court stated that this type of argument based on evidence was fine. *Id*. at 5430:24.

Plaintiff's closing argument was well within the guidelines set by the Court. In its motion, Monsanto lists several comments it finds objectionable but only contemporaneously objected to Counsel's statement that "[i]f it turns out that they're [EPA, EFSA] wrong, there's literally blood on their hands." *Id*. at 5569:8-24. The Court sustained the objection and admonished Counsel; Counsel apologized and moved on. *Id*. at 5569:10-24. The comment was made in the context of explaining the EPA's conduct relative to glyphosate. There is no basis to suggest that Counsel was implying that the jury would have blood on their hands. There is no prejudicial error. *People v. Dunlop* (1947) 79 Cal.App.2d 207, 211-212 (arguing that "blood will be on the jury's hands" if they do not convict was not prejudicial misconduct, jury was instructed "not to regard statements of counsel as evidence.").

Monsanto waives its other allegations of misconduct for failing to contemporaneously object when the other statements it complains of were made. "'One of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' " *Bigler-Engler,* 7 Cal.App.5th at, 295–296. "It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.

In *Sabella*, the Court deemed claims of attorney misconduct waived when "[a]t no time did counsel for defendant, an experienced trial attorney, interrupt plaintiff's counsel's opening or closing arguments to make objections as to the claimed instances of misconduct. Instead he elected to sit by while the improprieties accumulated until the conclusion of the closing argument, and then move for a mistrial." *Horn v. Atchison, Topeka and Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 610. ("Defense counsel, by his passive silence, undoubtedly encouraged the repetition of arguments which he now characterizes as so prejudicial that we should overlook his failure to object.").

Even if the arguments weren't waived there was no prejudicial error. The Court explicitly found that Counsel's statements regarding Monsanto's choice to warn were not false. Tr. at 5616:21-5617:3.

It is Monsanto's "obligation to adhere to FIFRA's labeling requirements," not the EPA's. *Bates*, 544 U.S. at 438. Monsanto is not prohibited from proposing a label amendment nor from otherwise warning consumers about Roundup's risk of cancer. Tr. at 3936:1-6

It was Monsanto who argued that a compromised immune system caused Mr. Pilliod's NHL, not plaintiff. Dr. Levine on cross-examination acknowledged that the Zhang (2019) study authors stated that glyphosate can negatively impact the immune system and therein lead to NHL, so it is fair to question why she did not consider this fact in her assessment of the Pilliod's case. *Id*. at 5281:20-5282:6. Monsanto did not object to this line of questioning and it was fair to address in closing arguments. *Id.*

Counsel correctly stated in closing that "as of right now, she's never had to pay for her chemo drugs. And we're really hoping in the future that stays that way. But if it doesn't and she has to pay out of pocket you heard testimony from Mr. Mills the future damages would be $2,957,710." *Id*. at 5598:13-19. There is nothing inappropriate in that evidence-based statement. Mrs. Pilliod testified the cost of the medication was being paid on a charitable basis. *Id*. at 3747:14-21. It would be reasonable for a jury to infer that a verdict in her favor would mean she would no longer qualify for charity.

Monsanto itself submitted evidence to the jury that people are exposed to glyphosate in food at a higher dosage then Dr. Phalen estimated via dermal exposure. D-Exh. 4916-0022 (average dietary exposure to glyphosate at 0.089771 mg/kg per day); Tr. at 4661:1-3 (Dr. Phalen testifying that dermally absorbed dose is .00048 mg/kg per day). The IARC monograph states that "[g]lyphosate residues have been measured in cereals, fruits, and vegetables." P-Exh. 1019-8. Dr. Ritz noted that the massive increase in glyphosate use in has resulted in everyone in the AHS study cohort being exposed to glyphosate and has made interpretation of the AHS study impossible. Tr. at 2537:4-6. Counsel was not eliciting fear, but was reiterating Dr. Ritz's point that it is impossible to conduct an epidemiology study today because people are exposed to glyphosate whether they spray it or not. *Id*. at 5557:15-22.

Counsel did inadvertently violate MIL 24 by referring to the "magic" tumor in rebuttal, but immediately realized the error and apologized on his own accord. *Id*. at 5717:3-8. The Court instructed the jury to disregard that statement. 5720:4-11. The Court did appropriately rein in Counsel when he got heated during rebuttal because of Defense counsel's improper arguments that Plaintiffs' counsel and expert witnesses were trying to manipulate the jury. *Id*. at 5659:25-5661-8.

Monsanto made no objection during or after Plaintiffs' closing with respect to the comments on the POEM exposure model[10], and that the "EPA has had a bad track record." Those arguments are also waived. "Raising the issue for the first time in a post-trial motion is insufficient because the trial court has no ability to correct the misconduct at that point." *Bigler-Engler* 7 Cal.App.5th at 295-296.

Finally, and egregiously, Monsanto quotes itself and fails to cite to the record in claiming that Counsel argued that punitive damages have "nothing to do with the Pilliods." Mtn. at 4; 5613:19-21. In reality, Counsel accurately stated the law that the "[t]he purpose of punitive damages is to punish. It's to deter. It's to change a company's conduct. It is not about compensating the Pilliods." 5603:10-12.

2. There was no Attorney Misconduct Throughout Trial

Monsanto identifies only three occurrences before closing arguments that it claims constitutes pervasive misconduct. Mtn at 5. None of these occurrences constitute misconduct and certainly not prejudicial misconduct. During *voir dire*, the Court sustained an objection regarding Counsel's questioning; provided a curative instruction, explained to Counsel the appropriate manner in which to find out if the jury is comfortable awarding damages; and denied Monsanto's motion for a mistrial. Tr. at 865:6-868:17. There was no misconduct, Counsel made an error in questioning and the Court corrected it. During opening, the Court again denied Monsanto's motion for a mistrial based on the use of the phrase "historic fight." The Court stated that the opening statement was proper and that if "I listened very carefully to everything. If I actually thought he crossed a line in a way that offended me, I would have said something for myself. And I didn't hear that." *Id*. at 1437:25-1438:3.

Wearing gloves when handling a bottle of Roundup is not a scare tactic. Monsanto's own internal documents recommends wearing gloves. *Id*. at 3237:13-23. The Court issued the curative instruction after Question No. 12, stating that there was only water in the first bottle of Roundup, and instructed the jury to disregard completely the second bottle of Roundup. *Id*. at 3806:11-16. This conduct wasn't prejudicial. In fact, Monsanto viewed the conduct as favorable to their case reminding

[10] Counsel's statement was not false or unsupported by the evidence. Counsel reminded the jury that he asked Dr. Phalen in cross-examination "When you use Monsanto's own model, the POEM model, when you actually use it, it was like 8 to 12 milligrams." 5711:2-4. The questions was based on data from Dr. Sawyer's report which Dr. Phalen reviewed prior to trial and was shown at trial during cross. 4682:12-4685:3 Dr. Phalen acknowledged that he did review the data. 4685:1-3. Monsanto asked Dr. Phalen about Sawyer's report in direct. 4624:16-18. The fact that Counsel reminded the jury in closing about a question he asked in cross is not prejudicial misconduct, the jury was instructed that questions from counsel are not evidence. 5476:1-2. The jury can certainly consider the credibility of Dr. Phalen in how he answered the question.

the jurors about both bottles in closing as a reason to return a defense verdict because Plaintiffs' were creating a charade to manipulate the jury. 5659:25-5661:19.

3. Joining Plaintiffs' Separate Claims in a Single Trial was Proper

There was no error in allowing the Pilliods, who used the same product, at the same times, on the same properties, and developed the same cancer, to have their cases tried together. Even if their cases were tried separately, a jury would still necessarily learn that both of them developed NHL after using Roundup. Joinder of Plaintiffs is appropriate where a group of plaintiffs "have been exposed to harmful chemicals at one location over a period of many years by inhalation, drinking of water, and physical contact." *Anaya v. Superior Court,* (Ct. App. 1984)160 Cal. App. 3d 228, 233.

Monsanto twice moved to sever the Pilliods' cases for trial and the Court twice denied Monsanto's motions. The Court should again reject Monsanto's arguments. The Court noted that "it is confident that with just two plaintiffs in the case the jury will be able to separately evaluate the evidence as to each plaintiff." Hoke Decl. Ex. O, Court's Order Denying Mot. to Sever. There is no indication that the jurors failed to evaluate the evidence as to each plaintiff. The Court carefully instructed the jury before both opening and closing argument that "[t]here are two plaintiffs in this trial, Alberta Pilliod and Alvin Pilliod. You should decide the case of each plaintiff separately as if it were a separate lawsuit." Tr. at 1179:22-25; 5478:16-18. The Court specifically addressed concerns raised by Monsanto and instructed the jury to parse out the evidence that is only relevant to one or the other Plaintiff:

> For example, you heard evidence that Mr. Pilliod and Mrs. Pilliod each used different amounts of Roundup and were diagnosed with cancer at different times. When considering Mr. Pilliod's and Mrs. Pilliod's claims, you should separately consider the evidence for each plaintiff regarding what Monsanto knew or reasonably should have known in light of the science that existed at the time of Mr. Pilliod and/or Mrs. Pilliod's use of Roundup that allegedly caused their harm. When considering Mr. Pilliod's claims, you may not consider evidence that is applicable only to Mrs. Pilliod's claims. Similarly, when considering Mrs. Pilliod's claims, you may not consider evidence that is applicable only to Mr. Pilliod's claims.

Tr. at 5479:18-5480:7. *See e.g. Livingston v. Kehagias*, No. 5:16-CV-906-BO, 2017 WL 2297004, at *2 (E.D.N.C. May 24, 2017) (any risk of prejudice from multi-plaintiff trials "may be mitigated against with proper instructions to the jury..."); Hoke Decl. Ex. P (Order in Wade v. Monsanto approving multi-plaintiff trial.) The jury followed these instructions and awarded distinct compensatory damages.

Plaintiffs' experts made clear that they looked at each case separately and still came to the

opinion that Roundup was a substantial factor in causing both Pilliods' NHL. *Id*. at 2785:19-22 (Weisenburger stating "I didn't let that information bias me when I analyzed these. I looked at each case separately. And each case, based on what I've shown you, points the finger to Roundup"). 3882:12-13 (Dr. Nabhan testifying that both Pilliods' NHL was caused by Roundup was not a hard call.)

Monsanto made no objection at trial to "cumulative" expert testimony by Nabhan and Weisenburger. Monsanto also made no objection to Dr. Nabhan testifying about the odds that both Pilliods would develop DLBCL. *Id*. at 3887:13-3888:7. Plaintiffs stated they would present such evidence in opening argument, yet there was no objection to this evidence until post-trial motions. The "[f]ailure to object to the reception of a matter into evidence constitutes an admission that it is competent evidence." *People v. Close* (1957) 154 Cal.App.2d 545, 552. Monsanto likewise made comments on the odds of developing NHL. 1441:1-3 (NHL is a "common form of cancer. Just this year alone, 75,000 people across the United States will be newly diagnosed with NHL.") In any event it is extremely rare for couple to both develop the same type of cancer absent a shared environmental exposure and this is backed up by peer-reviewed literature. Tr. at 3957:8-3960:22

4. Local Pretrial Publicity Did not Prevent Monsanto from Obtaining a Fair Trial

There is no basis for Monsanto's claim that the pre-trial publicity about Roundup tainted the jury pool. Most "people recognize that what they read or hear in the media is not always absolute and complete truth, and are willing and able to judge a matter anew, for themselves" at trial *People v. Rountree* (2013) 56 Cal.4th 823, 842–843. In *Rountree*, it was not error to seat a juror who formed an opinion based on publicity that the defendant "was guilty of something" where the juror stated that he "believe[d]" he could base his decision on only the evidence at trial. *Id.* at 843-844.

Only one juror heard about the Hardeman verdict and he stated it would not affect his impartiality. Tr. at 1302:19-1306:22. That juror was dismissed due to issues with his hearing. *Id.* Juror Olsen did not know anything about Roundup prior to this case and stated that "I believe I could" when asked if he could look at the evidence fairly for both sides. *Id*. at 1012:10-16;1025:23-1026:9. *People v. Kaurish* (1990) 52 Cal.3d 648, 675 (no error in seating juror that "stated her intention to 'try to be an impartial juror.'"). It is the Court's duty to make a credibility assessment of prospective jurors and make a finding as to the juror's "actual state of mind." *Rountree* 56 Cal.4th at 845. The Court carefully

considered Olsen's state of mind and concluded that he "looked like he was really prepared to really do his job." 1056:19-25. Juror Olsen ultimately ended up being one of the three jurors who voted against the amount of punitive damages awarded. Tr. at 5766:10-13.

5. There was no Error or Prejudice in the Court's Evidentiary Rulings

There were no prejudicial evidentiary errors by the Court and none that were so prejudicial that they "resulted in a miscarriage of justice" sufficient to warrant a new trial. Cal. Const., art. VI, § 13.

a. Plaintiffs' Expert Testimony Was Properly Admitted

Monsanto's arguments for the exclusion of expert testimony has been repeatedly rejected by this Court and each Court that has considered the issues and should again be rejected.

Dr. Benbrook. It was Monsanto that filed a brief seeking to limit Dr. Benbrook's testimony on the eve of him taking the stand, notwithstanding the Court's ruling on admissibility in the *Sargon* Order. Ultimately, the Court decided to not "make any preliminary rulings", to only "entertain objections if we get too close to the third rail", and that Dr. Benbrook was permitted to opine on the science in the context of "what it mean[s] in the regulatory framework[.]" Tr. at 3488:18-25, 3493:18-24. Plaintiffs adhered to the Court's rulings regarding the scope of Dr. Benbrook's testimony throughout the course of direct examination. Monsanto does not explain in its brief—beyond *ad hominem* attacks—exactly how Dr. Benbrook's testimony was unduly more prejudicial than probative, particularly since fewer objections were sustained than overruled. *Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 159 ("In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial.").

Dr. Sawyer: There was no error in the admission of Dr. Sawyer's testimony. Dr. Sawyer's testimony was focused mainly on Plaintiffs' exposure and the mechanisms of absorption, distribution, metabolism, and excretion of Roundup through the body. 3116:17-3120:10. Monsanto did not object or claim that such testimony is inadmissible. Dr. Sawyer appropriately concluded that the Pilliods' dose were sufficiently high to cause their NHL. 3249:8-12; *Whitlock v. Pepsi Americas,* (9th Cir. 2013) 527 F. App'x 660, 661 (Finding admissible Dr. Sawyer's similar testimony"). Monsanto on cross-examination specifically requested Dr. Sawyer's opinion about whether the Pilliods would have gotten NHL but for their exposure to Roundup. Tr. at 3286:12-3287:14. Dr. Sawyer's testimony on George was backed up and supported by Portier's testimony. *Id*. at 1686-1695; 3285:10-21.

b. There Was No Error in the Court's Other Evidentiary Rulings

Proposition 65. The Court's ruling on Prop 65 was not due to "pressure from Plaintiffs' counsel." Mtn. at 11. It was Monsanto that opted for the admission of Prop 65 after the Court offered Monsanto the choice of withdrawing its request for judicial notice ("RJN") of foreign regulatory evaluations, in which case Prop 65 would also be excluded, or standing by the RJN and thus also admitting Prop 65 in the express interest of fairness. Tr. at 1273:10-20. The Court held: "I do think that if I allow these documents from Canada, Australia, which I do think… represent the official acts of those governments, so too Prop 65 for the State of California. Everybody will have an opportunity to cross-examine and explain what that all means." *Id*. at 1273:16-22. Monsanto had the opportunity to cross-examine Dr. Pease, and repeatedly argued to the jury that Prop 65 is nothing but a ministerial listing.[11]

IBT – The Court explicitly stated that Plaintiffs could make "the connection between IBT and Monsanto and the work [Paul Wright] did.; Tr. at 483:18-25. The Court only excluded reference to criminal indictments. Hoke Decl. Ex. Q, 3/19/19 Order at 6. Counsel stated **"**I intend to tell the jury the facts of Paul Wright worked at Monsanto, went to IBT, came back to Monsanto, and while he was at IBT he committed scientific fraud." 1261:16-22. The Court approved. *Id.* This evidence was admitted through the testimony of Dr. Reeves and was appropriately referenced by Counsel in opening and closing argument. Reeves Dep. at 192:22 - 193:7. The evidence was relevant as it is undisputed that the carcinogenicity studies that Monsanto relied for the approval of Roundup were fraudulent, yet Monsanto continued to sell Roundup anyway. Hoke Decl. Ex. R, Heydens Dep. at 16:23-17:7.

EPA's 2019 Proposed Interim Registration Decision: The Court correctly excluded this document which Defendant sought to admit after the close of Plaintiffs' case-in-chief. 5068:25-5070-20. The Court held that the document would be prejudicial to Plaintiffs; would be inadmissible under Section 1280 because it doesn't come to a "conclusion about anything other than we're going to still continue to look at this;" it isn't "going to add to the body of evidence that the jury is going to consider;" and it would cause undue delay by requiring the Plaintiffs to rebut that evidence. *Id.* Considering the mountains of EPA documents admitted, the Court excluded this 11th hour redundant document.

[11] Monsanto never requested to introduce the irrelevant *Nat'l Ass'n of Wheat Growers v. Zeise*, (E.D. Cal. 2018) 309 F. Supp. 3d 842, 853 decision.

Trace Contaminants and Impurities: Dr. Sawyer appropriately testified at trial that the effect of these carcinogenic contaminants and impurities are additive to glyphosate and POEA. He stated while they may not be sufficient alone to cause cancer, "the rule is in toxicology and even under EPA policy, that regardless of the concentration of the carcinogen, they are all additive in terms of their effect." 3133:3-11. This same testimony by Dr. Sawyer was held admissible in the Johnson trial.

POEA: Monsanto does not explain how the Plaintiffs' experts' testimony on POEA are misleading. Dr. Sawyer relied on a peer-reviewed study when he correctly stated that POEA is forty times more gentoxic than glyphosate alone. 3157:19-3162:15. Dr. Weisenburger was also relied on a peer-reviewed study when he explained that Roundup is 200 times more genotoxic than glyphosate alone. 2763:17-2764:10. Dr. Weisenburger specifically explained the relevance of genotoxicity and how it leads to NHL. 2690:22-2692:22.

F. There Were no Instructional Errors Prejudicial to Defendants.

Consumer Expectation Instruction: The standard CACI 1203 instruction does not provide that the jury must first determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations. Monsanto's request to modify the instruction could only be granted if the Court had doubts that the Roundup sold to residential users is not a product that consumers can form safety expectations about. CACI 1203 (directions for use). The Court expressed no such doubts. Tr. at 4794:5-17; *Soule v. General Motors Corp.*, 8 Cal.4th 548, 567 (1994); *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 717. (the Court concluded that an ordinary consumer may "reasonably believe that pesticides are designed to eliminate pests within homes occupied by humans, without causing significant harm to the humans.").

Punitive Damages Instructional Error: Monsanto never objected at trial to separate verdict forms for the Plaintiffs and in fact Monsanto argued that they were "entitled" to separate verdicts regarding Monsanto's corporate conduct. 395:20-396:9. Monsanto proposed separate verdict forms for Mr. and Mrs. Pilliod which both contained the punitive damage question. Hoke Decl. at Ex. S. There can be no error when the Court granted what Monsanto requested. *Pearl*, 2019 WL 2511941, at *8 (argument waived where party stipulates to the propriety of the jury instructions).

G. Plaintiffs Presented Sufficient Evidence that Roundup is Defective

Under the consumer expectation test "[a[product design may be found defective if (1) "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner" *Webb v. Special Electric Co., Inc*, (2016) 63 Cal.4th 167, 180. Plaintiffs are not required to "prove that there was a safer alternative design." *Sparks v. Owens-Illinois, Inc.*, 32 Cal. App. 4th 461 (1995). A defense that a product is unavoidably unsafe is limited to claims against manufacturers of pharmaceuticals and medical devices. *Hardeman v. Monsanto Company* (N.D. Cal. 2016) 216 F.Supp.3d 1037, 1040 (holding that *Brown v. Superior Court*, (1988) 44 Cal.3d 1049 does not apply to Roundup). Glyphosate is not a raw ingredient, it is manufactured. 3129:2-4.

Monsanto is liable for design defect because Roundup causes NHL. *See Johnson v. U.S. Steel Corp.*, 240 Cal. App. 4th 22, 33 (2015) ("the seller of a completed product is strictly liable for any defect in the completed product")[12]. Dr. Sawyer testified that studies showed Roundup is more genotoxic than glyphosate alone. Tr. at 3161:5-12, 3164:22-23, 3178:7-25, 3243:17-44:6. Dr. Sawyer further testified that the surfactant in Roundup and the equipment supplied by Monsanto increased internal exposure to glyphosate thereby increasing the Pilliods' risk of developing cancer; and that there were alternative surfactants and equipment available to reduce this risk. *Id*. at 3137:20-3138:24, 3147:12-14, 3250:21-3251:19, 3234:6-3236:12, 3240:12-19. The epidemiology relied on by all of Plaintiffs experts examined Roundup as a formulated product and not isolated glyphosate. Tr. at 2565:5-10; 3257:25-3258:4.

IV. Conclusion:

The trial court ensured that Monsanto received a fair trial from a fair and impartial jury. Monsanto's motions for JNOV and a new trial should be denied. "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". *Coombs v. Hibberd* (1872) 43 Cal. 452, 453.

[12] *Pooshs v. Philip Morris USA, Inc.*, is not applicable here. 904 F. Supp. 2d 1009 (N.D. Cal. 2012). In *Pooshs* , the court's decision turned upon that fact that the act of smoking itself, as opposed to a defect in a particular brand of cigarettes, caused the plaintiff's injury. *Id.*, at 1025. But here, there is no evidence that ***spraying*** is inherently dangerous, or itself caused Plaintiff's NHL. Rather, the evidence presented at trial demonstrated that exposure to Roundup caused Plaintiff's cancer. *Pooshs* also utilized the risk-benefit test, as opposed to the consumer expectations test. Here, unlike *Pooshs*, where expert testimony was required, "it is well settled that expert testimony is not relevant in a consumer expectations theory of liability." *Mansur v. Ford Motor Co.*, 197 Cal. App. 4th 1365, 1380 (2011).

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Respectfully submitted,

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