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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

BEFORE THE HONORABLE WINIFRED Y. SMITH, JUDGE PRESIDING

DEPARTMENT NUMBER 21

---oOo---

COORDINATION PROCEEDING)	
SPECIAL TITLE (RULE 3.550))	
)	
ROUNDUP PRODUCTS CASE)	JCCP No. 4953
)	
_____)	
THIS TRANSCRIPT RELATES TO:)	
)	
Pilliod, et al.)	Case No. RG17862702
vs.)	
Monsanto Company, et al.)	Pages 3371 - 3456
_____)	Volume 21

Reporter's Transcript of Proceedings

Tuesday, April 16, 2019

Reported by: Kelly L. Shainline, CSR No. 13476, RPR, CRR
Stenographic Court Reporter



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I N D E X

Tuesday, April 16, 2019

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1 Tuesday, April 16, 2019

9:00 a.m.

2 ---oOo---

3 (Proceedings commenced out of the presence of
4 the jury:)

5 **MR. MILLER:** Your Honor, if now is the right
6 time, we'd like to talk about the Rubenstein deposition
7 and the rulings made. It's going to take about
8 15 minutes. If the jury is here and you want to wait,
9 we can wait.

10 **THE COURT:** One of the jurors is late by
11 another 10 or so minutes so it is a good time.

12 **MR. MILLER:** Oh, great.

13 **THE COURT:** Let me go fish out the depo and
14 rulings.

15 **MR. MILLER:** Thank you, Your Honor.

16 (Pause in the proceedings.)

17 **THE COURT:** So where are we?

18 **MR. MILLER:** Thank you, Your Honor.

19 So you had a colloquy with counsel yesterday
20 about Dr. Raj, and the Court said at the end of that it
21 was either -- talking about causality testimony from a
22 treater, it was either all in or all out.

23 And applying that to Dr. Rubenstein and the
24 facts in this case, it has to be all in under well
25 settled California law. I had --

1 **THE COURT:** Why don't you just tell me what
2 you're talking about first? Are there particular --

3 **MR. MILLER:** Yes, there are. I'd like to get,
4 if I could, just get two minutes to talk about the law.
5 Is that all right?

6 **THE COURT:** Sure.

7 **MR. MILLER:** All right. So just to put it in
8 context, we identified Dr. Rubenstein as a percipient
9 expert on January. They took his deposition, and under
10 the *Schreiber* case, it's clear that a -- it's
11 *Schreiber v. Estate of Kiser*, which is well-known -- but
12 I'll get the exact cite on the record here. It's
13 22 Cal. 431 and it tells us -- it's 22 Cal. 4th 31, a
14 1999 case, Supreme Court of California.

15 By contrast -- and it's talking about this
16 issue squarely. They're talking about is can a treating
17 physician give opinions, and the answer was yes.
18 Because the trial court had not allowed it. And the
19 Court of Appeals affirmed the trial court not allowing
20 it. California Supreme Court reversed it and said:

21 By contrast, the identity and
22 opinions of treating physicians are not
23 privileged. Rather...they acquire the
24 information that forms the factual basis
25 for their opinions independently of the

1 litigation, they are subject to no special
2 discovery restrictions.

3 And it goes on to squarely say they can give
4 opinions.

5 A treating physician is a percipient expert,
6 but that does not mean that his testimony is limited
7 only to personal observations.

8 That trial --

9 (Telephone interruption.)

10 **MR. MILLER:** -- said you could come in and
11 talk about your actual findings in the medical record --

12 (Telephone interruption.)

13 **MR. MILLER:** -- wouldn't let an opinion in.

14 But the --

15 (Pause in the proceedings.)

16 **MR. MILLER:** Your Honor, thank you.

17 What the Supreme Court of California told us
18 is, rather, like any other expert, he may provide both
19 factual and opinion testimony. The legislative history
20 clarifies it.

21 And again, plaintiff is not required to
22 produce a treating physician designated as experts for
23 depositions because they're not retained. Well, in this
24 case, we did depose them. But they're allowed to give
25 their opinions. That's been reaffirmed by the Second

1 Circuit as recently as 2014 in the *Ochoa Dorado* case,
2 but it said precisely the same thing.

3 So what we have here is an expert that we need
4 to talk about for one second. Unlike Dr. -- this is the
5 distinctions, and I think Dr. Raj ought to come in too
6 but I'm not arguing that now.

7 Dr. Rubenstein said: I know it's a known fact
8 that pesticides cause blood cancers, lymphomas. He
9 didn't say maybe. He said he reviewed the literature
10 and knew it, knew it as part of his treatment of Alberta
11 Pilliod. It can be found at page 31.

12 His answer:

13 Well, pesticides are known to be
14 associated with blood cancers. There is a
15 lot of data in the literature that blood
16 cancers, leukemias and lymphomas are
17 strongly associated with blood cancers.

18 That opinion of that treater that they were
19 allowed to take his deposition on is clearly relevant
20 and admissible opinion, and we're asking Your Honor to
21 admit that. That's at page 31, line 17 through line 7
22 to page 32.

23 So it isn't a question of all out because this
24 is powerful testimony and by law is allowed in. So
25 we're asking the Court to reconsider that.

1 If we go through, there's some other places
2 here and I'll give you precise spots we believe is
3 applicable.

4 If we go to page 44, Your Honor, 44, line 7,
5 to 46, line 10, and we read that, he's -- they ask
6 him -- again, this is query from Monsanto counsel.

7 They ask him when his knowledge and experience
8 of pesticides and its relationship to non-Hodgkin's
9 lymphoma began. And he explains how he's done so much
10 work with farm workers and it's a known fact.

11 So that is opinion that is clearly relevant,
12 clearly admissible under the California Supreme Court.
13 And queried by defense counsel.

14 So we'd ask the Court to allow in 46 -- I'm
15 sorry -- 44:7 to 46:10.

16 If I could quickly, I only have a few more.
17 If we could turn to 46:14 to 18.

18 Again, question by defense counsel:

19 Q. When did you develop this notion
20 that pesticides caused non-Hodgkin's
21 lymphoma?

22 "A. Developed it? I didn't develop
23 it. I was aware of it in the
24 literature. You know, I write papers on
25 the subject of what causes lymphoma."

1 That's clearly opinion that they demanded out
2 of the witness relevant to the topic herein during the
3 time he was treating Alberta Pilliod. So it's squarely
4 within the *Estate of Kiser* and we'd ask the Court to
5 allow it in.

6 And, again, they've got lots of testimony
7 from -- on theories that they had on --
8 immunocompression or immunocompromised. So it would be
9 beyond the pale for the case of goose versus gander,
10 like you said, either all in or all out. But under well
11 settled California law, it's got to come in. I mean,
12 this is what he says.

13 And then finally, example, if you go to
14 page 47:19, they ask him about Roundup and whether it's
15 been cleared and under case-control, and he equivocates.
16 So both of these come in, I don't doubt that.

17 40 -- page 54, line 9, and he says there is
18 absolutely evidence that it may be a risk. That's 54,
19 line 9, through 55:05. It talks about pesticides. And
20 he goes on to say, they tried to query him to see if he
21 would let his family use Roundup. He said, "No, I don't
22 use it, I won't let my family use it." That goes to his
23 integrity, his credibility. They challenged him on it.
24 Imagine if he'd said, "Oh, yeah, I use Roundup all the
25 time." They'd be standing here screaming to get that

1 in. Right?

2 **THE COURT:** I wouldn't let any of that in
3 either. Yeah, it's not relevant. So that's aside.

4 **MR. MILLER:** That section may be weak, but the
5 rest of it is, I think, all square -- on all fours with
6 what the law allows.

7 So I'm almost done. I'm almost done.

8 **THE COURT:** So wait. 54:9, 55:5. Okay.

9 **MR. MILLER:** Yes, Your Honor.

10 One more second here.

11 Yes. Page 91, line 22. I asked a
12 hypothetical. And I think California law is as liberal
13 as I've ever seen on hypotheticals of experts. And a
14 percipient witness is, under California Supreme Court
15 law, an expert.

16 So I just said hypothetically if she'd have
17 walked in 2002 and says, "I spray Roundup at least nine
18 times a year, but I'm worried about getting
19 non-Hodgkin's lymphoma. What would you recommend?"

20 He says, "I would recommend you don't do it,"
21 in so many words.

22 But that's the hypothetical, but I think it's
23 clearly proper. And if he had said an answer I didn't
24 like, it would have still been admissible. But so I
25 think that ought to be allowed.

1 Does Your Honor have any questions on that?

2 **THE COURT:** Let me just go back and make sure
3 I've identified each one properly.

4 **MR. MILLER:** Thank you, Your Honor.

5 **THE COURT:** Just tell me the first one again.

6 **MR. MILLER:** 31:17 to 20. Then 44:7 to 46:10.
7 46:14.

8 **THE COURT:** Hold on.

9 **MR. MILLER:** I'm sorry.

10 **THE COURT:** 44?

11 **MR. MILLER:** 44:7 to 46:10.
12 46:14 to 18.

13 **THE COURT:** Okay. I think I got the rest.

14 **MR. MILLER:** Great.

15 **THE COURT:** 54:9 to 55:5?

16 **MR. MILLER:** Yes, Your Honor.

17 **THE COURT:** And 91:22 to 92:19.

18 **MR. MILLER:** Yes, Your Honor.

19 **THE COURT:** Okay. Mr. Ismail.

20 **MR. ISMAIL:** Thank you, Your Honor.

21 Just to sort of close a little about Dr. Raj,
22 the Court's departing words on discussion yesterday was
23 that the Court had sustained our objection to portions
24 of the hearsay conversation with Dr. Raj and
25 Mrs. Pilliod. And I believe the Court's directive was,

1 in fairness, what we designated from that conversation,
2 either that conversation is in or it's out. We've
3 agreed to remove our designations of that section.

4 The concern that Mr. Wisner raised and that
5 Your Honor recognized that that conversation is --

6 **THE COURT:** Right.

7 (Simultaneous colloquy.)

8 **MR. ISMAIL:** -- so we agreed to withdraw it.
9 And we believe Dr. Raj is now -- I'm sorry.

10 **MR. WISNER:** We don't agree. We think it all
11 comes in. We made our argument yesterday. I don't
12 believe I changed the Court's mind.

13 I do think that there's a serious fairness
14 issue here where they have argued, and at the end of his
15 opening, he says: I demand that the plaintiff show you
16 some evidence that any doctor actually considered
17 Roundup. And the fact that there was a conversation in
18 the context of their treatment, and she said possible
19 cause, I don't understand how that's not admissible.
20 Not for proving causation, not as an expert opinion, but
21 as a fact of what occurred.

22 And so we ask that it all be in, but obviously
23 Your Honor is not --

24 **THE COURT:** I actually didn't rule. I just
25 said talk about it.

1 **MR. WISNER:** Oh, okay. So our position is it
2 comes in.

3 **THE COURT:** Right, okay.

4 **MR. WISNER:** But if it doesn't come in, we
5 talked about what comes out. So we have an agreement on
6 if it doesn't come in. But I strongly believe that it's
7 only fair for it to come in.

8 **MR. ISMAIL:** So I don't want to rehash the
9 discussion we had yesterday, but I'm happy to address it
10 if Your Honor wants further argument.

11 **THE COURT:** I'm thinking about it. I'm not
12 sure -- I said all in, all out, but I may rule it in.
13 But let me just talk about what we're talking about.

14 **MR. ISMAIL:** So with respect to
15 Dr. Rubenstein, so just by way of background,
16 Dr. Rubenstein, Mr. Miller met with Dr. Rubenstein at
17 least once, if not twice, before his deposition.
18 Mr. Miller provided Dr. Rubenstein a binder of articles
19 relating to pesticide exposure and NHL. In fact, sent
20 him a copy of the Zhang article before it was even
21 publicly available. I'm sure you saw that in the
22 designations. Paid Dr. Rubenstein \$8,000, we believe
23 was the amount.

24 Dr. Rubenstein doesn't have an expert
25 disclosure in the case. He's not -- even under the

1 *Schreiber* case and *Ochoa*, they do make this distinction
2 of, you know, have you been worked up as a litigation
3 expert versus your status as a treating physician.

4 Having met with him, paid him, sent him
5 materials outside his care and treatment, they've
6 attempted to transform Dr. Rubenstein into a different
7 witness than what he is.

8 And so if you go through the specific page and
9 line designations -- I guess I'll work backwards. I
10 believe a hypothetical posed to a treating physician is
11 completely improper.

12 **THE COURT:** So I'm not letting that in. But
13 let's go back to the other.

14 **MR. ISMAIL:** Okay. And the one about the
15 family, I believe you want my comments on that, it's a
16 nonresponsive answer about --

17 **THE COURT:** You have to tell me where to look.

18 **MR. ISMAIL:** I'm sorry, Your Honor.

19 That was 54:9 through 55:5.

20 **THE COURT:** Okay. Hold on one second.

21 **MR. ISMAIL:** So then I believe we're talking
22 about two page-and-line designations. So 31:17 through
23 32:1, I believe, was the --

24 **THE COURT:** Hold on. You -- 54:9 through
25 55:5.

1 **MR. ISMAIL:** Yeah. So that's the one about --

2 **THE COURT:** Let me just take a look at it
3 really quickly.

4 (Pause in the proceedings.)

5 **THE COURT:** See, that's the part that
6 really -- when I was sort of mentioning to him casually
7 yesterday, he doesn't have any specialty or an expertise
8 because he's talking about -- he said, oh, I thought
9 that was about mutation or something. And so it's not
10 even a question about having an expertise. So you may
11 be asking a physician who was treating about their scope
12 of knowledge about a particular subject.

13 But in this case, if you had actually provided
14 him with the information he did not otherwise have. Now
15 there are a couple of places where he says, "I wrote
16 articles," but I'll take a look at that. But simply
17 responding to what you've learned in the few weeks --

18 **MR. MILLER:** Your Honor, he says in here
19 unequivocally, and I can point the Court to it, he is
20 literally the world's leading expert on the causes of
21 primary central nervous system lymphoma. He even says
22 under oath here, "I write articles about what causes
23 it."

24 He says at page 31, "Pesticides are known to
25 be associated with blood cancer."

1 That's not a possible like Dr. Raj. That's a
2 known.

3 **THE COURT:** Let's start from the beginning.

4 **MR. ISMAIL:** Sure.

5 **THE COURT:** Go from the beginning and go this
6 way and the whole conversation will make more sense.

7 **MR. ISMAIL:** Of course, Your Honor.

8 **THE COURT:** So let me do that.

9 **MR. ISMAIL:** So 31:17 is the first one I have.

10 **THE COURT:** Yes.

11 **MR. ISMAIL:** Is that fair?

12 **THE COURT:** Yes.

13 **MR. ISMAIL:** So, again --

14 **THE COURT:** So let me just tell you my
15 thought. I think that can come in. I think that could
16 come in. But he does get to a point where he's having a
17 colloquy with -- I guess, Mr. Miller, was that you, did
18 you question him?

19 **MR. MILLER:** I was the examiner, yes,
20 Your Honor.

21 **THE COURT:** So where he's having a colloquy
22 with you just sort of talking about literature that he
23 reviewed in anticipation of the deposition, which I have
24 some issues with. But let's just go one by one.

25 **MR. MILLER:** Yeah, I didn't ask to put that

1 back in. Your Honor ruled out that colloquy about
2 Zhang, and I didn't ask to put that back in.

3 The next one is 44, Your Honor.

4 **THE COURT:** The next one is 44.

5 **MR. MILLER:** Line 7. To 46, line 10.

6 These are questions from Monsanto's lawyer
7 here.

8 **THE COURT:** I mean, I was really a little
9 conflicted with the extent to which he opines very
10 little about their health and a whole lot about --

11 **MR. MILLER:** That's because Monsanto asked
12 him, Your Honor.

13 **THE COURT:** No, I'm just talking -- I'm just
14 talking in terms of the deposition.

15 **MR. MILLER:** Right.

16 **THE COURT:** So let me just go back and look
17 through it carefully.

18 **MR. MILLER:** I narrowed it down. I started at
19 44:7. Your Honor had ruled out some other stuff, and
20 then I just focused really specifically on what was very
21 relevant and very critical. And that's 44:7 to 46:10.

22 **THE COURT:** Okay.

23 **MR. ISMAIL:** Your Honor, that section has
24 nothing to do with his care and treatment of
25 Mrs. Pilliod. He doesn't relate that experience to her,

1 didn't inform his diagnosis or treatment. He never says
2 that he considered pesticides as being relevant to or a
3 part of her care and treatment.

4 It is -- it is just his -- first of all, he's
5 never written on the subject. He's not an author or
6 researcher in the field. So to the extent the
7 suggestion is he's intimately familiar with pesticide
8 epidemiology is not the case. And he relates this,
9 "I've treated farm workers who have come down with blood
10 cancers."

11 No discussion of what pesticides at issue. It
12 has nothing to do with his care and treatment of
13 Mrs. Pilliod. It's just hanging out there as "I've
14 taken care of farm workers who -- since the '90s who
15 have had blood cancers."

16 **MR. MILLER:** This is exactly what the --

17 **THE COURT:** Okay. Here we go.

18 I'm okay up to 48 because he's just sort of
19 talking about his experience. That's kind of neither
20 here nor there. It's when he starts saying, "Have you
21 seen any of this literature before contained in this
22 notebook from Mr. Miller?" That's when I have a
23 problem.

24 **MR. MILLER:** I'm sorry. Where are you,
25 Your Honor?

1 **THE COURT:** I'm looking at -- I'm just going
2 to page 48. I'm sort of looking at the passage that
3 we're talking about.

4 So 44 I don't really have a problem with.

5 **MR. MILLER:** Okay.

6 **THE COURT:** It's when we get to 48 where he
7 basically says, "Never seen this stuff before," so but
8 they go on and talk about it at length because he's
9 reviewed it. But he's -- this I don't think falls
10 within the *Schreiber* case. I don't think that when you
11 give a treating physician articles about a topic and
12 then he starts talking about it and basically offering
13 opinions about what he thinks about it --

14 **MR. MILLER:** Yes, Your Honor --

15 **THE COURT:** -- that's not expert opinion and
16 that's not even expert in the realm of "I treated this
17 person but I also have a body of knowledge that I can
18 discuss."

19 **MR. MILLER:** We'll stop at 46:18, Your Honor.
20 And I think that satisfies then.

21 If I could, counsel's statement about it has
22 to be personal observation is --

23 **THE COURT:** It doesn't have to be personal.
24 But there's a whole lot in here that I disagree is based
25 on any expertise at all.

1 **MR. MILLER:** I understand, Your Honor.

2 We'll go 44:7 to 46:18, what's been marked.

3 And there's one other area we could talk
4 about.

5 Page 50, if we could, Your Honor.

6 No, I can withdraw that. 50 is withdrawn by
7 the Court's ruling.

8 **THE COURT:** Let's go to 57.

9 **MR. MILLER:** Yeah, 57.

10 **THE COURT:** I think that's, "Do you use
11 Roundup," that's out. I'm not changing my mind about
12 that.

13 Let's go to --

14 **MR. MILLER:** 57 is out.

15 **THE COURT:** Yeah, that was out anyway.

16 So I think the next one is 91.

17 **MR. ISMAIL:** 91.

18 **THE COURT:** Which is out.

19 So I'm willing to revise my opinion -- but
20 none of the discussions about stuff where he just read
21 the articles.

22 **MR. ISMAIL:** So, Your Honor, how much -- and
23 maybe I wasn't taking good enough notes when Mr. Miller
24 was talking, but 44:7 to 44:23 is what he asked to be
25 considered, is what I wrote down.

1 **THE COURT:** 44:7 to 45?

2 **MR. MILLER:** To be clear.

3 **THE COURT:** I'm sorry. 44:7. Well, he can
4 talk about his experience. I don't have a problem with
5 him discussing what his experiences are. It's when he
6 gets into -- I mean, that there are -- he has knowledge
7 about pesticides as they relate to -- he has some
8 knowledge about the exposure of farm workers to
9 pesticide based on his personal experience and training.
10 That's fine.

11 It's just when it goes beyond that and then he
12 begins to talk about the articles and other things that
13 I don't think he has an expertise in. I don't think so.

14 **MR. MILLER:** So we'll stop at 46:18 as we
15 discussed. 44:7 to 46:18.

16 **THE COURT:** Well, 44:10 -- 46:10.

17 **MR. MILLER:** All right, Your Honor, 46:10.

18 **THE COURT:** I'm not sure what that has to do
19 with anything.

20 **MR. MILLER:** All right.

21 **MR. ISMAIL:** So, I mean, Your Honor, this
22 whole discussion of, you know, he's coming in about
23 leukemia which is not an issue in this case. Even they
24 don't claim the pesticides have anything to do with
25 leukemia. Whether it was glyphosate, I have no idea.

1 He's talking about migrant farm workers on page 46.

2 **THE COURT:** Well, he's just talking about his
3 experience which is not -- it doesn't have to relate
4 specifically to his treatment. He's just talking about
5 what his experience is and what he -- and on what he --
6 how he relates.

7 But beyond his own experience, so he's talking
8 about how he's come to know something about the topic.

9 **MR. ISMAIL:** So he says at 45:

10 I did three months in a row at a
11 blood bone marrow transplant unit. And
12 it's not -- you don't have to be a genius
13 to see the recurrent pattern of people who
14 are working in the fields and have
15 leukemia at a young age.

16 That's not this case.

17 **MR. MILLER:** That's exactly what --

18 **MR. ISMAIL:** This is not a leukemia case.
19 This is -- this isn't experience that relates to his
20 care and treatment of Mrs. Pilliod.

21 **MR. MILLER:** Nor does it have to.

22 **MR. ISMAIL:** But it does have to have some
23 relevance under 352 to outweigh the prejudicial effect
24 on the playing of this testimony.

25 **MR. MILLER:** He's talking about a blood

1 cancer.

2 **MR. ISMAIL:** If I may.

3 The leukemia issue at a young age is not this
4 case, is not what's alleged disease in this trial, and
5 has -- respectfully has nothing to do with what we're
6 talking about here.

7 Then he goes on to say relationship of blood
8 cancers, down in 45. And then I would suggest the, you
9 know, the reference to migrant farm workers starts to
10 get -- is further prejudicial, Your Honor.

11 We're starting to invoke this idea that
12 migrant farm workers have been -- well, first of all,
13 it's not alleged in this case that Mrs. Pilliod or
14 Mr. Pilliod used it occupationally. But, of course,
15 when you start referencing migrant farm workers, there's
16 additional 352 issues.

17 So I believe when Your Honor has allowed
18 44:7 --

19 **MR. MILLER:** To 46:10.

20 **MR. ISMAIL:** If I may, Mike.

21 Allowing him to describe that he has seen
22 blood cancers in farm workers, as he does on page 44:7
23 through 23, and then he starts talking about leukemia
24 patients on the bone marrow transplant at a young age, I
25 think we've now gone further afield under 352. And it's

1 not informing his care and treatment at all. We've sort
2 of crossed that line in that set of testimony.

3 And so I would ask the Court to hold the line
4 at 44:23 and not start getting into this discussion of
5 leukemia which is not at issue in this case.

6 **MR. MILLER:** Your Honor, the defendants have
7 been arguing about farm workers and the Agricultural
8 Health Study for the last three weeks. And now to say
9 when they don't like treatment testimony from a treater
10 about farm workers it should be excluded would be
11 grossly unfair.

12 This is squarely in what the Supreme Court
13 said could be not just personal observation, but may
14 provide both fact and opinion testimony.

15 And in fact --

16 **THE COURT:** First of all, this isn't that.
17 He's just describing his background. This isn't his
18 opinion. This is just "what I've done." And this is a
19 relevance issue, not a question of either of the cases
20 that you cited. I understand what those cases say.
21 This isn't that.

22 **MR. MILLER:** But it's relevant.

23 **THE COURT:** His testimony is -- no, not
24 everything that comes out of his mouth is. I'm just
25 saying there are parts of it that are opinion, there are

1 parts of it that are just biographical information. And
2 so we're in the biographical information, and this is a
3 relevance issue that we're talking about here.

4 **MR. MILLER:** I understand, Your Honor.

5 **THE COURT:** So I'm looking at it.

6 Let me -- are the jurors all here now?

7 **COURT ATTENDANT:** They're all here.

8 **THE COURT:** Okay. Let me just take a look. I
9 know that you want to put this together.

10 **MR. MILLER:** Yes.

11 **THE COURT:** But let me just take a look at it.
12 Let's get the jurors in here.

13 **MR. MILLER:** Fair enough, Your Honor. Thank
14 you.

15 **THE COURT:** When we take a break, I will have
16 looked at it more carefully.

17 **MR. MILLER:** Great. Thank you, Your Honor.
18 Thank you very much.

19 **THE COURT:** The reason is I want to go back to
20 42 and read through and just sort of get a clearer sense
21 of exactly how the conversation starts and where it
22 goes.

23 **MR. MILLER:** Sure.

24 **THE COURT:** Because I think Mr. Ismail has a
25 point, but I am going to let some of it in. I just need

1 to figure it out.

2 **MR. MILLER:** Thank you.

3 **MR. ISMAIL:** Thank you.

4 (Brief recess at 9:32 a.m.)

5 (Proceedings continued in the presence of the
6 jury at 9:36 a.m.)

7 **THE COURT:** Good morning.

8 **ALL:** Good morning, Your Honor.

9 **THE COURT:** Okay. Welcome back.

10 You may proceed with the continuation of
11 Dr. Koch.

12 **MR. WISNER:** That's right.

13 I spoke with counsel. Our next live witness
14 will be here at around 10:00, 10:15. And so we've
15 agreed to pause the Koch video and have Dr. Pease
16 testify so he won't be waiting outside.

17 **THE COURT:** That's fine.

18 (Video excerpts from the deposition testimony
19 of Michael Koch resumed playing in open court; not
20 reported herein.)

21 **MR. WISNER:** Your Honor, this is probably a
22 good time to stop.

23 **THE COURT:** That's fine. Do you want to take
24 a break?

25 **MR. WISNER:** Yeah.

1 **THE COURT:** We'll take a quick 10-minute
2 break. We're going to break for a live witness and then
3 we'll go back to the video.

4 (Recess taken at 10:16 a.m.)

5 (Proceedings resumed in open court in the
6 presence of the jury at 10:29 a.m.)

7 **THE COURT:** Mr. Wisner.

8 **MR. WISNER:** Yes, Your Honor. At this time,
9 the plaintiff calls Dr. William Pease to the stand.

10 **THE COURT:** All right. Doctor, please come
11 forward. Stand right there to be sworn.

12 **THE CLERK:** Raise your right hand.

13 **WILLIAM PEASE,**
14 called as a witness for the plaintiffs, having been duly
15 sworn, testified as follows:

16 **THE WITNESS:** I do.

17 **THE CLERK:** Thank you. Please be seated.

18 And would you please state and spell your name
19 for the record.

20 **THE WITNESS:** My name is Dr. William S. Pease.
21 P-E-A-S-E.

22 **MR. ISMAIL:** Is there a disco presentation in
23 here?

24 **MR. WISNER:** Yeah, I was hoping it would go
25 away.

1 May I proceed, Your Honor?

2 **THE COURT:** Yes, you may.

3 **DIRECT EXAMINATION**

4 **BY MR. WISNER:**

5 Q. Good morning, sir.

6 A. Good morning.

7 Q. Could you please introduce yourself to the
8 jury, tell the jury where you're from and where you
9 currently live.

10 A. My name is Dr. William Pease. I am from Hyde
11 Park, Vermont up near the Canadian border. I have been
12 living in Berkeley since 1986.

13 Q. So you had a long commute this morning?

14 A. By BART, very quick.

15 Q. All right. Sir, I want to talk to you about
16 some of your background and experience. You said
17 Dr. William Pease. Do you, in fact, have a Ph.D.?

18 A. Yes. I have a Ph.D. from UC Berkeley. I
19 received it in 1992.

20 **MR. WISNER:** May I approach with the binder?

21 **THE COURT:** Yes.

22 **BY MR. WISNER:**

23 Q. And, Doctor, I believe in your binder is
24 Exhibit 3086. Is that a copy of your curriculum vitae?

25 A. Yes, it is.

1 **MR. ISMAIL:** Permission to publish?

2 **MR. BROWN:** Objection, Your Honor. Hearsay.

3 **THE COURT:** Overruled.

4 **BY MR. WISNER:**

5 **Q.** Okay. Doctor, we're looking at your
6 curriculum vitae and I want to start off on your
7 education.

8 **MR. WISNER:** Your Honor, would it be possible
9 to turn that light off because it's very distracting?

10 **THE COURT:** Sure.

11 **MR. WISNER:** There we go. Thank you,
12 Your Honor.

13 **Q.** All right. So start with your education. You
14 mentioned your Ph.D., but let's start earlier.

15 You went to college where, sir?

16 **A.** I went to college at Yale University, New
17 Haven, Connecticut.

18 **Q.** What did you study at Yale?

19 **A.** I studied English literature.

20 **Q.** And then after Yale, what did you do?

21 **A.** I received a Rhodes scholarship, which is a
22 scholarship that the Rhodes Foundation provides for some
23 academic excellence. It allowed me to go to Oxford for
24 two years. And then --

25 **Q.** What did you study at Oxford?

1 **A.** At Oxford, I studied English literature as
2 well.

3 **Q.** Doctor, let's move the mic a little closer to
4 you so we can hear your voice better.

5 All right. And then it looks like between
6 your time at Oxford University and your next degree at
7 Berkeley, 1988, there was about a seven- or eight-year
8 gap?

9 **A.** Yes, about a 10-year gap.

10 **Q.** Okay. What did you do during that time?

11 **A.** When I finished at Oxford, I came back to the
12 United States and began working as a community
13 organizer. For the next 10 years, I alternated between
14 Europe and the U.S. working for social justice
15 organizations in Europe. It was primarily
16 peace-oriented organizations. In the United States, it
17 was inner city community organizing.

18 At the end of that period of time, I decided I
19 kind of wanted to reenter the professional world. So I
20 got a job working for the Massachusetts Department of
21 Environmental Management. Loved it. Realized I had a
22 real interest in environmental science and an aptitude
23 for it and decided that I would return to Berkeley to
24 get a master's and Ph.D. in environmental sciences.

25 **Q.** Now, Doctor, you studied English literature in

1 college and then jumped into environmental sciences.

2 Why did you do that?

3 **A.** I've had a lifelong interest in science and in
4 protecting the environment. Most of the experience that
5 I put my English literature degree to was in basically
6 being able to communicate well and explain things to
7 people.

8 So I realized that it was a real opportunity
9 in the field of environmental science for someone who is
10 both a good communicator and interested in mastering the
11 underlying science, because so many mistakes were being
12 made, not enough was being done. So I was very excited
13 to be able to come to Berkeley which had the preeminent
14 program for training scientists to then move back into
15 the policy arena.

16 **Q.** And so when did you come back to Berkeley to
17 begin your degree?

18 **A.** In 1986.

19 **Q.** In 1986, did you get involved at that point
20 with a legislative movement in California called
21 Proposition 65?

22 **A.** Yes. Since I was a community organizer, I
23 needed to find work to pay for my education. My first
24 job here in California when I moved here was working for
25 a coalition of environmental organizations that were at

1 that point trying to put Proposition 65 on the 1986
2 general election ballot.

3 And I worked for them for about nine months,
4 both preparing communications about what the
5 Proposition 65 entailed and in actually doing the
6 organizing to collect the signatures, and then
7 eventually doing the organizing to win support for the
8 initiative. The initiative passed in November of 1986
9 by 63 percent.

10 Q. And you said you were out doing organizing.
11 What did that actually entail in the context of the
12 Proposition 65?

13 A. Literally the types of organizers you meet on
14 the street all the time. Collecting signatures,
15 petition signatures to get the initiative on the ballot
16 was a large part of it. Working to get press coverage,
17 favorable press coverage of the initiative. And then
18 working with a bunch of organizations to try to build a
19 broad base of support for the initiative in the labor
20 community, in the social action community, social
21 justice community.

22 Q. And as part of your work organizing, did you
23 have a chance to interact with some of the authors of
24 Proposition 65?

25 A. Yeah, I was lucky enough to be able to -- most

1 of the work that I was doing was largely being sponsored
2 by the Environmental Defense Fund. They were one of the
3 major California environmental organizations that were
4 supporting the initiative and had drafted the
5 initiative.

6 So I got to work closely with the three
7 attorneys who wrote Prop 65 and effectively sort of
8 defined the way the Safe Drinking Water and Toxic
9 Enforcement Act would show up on the California law.

10 Q. We mentioned Prop 65 a couple of times now.
11 Let's quickly -- what is Proposition 65?

12 A. So it's the Safe Drinking Water and Toxic
13 Enforcement Act. It was an effort to break through a
14 lot of what at least the public considered to be
15 regulatory paralysis in the mid 1980s, not enough action
16 being taken on known hazards.

17 So the approach of Prop 65 was mandating that
18 the State create a list of substances that are known to
19 the State to cause cancer or reproductive toxicity, and
20 then requiring that certain actions be taken to protect
21 public health once a substance is on that list.

22 Q. Now, you got your master's degree in 1988; is
23 that right?

24 A. That's correct.

25 Q. And then after that, you went and got a Ph.D.

1 in environmental sciences; is that right?

2 A. Environmental health sciences, yes.

3 Q. Sorry. Environmental health sciences.

4 What's the difference between environmental
5 sciences and environmental health sciences?

6 A. Environmental health sciences is more focused
7 on the types of things we'll be talking about here
8 today, chemical risks. So environmental health sciences
9 involves the study of toxicology, which is basically the
10 science of how chemicals cause adverse health effects.
11 Typically that work is done in animals or in laboratory
12 tests.

13 It involves the study of epidemiology because
14 it's obviously important to understand when we have
15 human data on whether a chemical can cause a particular
16 health problem.

17 And then there are several other steps in
18 being able to identify chemical hazards and then
19 regulate them that the program also covered.

20 So it's important to know, for example, you
21 know, how much people are being exposed to. So there's
22 an exposure assessment component to what I was doing.
23 And then there was how does the political system respond
24 to scientific information about health hazards through
25 the process of what's called risk management. So what

1 are the rules that society adopts to try to control
2 potential adverse health effects from these substances.

3 Q. What did you do your dissertation in?

4 A. I did my dissertation on Proposition 65's
5 impact on what are considered to be the four major
6 components of chemical risk management. So I looked at
7 how Proposition 65 identifies chemical hazards, how it
8 conducts what are called dose-response assessments to
9 determine how toxic a particular substance is. I looked
10 at exposures that were occurring in California in the
11 late 1980s, early 1990s, to try to assess whether there
12 were exposures to known hazards that were of concern.

13 And then I also looked at how the system works
14 in the real world, how Prop 65 works in the real world
15 in terms of did it change behavior either by consumers
16 avoiding exposures or by manufacturers of products or
17 operators of factories reducing their emissions of the
18 known hazards.

19 Q. So after your Ph.D., sir, turning to the last
20 page, it looks like you started work as an environmental
21 planner; is that right?

22 A. Yes. That was the work in Massachusetts that
23 I described.

24 And then while I was a graduate student, I
25 worked --

1 **MR. BROWN:** Excuse me, Your Honor. We object.
2 There's no question pending.

3 **THE COURT:** Overruled. He can finish.

4 **THE WITNESS:** So while I was a graduate
5 student, I worked at the Regional Water Quality Control
6 Board which is in charge of setting standards for water
7 pollutants in San Francisco Bay.

8 And then following, once I got my degree,
9 Berkeley hired me as a research toxicologist to continue
10 to do research programs on toxic chemical use in
11 California, as well as to teach their graduate courses
12 in chemical risk assessment and chemical risk
13 management.

14 **BY MR. WISNER:**

15 **Q.** It says right here directed research program
16 on the human health of ecological impacts of pesticide
17 use in California.

18 Was part of the work that you did in your
19 research capacity at Berkeley focused specifically on
20 pesticides?

21 **A.** Yes. I had -- my collaborators and I had a
22 grant that we -- basically that funded two years' worth
23 of research looking at all of the information that
24 California has collected about both pesticide use and
25 pesticide impacts. And we produced a series of reports

1 that looked at what are the impacts of pesticides' use
2 in agriculture, on agricultural workers, on ecosystems,
3 what are the impacts of pesticide use in structural or
4 landscape situations, what are the impacts of pesticide
5 use in regard to residue risks in food.

6 And then we proposed a number of approaches
7 that the State could take to basically do a better job
8 of managing -- prioritizing and managing the risks of
9 pesticides.

10 Q. The jury heard testimony from an earlier
11 expert named Dr. Beate Ritz. She focused on some of
12 those things. Are you familiar with Dr. Ritz?

13 A. I don't know her personally. I know that she
14 served on the Science Advisory Panel of Prop 65, which
15 is one of the ways we'll eventually discuss a chemical
16 can get onto the known list of substances causing
17 cancer. So I've certainly observed how she works
18 professionally over the years.

19 Q. Okay. And then following your time as a
20 researcher at Berkeley, it looks like your next job here
21 was director of Internet projects and senior scientists
22 at Environmental Defense Fund; is that right?

23 A. That's correct.

24 Q. What did you do at the Environmental Defense
25 Fund in Oakland?

1 **A.** I moved my research grants from Berkeley to
2 the Environmental Defense Fund, and we broadened our
3 focus to the use of toxic chemicals nationally. And I
4 led a number of projects that looked at, in one case it
5 was what amount -- is there enough toxicity data
6 available on the substances that are produced at the
7 highest production volumes in the U.S. to actually
8 assess them for safety. There wasn't. And that report
9 has generated a lot of testing activities on the part of
10 industry over the last couple of decades to fill those
11 gaps.

12 And I also worked on a project to try to get
13 communities information about pollution in their
14 neighborhood, and this was a very innovative project at
15 the time. It was the first time the Internet was used
16 to distribute high quality environmental information to
17 communities.

18 We built a web service called scorecard.org
19 where you could type in your ZIP code and you will get
20 an easy-to-understand report on the pollution in your
21 community. So information that used to only be
22 available to researchers like myself was suddenly
23 available in every community around the United States.

24 **Q.** This concept of using the Internet to bring
25 consumers the information about health risks, is that

1 something that you pursue even in your current career?

2 **A.** Yes. I've sort of always had a particular
3 interest in risk communication. I did leave
4 environmental science for a period of about 10 years to
5 start a software company and really did not do much in
6 the environmental field during that period of time.

7 After I sold that company, I returned to the
8 field of environmental science to work for a
9 San Francisco-based Internet startup called GoodGuide
10 which had a very similar mission to ScoreCard except it
11 was focused on consumer products. And we built a
12 service that you can use today where you can take your
13 cell phone and scan the bar code of a personal care
14 product or a cleaning product and get a report on, well,
15 what are the ingredients in that product? Are any of
16 them hazardous? You know, looking at the product
17 overall, is it one of the better products on the market,
18 safer products on the market? Or is it a product that
19 contains ingredients that you might prefer to avoid?

20 **Q.** Now, after your time at the Environmental
21 Defense Fund, it looks like between 1995 and 2002, you
22 were actually an adjunct professor at Berkeley; is that
23 right?

24 **A.** Yeah. In the early years of my startup, I
25 continued to teach at Berkeley and then eventually left

1 Berkeley in 2002 and devoted my career full-time to the
2 company I had founded for the next eight years until we
3 sold it.

4 Q. It says here that you taught graduate courses
5 in risk assessment policy and toxic regulation. What
6 does that mean?

7 A. That means for students who are pursuing,
8 like, a master's in public health who will eventually go
9 on to work for public health agencies or companies doing
10 industrial hygiene, I was the individual who taught them
11 the basics of how does one identify a chemical hazard,
12 take the information available from toxicology or
13 epidemiology studies, make use of that to understand
14 whether the hazard presents enough of a risk that it's
15 something that some action should be taken about. That
16 basically was the course of chemical risk assessment,
17 how to use toxicology and epidemiology data to make
18 better, smarter decisions about exposure to different
19 substances.

20 And then I also taught them chemical risk
21 management, which was more of a policy science. It is
22 basically how, at both the federal and state level, are
23 chemicals controlled, what are the various strategies
24 that society has for limiting access to substances that
25 may cause health effects.

1 **Q.** Now, Doctor, you mentioned earlier your
2 current job was first at GoodGuide and then at UL; is
3 that right?

4 **A.** That's correct.

5 **Q.** And it's right here in -- and this is the work
6 you've been doing since 2010, about helping people
7 identify hazards in the products they're either selling
8 or manufacturing?

9 **A.** That's correct. So GoodGuide is a consumer
10 basing information service. UL, Underwriters Lab, was
11 interested in moving into the field of chemical safety.
12 They purchased us because we had the expertise in
13 actually getting kind of health information out to
14 consumers.

15 UL, you might know from that stamp you'll see
16 on electrical products or on, you know, fiberboard used
17 in construction buildings, they do fire safety,
18 electrical safety, and with my program, we do chemical
19 safety.

20 At this point for -- since they purchased
21 GoodGuide, my work has evolved significantly. I
22 currently work with the largest U.S. retailers and some
23 of the major brand manufacturers helping them develop
24 programs that avoid problematic chemicals, you know,
25 substitute safer chemicals whenever they can, and

1 basically put healthier and more sustainable products on
2 the shelves if it's a retail or on the market if it's a
3 producer.

4 Q. Now, Doctor, we haven't brought you here to
5 talk about whether or not glyphosate or Roundup causes
6 cancer; right?

7 A. That's correct.

8 Q. We're here to talk about Proposition 65.

9 A. Correct.

10 Q. And so let's talk a little bit about your
11 experience and work in Proposition 65.

12 Since graduating with your Ph.D. from
13 Berkeley, have you published about Proposition 65's
14 system and process?

15 A. Yes. I've published a number of peer-reviewed
16 articles in good scientific journals that look at a
17 variety of aspects of how Prop 65 works or the context
18 that led to the passage of Prop 65 in California.

19 So I've written about how chemicals get placed
20 on the Proposition 65 list. I've written and worked
21 with colleagues of mine at the CalEPA on mathematical
22 approaches to improving how risk assessment of Prop 65
23 carcinogens is done. I have written on how effective
24 are the regulatory actions that Prop 65 requires in
25 terms of are they reducing emissions of, say,

1 cancer-causing agents in California or are they causing
2 consumers to avoid products or manufacturers to
3 reformulate products in order to avoid use of a
4 problematic chemical.

5 **MR. WISNER:** At this time, Your Honor, I would
6 tender Dr. Pease as an expert in Proposition 65.

7 **MR. BROWN:** No questions, Your Honor.

8 **BY MR. WISNER:**

9 **Q.** All right, Dr. Pease. So we don't have to
10 spend too much time on this because it's not too
11 complicated. But let's go over some basics first.

12 Who administers Proposition 65 in the State of
13 California?

14 **A.** So the statute gives the authority to run the
15 program to the governor, and he delegates it to an
16 administrative agency, that's CalEPA, in specific to a
17 particular department within CalEPA called the Office of
18 Environmental Health Hazard Assessment.

19 **Q.** And so would it be fair to say that the
20 California EPA has sort of the day-to-day governance of
21 Proposition 65 listing?

22 **A.** Correct.

23 **Q.** And when a substance is put on the
24 Proposition 65 list, does that mean that the State of
25 California has determined that that substance is known

1 to cause cancer or reproductive harm?

2 A. Yes, that's exactly what being placed on the
3 list means.

4 Q. All right. And to be clear, right up front,
5 has the State of California determined that glyphosate
6 is a substance known to cause cancer?

7 A. Yes. They've made that determination and
8 glyphosate was added to the Proposition 65 list on
9 July 7th of 2017 as a substance known to the State to
10 cause cancer.

11 Q. All right. I want to talk about this list.
12 Okay?

13 What year was the initial proposed listing of
14 glyphosate put up?

15 A. I believe that the State proposed adding it to
16 the list in late 2015.

17 Q. And when did it ultimately officially make it
18 on the list?

19 A. July of 2017.

20 Q. And so there was a delay period between the
21 proposed listing and the final listing?

22 A. Correct. Correct.

23 Q. I want to talk about how something gets on the
24 list. Now, what are the mechanisms through which a
25 chemical like glyphosate can make it on the

1 Proposition 65 list?

2 A. So there are four mechanisms that the Safe
3 Drinking Water and Toxic Enforcement Act sets up for
4 building this list.

5 The first mechanism is called the Labor Code
6 section, and it's basically a reference to a list that
7 already existed in 1986, which is why that mechanism was
8 chosen, to be able to provide a minimum base list for
9 Prop 65 to act on.

10 The Labor Code basically -- mechanism
11 basically says if a substance has been identified as a
12 carcinogen by IARC, it should be automatically placed on
13 the Proposition 65 list. And so that's what we'll
14 probably spend most of our time talking about here.

15 There are three other mechanisms.

16 Prop 65 authorized the governor to establish a
17 group, what's called the State's Qualified Experts,
18 independent scientists typically like Beate Ritz from UC
19 campuses who are experts in toxicology or epidemiology
20 and who can individually identify substances that they
21 believe should be on this list and then effectively
22 conduct an evaluation of them and make a recommendation
23 to OEHHA that the substance should be listed.

24 The State's Qualified Experts also are
25 involved in the third mechanism for placing substances

1 on the list which is called the authoritative bodies
2 provision. The State's Qualified Experts were required
3 to select international or national health or regulatory
4 institutions that they believed conducted extremely
5 credible evaluations of chemical data. And the
6 authoritative bodies provision basically says if you've
7 identified an entity as an authoritative body and that
8 authoritative body identifies a chemical as a
9 carcinogen, it also gets added to the Prop 65 list.

10 The authoritative bodies that the State's
11 Qualified Experts picked include IARC, amongst several
12 others.

13 And then the final mechanism for listing is if
14 a substance is formally required by some regulation,
15 typically FDA regulation in drugs, to carry a warning
16 that it is either a carcinogen or a reproductive or
17 developmental toxicant, those also belong on the list.

18 The idea here was that you wanted to build a
19 list that represented the set of chemicals that had the
20 strongest scientific -- amount of scientific evidence
21 that they posed either a cancer risk or a reproductive
22 or developmental risk.

23 Q. Now, that was fantastic. Thank you for
24 running through all of those.

25 I put up here four different ones that I think

1 I characterized them correctly.

2 Is this okay with you, sir?

3 A. Yes.

4 Q. So there's the Labor Code and these other
5 ones. Let's start off with how the Labor Code is
6 different than the other ones.

7 A. Well, the Labor Code is -- I basically would
8 place 1 and 4 in the same category. Both the Labor Code
9 and "formally required to labeling" effectively are
10 automatic pass-throughs. If a substance is on the
11 Labor Code's list of carcinogens, it belongs on the
12 CalEPAs Proposition 65 list of substances known to the
13 State to cause cancer.

14 There is not any independent review. Those
15 listings are effectively ministerial which means that
16 OEHHA watches to see what these organizations do. If
17 IARC puts a new chemical on its list, it then becomes a
18 candidate for addition to the Prop 65 list if it meets
19 some basic quality control criteria. Same with
20 "formally required to be labeled."

21 The State's Qualified Experts approach is the
22 most different in that it actually requires a complete
23 ground up evaluation, collection of toxicology and
24 epidemiology data, and ground up evaluation of that data
25 by an independent panel here in California. So that's

1 the most different.

2 The authoritative bodies provision is a bit of
3 a hybrid. As I mentioned, you know, IARC is on it, but
4 IARC carcinogens already come through via the Labor Code
5 provision. So IARC is primarily used as a source of
6 what are called listings for transplacental carcinogens,
7 things that are reproductive toxicants that you wouldn't
8 normally expect IARC to be working on.

9 For authoritative bodies, the other ones
10 include FDA, the National Institute of Occupational
11 Safety and Health, the U.S. EPA. And in all those
12 cases, a relatively modest evaluation of the
13 authoritative body decision is made before passing that
14 substance on to the Prop 65 list.

15 **Q.** So the Labor Code listing is automatic. So is
16 the regulation listing. But if it's done by an
17 authoritative body or qualified experts, OEHHA or
18 California EPA has to exercise some discretion?

19 **A.** Yes, although I would distinguish between
20 experts and authoritative bodies. OEHHA is not allowed
21 for authoritative bodies to substitute its judgment for
22 the authoritative bodies' judgment. They just need to
23 make sure that in fact a sufficient amount of either
24 animal or human evidence is being cited by the
25 authoritative body to warrant the listing.

1 **Q.** Okay. And just to be clear, the qualified
2 experts group, did I hear you say that Dr. Ritz was one
3 of those?

4 **A.** Yes. Yes.

5 **Q.** Okay. And then authoritative bodies, under
6 there is IARC; is that right?

7 **A.** Yes.

8 **Q.** As well as the U.S. EPA?

9 **A.** As well as the U.S. EPA, FDA, and NIOSH.

10 **Q.** Now, Doctor, if the EPA had classified
11 glyphosate as a category C carcinogen, a possible human
12 carcinogen, how would that interplay with the
13 Proposition 65 list?

14 **A.** Well --

15 **MR. BROWN:** Excuse me, Your Honor. I'm going
16 to object. Assumes facts, lacks foundation, calls for
17 speculation.

18 **THE COURT:** Sustained.

19 **BY MR. WISNER:**

20 **Q.** Sir, are you familiar with how the
21 authoritative bodies regulation works?

22 **A.** Yes.

23 **THE COURT:** Why don't you approach, counsel.

24 (Sidebar held but not reported.)

25 ///

1 **BY MR. WISNER:**

2 **Q.** All right. Doctor, all right. So let's talk
3 about the Labor Code. Okay.

4 What are the organizations under the
5 Labor Code that automatically require the California EPA
6 to list it as a carcinogen?

7 **MR. BROWN:** Objection, Your Honor. It's been
8 asked and answered.

9 **THE COURT:** Overruled. He can answer.

10 **THE WITNESS:** So the Labor Code provision
11 reference Prop 65 basically has two components. One
12 points specifically to IARC for carcinogens. And the
13 other points more generally to any substances that are
14 being regulated as carcinogens or reproductive or
15 developmental toxicants that have become subject to the
16 Federal Occupational Safety and Health Acts hazard
17 communication standard.

18 So the hazard communication standard uses as
19 its source for carcinogens IARC and the National
20 Toxicology Program.

21 So for carcinogens, really, the Labor Code is
22 focused on bringing in the results of hazard
23 identification efforts that either the U.S. National
24 Toxicology Program or the International Agency for
25 Research on Cancer have concluded.

1 **BY MR. WISNER:**

2 **Q.** So let's break that down. So IARC is one of
3 the organizations and so is OSHA; is that right?

4 **A.** OSHA by virtue of issuing a list that the
5 hazard communications -- the rules that are involved
6 with the hazard communications standard and that OSHA
7 has turned and again, as California did, deferred to
8 authoritative hazard identification of organizations.

9 So it's really not OSHA itself making the
10 determination. It is OSHA realizing that -- remember
11 this provision of Labor Code dates basically back to
12 like 1985, 1986. At that point, if you were a
13 regulatory agency, whether it's OSHA or whether it's the
14 drafters of Prop 65, and you wanted to be sure that you
15 were capturing all the scientific work that had been
16 done up to that date to identify potential carcinogenic
17 hazards or reproductive toxicants, where that work was
18 happening was at the National Toxicology Program or at
19 IARC. Those were the two places where that work was
20 happening.

21 **Q.** So I think this is made a little more simple.
22 IARC is officially part of the Labor Code; right?

23 **A.** Yes.

24 **Q.** And then OSHA to the extent it follows IARC or
25 NTP?

1 **A.** And actually there's a third fork too.
2 OSHA-specific regulations but they generally don't have
3 much of an impact on this.

4 **Q.** Okay. So Labor Code uses IARC, and OSHA
5 follows IARC?

6 **A.** Yes.

7 **Q.** Okay. Now, sir, why was IARC selected as an
8 organization that caused an automatic listing?

9 **MR. BROWN:** Calls for speculation. Lacks
10 foundation. Exceeds the scope.

11 **THE COURT:** Overruled. He can answer that.

12 **THE WITNESS:** So IARC was -- well, let's keep
13 this straight. IARC was originally selected before
14 Prop 65 by both the federal Occupational Safety and
15 Health Administration and by the California equivalent
16 as the best source for information about which chemicals
17 had been identified as carcinogens.

18 At that time, which was 1986, IARC was really
19 the only -- the only science-based hazard identification
20 program that had a good and extended track record in the
21 field. IARC began evaluating chemicals and indicating
22 which ones were carcinogens in 1971 or 1972.

23 The National Toxicology Program didn't even
24 start doing that until 1980. So it had much less of a
25 track record in the mid 1980s. And an organization like

1 EPA hadn't even formalized what its guidelines were
2 going to be for identifying chemicals as hazards by the
3 mid 1980s.

4 So the decision to essentially recognize the
5 authoritativeness of IARC was in the context of Prop 65
6 made twice by the people in California. Once in order
7 to provide an information base for the workers of health
8 and safety program, and then again by the drafters of
9 Prop 65 who recognized, well, there's the core list,
10 that's the list of -- that's a really good list of
11 substances that the best authorities in the world have
12 agreed are carcinogens or reproductive toxicants.

13 Q. And, Doctor, I guess my last question for you
14 is: In light of the IARC classification of glyphosate,
15 is that why today it is a substance known to the State
16 of California to cause cancer?

17 A. Yes. There's a process that is triggered that
18 OEHHA followed to the letter following the publication
19 of an IARC monograph that identifies a substance as, in
20 glyphosate's case, a category 2A carcinogen which means
21 it has limited evidence of carcinogenicity in humans and
22 sufficient evidence of carcinogenicity in animals, it
23 automatically goes onto the list.

24 Q. And, see, you made me a liar because that was
25 my last question, and now it's not. You said limited

1 evidence of carcinogenicity in human. What does that
2 mean under the IARC standard?

3 A. Well, it actually means better evidence that
4 you might think based on the sort of terminology. What
5 IARC does is it separately evaluates human
6 epidemiological data, animal toxicology data, and what
7 we call mechanistic data, laboratory studies.

8 And in each of those areas, it classifies the
9 available data set as sufficient, limited, or
10 inadequate.

11 And in the context of their evaluation of the
12 glyphosate epidemiology data, limited means that there
13 was good evidence of -- and credible evidence of a
14 causal association between the exposure to glyphosate
15 and cancer but that it could not be -- that other
16 potential confounding or bias factors could not be ruled
17 out.

18 So it takes an extremely well conducted set of
19 epidemiological data to actually reach the sort of
20 sufficient level of human evidence. I think there's
21 probably only about 30 compounds in the last 30 years
22 that have had that awful an experience in terms of human
23 exposure to them that there's absolutely no question
24 that they cause it in humans.

25 MR. WISNER: Thank you.

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No further questions, Your Honor.

THE COURT: Cross-examination.

MR. BROWN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BROWN:

Q. Do you prefer to be referred to as "Doctor" or "Mr. Pease"?

A. You can call me Bill. Mr. Pease is fine.

Q. All right, Mr. Pease.

You told us that you had been working in the -- well, let me back up and ask you this.

What is your current occupation?

A. I am a senior scientist in the product and supply chain intelligence division of UL, Underwriters Laboratory.

Q. Okay. And does that involve in any way enforcement as it relates to Prop 65?

A. Not at all.

Q. Okay. And you told the jury that you had published in the area of Prop 65; is that correct?

A. Correct.

Q. All right. And when did you last publish an article in regard to Proposition 65?

A. I think the last date would have probably been mid 1990s, 1995 or 1996.

1 **Q.** Have you ever worked for the Office of
2 Environmental -- I'm sorry. The Office of the Health
3 Hazard Assessment?

4 **A.** While I was a graduate student in my doctoral
5 program, I worked as an intern at the previous
6 incarnation of OEHHA. At the very beginning of the
7 implementation of Prop 65 in the late 1980s, it actually
8 wasn't part of CalEPA, it wasn't called OEHHA, but it
9 was the group that was responsible inside the California
10 Health and Welfare Agency for implementing Prop 65,
11 developing the list, establishing guidelines for how
12 substances would be identified. So, yes, I have worked
13 for the predecessor to OEHHA.

14 **Q.** And how long did you intern with that entity?

15 **A.** I probably was working with them for at least
16 two years, and then subsequently after I got my Ph.D,
17 continued to collaborate with many of the lead
18 scientists at OEHHA on a number the of publications that
19 I subsequently published.

20 **Q.** Were you an author of Proposition 65?

21 **A.** No.

22 **Q.** And have you participated in the determination
23 that any substance should be added to the Prop 65 list?

24 **A.** Included at the time when I was working for
25 the California Health and Welfare Agency, yes, I was

1 involved in the preparation of a number of documents
2 that supported the listing of about probably ten
3 different compounds. So, yes.

4 Q. Not glyphosate?

5 A. Not glyphosate.

6 Q. And generally can you tell us the number of
7 substances that are listed on the Prop 65 list?

8 A. Combining carcinogens and reproductive
9 developmental toxicants, approximately a thousand today.

10 Q. And are there any substances listed on the
11 Prop 65 list that we might be generally familiar with?

12 MR. WISNER: Objection. Relevance.

13 THE COURT: Sustained.

14 BY MR. BROWN:

15 Q. Now, if we wanted to, after this trial is
16 over, go and look at Proposition 65, where would we go?

17 A. Well, the CalEPA OEHHA has a really excellent
18 website that, for example, includes all of the
19 regulations and everything associated with their
20 implementation, but it also is designed to be accessible
21 to the general public. You can look up listed
22 chemicals. You can get a common language description of
23 the health hazards or places where one might be exposed
24 to these substances, as well as the more
25 science-oriented data that people like me deal with on

1 how toxic is it, what's the basis for the listing, that
2 sort of thing.

3 **Q.** And so this information is publicly available?

4 **A.** Correct.

5 **Q.** And you don't need any kind of special
6 credentials to access it?

7 **A.** Correct.

8 **Q.** Now as I understand, you are not a lawyer.

9 **A.** Correct.

10 **Q.** You don't practice law; correct?

11 **A.** Correct.

12 **Q.** You talked a little bit about IARC; correct?

13 **A.** Yes.

14 **Q.** All right. And IARC is not a regulatory body,
15 is it?

16 **A.** No, it is not.

17 **Q.** All right. And it's not a department of the
18 United States government, is it?

19 **A.** No, it is not.

20 **Q.** Okay. And it doesn't issue mandates, does it?

21 **A.** No. Its sole purpose is to identify
22 carcinogenic hazards. It's a part of the World Health
23 Organization.

24 And then regulatory agencies around the world
25 have historically and up until the present day make use

1 of that information to inform their regulatory programs.
2 So they are an information provider to the world's
3 chemical regulators.

4 Q. And you've indicated that glyphosate is on the
5 list currently; correct?

6 A. That is correct.

7 Q. Going on the list in 2017?

8 A. Correct.

9 Q. Is that the first time that glyphosate has
10 been on the list?

11 A. Yes.

12 Q. And you mentioned that other regulatory
13 agencies around the world use IARC's information; is
14 that correct?

15 A. Correct.

16 Q. You also mentioned that the State of
17 California, OEHHA, is required if, for instance, IARC or
18 the Labor Code -- other -- there are four mechanisms
19 that allow for substances to go on the list; correct?

20 A. Correct.

21 Q. Is the State of California, the Office of
22 Environmental Health Hazard Assessment entitled to
23 consider ECHA, which is E-C-H-A?

24 A. No.

25 Q. Are they allowed to consider EFSA?

1 **A.** No.

2 **Q.** Are they allowed to consider any of the other
3 entities that we have posted on the board here which
4 statements, conclusions of scientific regulatory
5 authorities in determining whether or not substances go
6 onto the Prop 65 list?

7 **A.** Certainly allowed to, if EPA had classified
8 glyphosate as a 2B carcinogen, they would be allowed to
9 make use of that.

10 I do think it's important to provide some
11 context.

12 In general, you know, the purpose of Prop 65
13 was to accelerate the process of carcinogen
14 identification, to make sure that if an authoritative
15 entity had determined that a substance was a carcinogen
16 it got placed on the Prop 65 list.

17 There was not an effort to make sure that
18 every one of their authoritative bodies agreed with that
19 determination or had even assessed that chemical.

20 **Q.** Okay. So once, for instance, an organization
21 like IARC or the Labor Code, one of the four mechanisms
22 identifies the product or substance, it goes on the
23 list?

24 **A.** Correct.

25 **MR. BROWN:** I think those are all the

1 questions I have for the witness.

2 **THE COURT:** Any redirect?

3 **MR. WISNER:** Very short, Your Honor.

4 **REDIRECT EXAMINATION**

5 **BY MR. WISNER:**

6 **Q.** Dr. Pease, there were some questions about
7 your interactions with OEHHA and California EPA
8 following when you started working as a professor at
9 Berkeley.

10 What interactions have you had with members or
11 the scientists at CalEPA?

12 **A.** No substantive interactions in I would say
13 like the last 10 years. I've remained personal friends
14 with some of them. Some of them live in my home
15 community. We have not discussed this case.

16 I think that the bulk of my interaction with
17 them was while I was working at Berkeley and we were
18 developing -- we were basically trying to take stock of
19 the Prop 65 initial years of implementation, the
20 experience that that had given us, and develop
21 approaches to solving some of the problems that we had
22 seen in implementation.

23 And so that's why, for example, I worked with
24 the group at OEHHA to develop a technical method to
25 estimate the potential toxicity of carcinogens that

1 could result in the generation of regulatorily useful
2 numbers in a matter of weeks instead of a matter of
3 years.

4 So it's really a professional interaction.

5 **Q.** Now, Doctor, are you familiar with -- one of
6 these people that you've interacted with over the years
7 is a scientist at the California EPA by the name of
8 Lauren Zeise?

9 **A.** Yes.

10 **Q.** And you understand that Dr. Zeise -- what
11 position did she hold at OEHHA in 2015?

12 **MR. BROWN:** Excuse me, Your Honor. It exceeds
13 the scope.

14 **THE COURT:** Sustained.

15 **BY MR. WISNER:**

16 **Q.** You recall there was a lot of questioning by
17 counsel accusing you of not working on Prop 65 since
18 Berkeley; correct?

19 **MR. BROWN:** Excuse me, Your Honor. The
20 question is argumentative.

21 **THE COURT:** Yeah, strike that. It's
22 argumentative.

23 **MR. WISNER:** Your Honor, this is within the
24 scope of that cross-examination. I'm trying to lay the
25 foundation.

1 **THE COURT:** Approach.

2 **MR. WISNER:** Sure.

3 (Sidebar held but not reported.)

4 **BY MR. WISNER:**

5 **Q.** Okay. There were some questions asked about
6 you about whether ECHA, right, was part of the listing?

7 **A.** Yeah.

8 **Q.** None of the other agencies that put up on the
9 screen are; right?

10 **A.** The only agency that's identified as
11 authoritative amongst that list is U.S. EPA.

12 I would want to clarify in my response in
13 answer to him is that these other regulatory agencies,
14 they would -- there's -- they haven't to the best of my
15 knowledge even been considered for designation as
16 authoritative bodies.

17 They wouldn't be prohibited from providing an
18 opinion to OEHHA, for example, if it was a de novo
19 State's Qualified Expert evaluation of a substance, they
20 could easily have their position represented there.

21 But the Prop 65 is really clear. There are
22 uncertainties, and they're also very different
23 process -- uncertainties about the science and very
24 different processes that these different organizations
25 use for identifying substances.

1 I would maintain that IARC basically is the
2 gold standard for carcinogen identification because of
3 its processes.

4 So the -- you know, there is an opportunity,
5 you know, for these other agencies to express opinions.
6 Whether or not their opinions need to be formally
7 integrated into the Proposition 65 listing process
8 varies depending on the listing method.

9 Q. Fair enough, Doctor. And this is really my
10 last question.

11 None of those agencies, none of them on that
12 slide that Mr. Brown put up, fall into the Labor Code;
13 right?

14 A. Correct.

15 Q. But IARC does?

16 A. Correct.

17 MR. WISNER: No further questions.

18 THE COURT: All right. Thank you.

19 THE WITNESS: Thank you.

20 THE COURT: You may be excused.

21 (Witness excused.)

22 MR. WISNER: At this time, Your Honor, we'll
23 start the video up.

24 THE COURT: We're going to continue with
25 Dr. Koch.

1 I almost hesitated. I'm not sure who is a
2 doctor and who's not.

3 **MR. MILLER:** I'm the same.

4 (Video excerpts from the deposition testimony
5 of Michael Koch resumed playing in open court; not
6 reported herein.)

7 **MR. WISNER:** That concludes the plaintiffs'
8 portion. And now it's the defendant's.

9 **THE COURT:** We're going to go till lunch.

10 **MR. WISNER:** Yeah.

11 **THE COURT:** So now the witness will be
12 questioned by the defense counsel.

13 (Video excerpts from the deposition testimony
14 of Michael Koch resumes playing in open court; not
15 reported herein.)

16 **MR. WISNER:** I do believe that concludes the
17 Monsanto's portion. I believe there's a very short --

18 **TECH PERSONNEL:** No, there's not.

19 **MR. WISNER:** That's it, Your Honor.

20 **THE COURT:** Well, it's lunchtime.

21 We're going to take an hour. And I want to
22 admonish you at this point about talking to each other
23 about this case at all. You've heard a lot of evidence,
24 and I know it's probably hard not to talk about it or
25 think about it, but it's really, really important, more

1 so than going home and talking about it at home, which
2 is also prohibited, but at the end of the day you're
3 probably not even interested in doing that. But it's
4 going to be difficult not to talk about what you hear.
5 And I really want you to be conscious of that and to get
6 to know each other so when you do deliberate, you're
7 familiar with each other. But do not talk about any
8 aspect of the case, any evidence that you've heard.

9 Thank you. 1:00 o'clock.

10 (Jury excused for the lunch recess.)

11 (Proceedings continued out of the presence of
12 the jury:)

13 **THE COURT:** I'll see everybody at
14 1:00 o'clock.

15 **MR. EVANS:** Your Honor, can I just put
16 something on the record quickly.

17 Regarding the playbacks, this has happened I
18 believe on each of the videos when there's a break.
19 Mr. Wisner strategically decides when he's going to
20 break because he likes a certain clip. And then when we
21 start again, instead of just starting where we started,
22 he goes back 10 seconds or 30 seconds or something like
23 that and replays what's already been played.

24 I would just ask, we're playing videos one
25 time through, it should go to wherever it stops and then

1 start to where it stops going forward.

2 So the concept that we, you know -- one
3 example was the junk science quote from, you know,
4 they've had on several people talking about Donna Farmer
5 had some kind of e-mail where she referred to AHS as
6 junk science. That particular thing was played once.
7 And when we started up again, he rewound it and played
8 it again.

9 And it's just, again, we're playing videos one
10 time through. It should just be we stop wherever it
11 stops, we start where it stops and move forward. It's a
12 simple request.

13 **THE COURT:** Okay. Do you want to say anything
14 at all, Mr. Wisner, or just be clear that that's what
15 we'll be doing?

16 **MR. WISNER:** That's what we're doing. The
17 rewinds have happened because after a day, it's
18 incomprehensible to start where it exactly stopped. I'm
19 not doing anything strategically. I don't even want to
20 respond to the personal attacks.

21 But, Your Honor, respectfully we're trying to
22 do that, and I don't really know where this is coming
23 from.

24 The portion about junk science, it was
25 literally another three or four minutes about it, we

1 were trying to take a break. We stopped. And then I
2 rewound it 30 seconds just so you had the context of the
3 question and answer. That was all.

4 **THE COURT:** Have a good lunch.

5 **MR. WISNER:** Oh, Your Honor, one other thing
6 that I wanted to ask.

7 At the end of the day, can we have an
8 admonishment about websites. I only say that because
9 Mr. Brown brought up this website on cross, and I don't
10 want the jury to think that they should be going on to
11 OEHHA and looking up stuff.

12 **THE COURT:** Well, I will, but I've talked to
13 them about --

14 **MR. WISNER:** Yeah, I know.

15 **THE COURT:** -- any kind of research. And
16 honestly there have been so many references to websites
17 by everybody that, you know, they're either going to do
18 it or not. But I don't think they will.

19 **MR. EVANS:** I agree it's good to admonish them
20 again about websites.

21 **THE COURT:** There was something else, not
22 that, that I saw that I thought we need to keep websites
23 out for that reason. But it was something else that was
24 referenced.

25 But you're right. I will mention that because

1 the temptation may be proved too great.

2 **MR. WISNER:** I appreciate that, Your Honor.

3 (Recess taken at 11:58 a.m.)

4 (Proceedings resumed in open court in the
5 presence of the jury at 1:06 p.m.)

6 **THE COURT:** Good afternoon.

7 Are we going to continue with plaintiffs' next
8 witness?

9 **MR. MILLER:** Yes, Your Honor.

10 **THE COURT:** By video deposition, I believe.

11 **MR. MILLER:** By video deposition, Rockville,
12 Maryland.

13 What's the date on this, Mr. Wisner?

14 **MR. WISNER:** Oh, all right. It is an hour and
15 36 total.

16 Dr. Aaron Blair, dated March 20th, 2017, in
17 Washington, D.C. And it's an hour 36 minutes total,
18 36 of which is the plaintiff, the remainder is Monsanto.

19 **THE COURT:** Okay. You may proceed.

20 **MR. MILLER:** Thank you, Your Honor.

21 (Video excerpts from the deposition testimony
22 of Aaron Blair played in open court; not reported
23 herein.)

24 **MR. WISNER:** That concludes the plaintiffs'
25 portions. Now it's Monsanto's.

1 (Video excerpts from the deposition testimony
2 of Aaron Blair resumes playing in open court; not
3 reported herein.)

4 **MR. WISNER:** We have a short redirect, but
5 let's take a break, I think.

6 **THE COURT:** Let's take a break. Take a
7 15-minute break and we will resume at 20 of the hour.

8 (Jury excused for recess.)

9 (Proceedings continued out of the presence of
10 the jury:)

11 **THE COURT:** So, counsel.

12 **MR. WISNER:** Yes, Your Honor.

13 **THE COURT:** Apparently someone's laptop got
14 stolen that was left outside, and there's a bag outside
15 and the sheriff's department -- I don't know who may
16 have left a bag outside, but if you did, you need to
17 bring it in because the sheriff's department is going to
18 remove it. I don't know if it belongs to anybody in the
19 room, but if it does -- I mean, there are other
20 departments on the floor, but pass along to anybody
21 don't leave anything out in the hallway. Keep all of
22 your belongings with you inside the courtroom.

23 **MR. WISNER:** Thank you, Your Honor.

24 **THE COURT:** Thank you. We'll see you in
25 10 minutes.

1 (Recess taken at 2:24 p.m.)

2 (Proceedings resumed in open court in the
3 presence of the jury at 2:42 p.m.)

4 **THE COURT:** We will continue. We're back on
5 the record.

6 And Mr. Wisner.

7 **MR. WISNER:** We're going to continue.

8 **THE COURT:** I'm sorry. Redirect on Dr. Blair.

9 (Video excerpts from the deposition testimony
10 of Aaron Blair resumes playing in open court; not
11 reported herein.)

12 **MR. WISNER:** Thank you, Your Honor.

13 Our next witness will be Dr. Daniel Goldstein.
14 And to clarify, there's two depositions by
15 Dr. Goldstein. The second deposition which we're going
16 to show next after this one, it was done in a
17 representative capacity for Monsanto. But this one is
18 in his individual capacity. It's from February 27,
19 2018, in St. Louis, Missouri.

20 The total run time is one hour and one minute,
21 of which 44 or 45 minutes is the plaintiffs' and
22 13 minutes is Monsanto's.

23 (Video excerpts from the deposition testimony
24 of Daniel Goldstein played in open court; not reported
25 herein.)

1 **MR. WISNER:** That's the completion of our
2 portion. Do you want to take a break now or do you want
3 to keep going? 13 more minutes for the defendants.

4 **THE COURT:** Go ahead. We're going to
5 continue.

6 (Video excerpts from the deposition testimony
7 of Daniel Goldstein resumes playing in open court; not
8 reported herein.)

9 **MR. WISNER:** That concludes the deposition.
10 We have the next one ready to go, but if you want to
11 take a break for a little bit. It's only 17 minutes.

12 **THE COURT:** Then let's just keep going for
13 17 more minutes and then we'll break for the day.

14 **MR. MILLER:** Do you want to stretch or
15 anything?

16 **THE COURT:** Why don't we take a five minute.

17 **JUROR NO. 8:** Just a stretch.

18 (Recess taken at 3:55 p.m.)

19 (Proceedings resumed in open court in the
20 presence of the jury at 4:02 p.m.)

21 **THE COURT:** We're going to go back on the
22 record.

23 And Mr. Wisner or Mr. Miller.

24 **MR. WISNER:** Yes. Our final witness for today
25 is actually Dr. Daniel Goldstein again, but now he's

1 testifying in a representative capacity on behalf of
2 Monsanto. It was taken on November 16 and 17, 2017, in
3 St. Louis, Missouri, and the entire run time is
4 14 minutes. The plaintiffs' portion is 11 minutes, the
5 defendant's portion is 3.

6 (Video excerpts from the deposition testimony
7 of Daniel Goldstein resumes playing in open court; not
8 reported herein.)

9 **THE COURT:** Okay. So, ladies and gentlemen,
10 that is it for today. We will start again tomorrow
11 morning at 9:00 o'clock with more evidence.

12 And have a good evening. Please don't discuss
13 anything that you've heard so far. Please, no research
14 of any sort. Don't talk about this with your family.

15 And as I said, as you're getting to know each
16 other better, please don't talk about this among
17 yourselves.

18 Thank you for your time and attention. I will
19 see you in the morning.

20 (Jury excused for the evening recess.)

21 (Proceedings continued in open court out of
22 the presence of the jury.)

23 **THE COURT:** So, you know, it's just those
24 lines I'm looking at. I'll have it by tomorrow morning.

25 **MR. WISNER:** And also the Raj issue, you know,

1 whatever you decide.

2 **THE COURT:** Oh, okay.

3 What's the next -- what's the next deposition
4 that is needed?

5 **MR. WISNER:** So, yeah. So it will be probably
6 Rubenstein that we'll be playing next, but it won't
7 be --

8 **THE COURT:** No, no, no. That I haven't
9 already read. I'll deal with a couple of rulings.

10 **MR. WISNER:** I think right now all you have
11 left to rule on is Murphey and Guard, which I think both
12 are not very long.

13 **THE COURT:** So I noticed in Guard which I may
14 want to have a conversation, that all of the objections,
15 all of the responses are exactly the same. So I haven't
16 really read enough of it to figure out what the issue
17 is, and I thought to myself, well, if it's the same
18 objection literally, the same objection and literally
19 the same response, what is the deal?

20 **MR. WISNER:** That's a fair question.

21 **THE COURT:** I haven't read far enough to
22 actually ask the question yet, but I just noticed.

23 **MR. ESFANDIARY:** So they broke out the
24 objections to -- if it's regarding the same topic,
25 they'll make the same kind of objections and thus it

1 would warrant the same kind of response. I know it
2 looks odd.

3 **THE COURT:** This is through the whole thing.
4 That's why I thought it just didn't vary. I just was
5 wondering. Do you want to give me a heads-up about
6 something, an issue?

7 **MR. ESFANDIARY:** I don't think we were trying
8 to signal any kind of weird way. It's just that the
9 deposition was about the MSDS on the label, he was there
10 to talk about as the PMK. And we only designated like
11 25 minutes of the depo. So it's going to be about the
12 same topics and all the objections. For example, they
13 object naturally to any testimony about MSDS because the
14 Pilliods didn't see it even though no one sees the MSDS.

15 **THE COURT:** So no motion? No motion? There
16 wasn't a motion to exclude the testimony since it was
17 pretty much about the --

18 **MR. ESFANDIARY:** No, there was no motion to
19 exclude the testimony.

20 **MR. ISMAIL:** Well, it was just handled on the
21 page-line designation.

22 **THE COURT:** I'll just read it.

23 **MR. WISNER:** You know, we can have argument.
24 I won't do it now. I don't know if you're ready to talk
25 about it.

1 **THE COURT:** No, no, no, no. I'm not. I just
2 noticed that they were the same objections, the same --
3 I mean, the same objections and the same responses to
4 objections all the way through so I thought maybe there
5 was some particular issue I needed to be aware of, let
6 me know what it is.

7 **MR. WISNER:** And then we have Samuel Murphey
8 as well. His also is not very long.

9 **MR. ESFANDIARY:** That's right. It's about
10 45 minutes total.

11 **THE COURT:** Okay.

12 **MR. WISNER:** And then the only one that's
13 really outstanding that we haven't yet submitted to you
14 is potentially Dr. Farmer. That is, at this point, the
15 five-and-a-half-hour-long depo. I'm working in my free
16 time to try to get it to something more manageable.
17 They've designated two and a half hours already. So
18 it's already going to be long regardless.

19 I am meeting with my team. I'll let you -- if
20 we're going to give it to you to even get rulings, we
21 might just not call her, I don't know. But if we decide
22 to do that, we'll get it to you before the end of the
23 week, and that will be the only thing that we'll need
24 rulings on by Monday to play.

25 So next week Dr. Nabhan will be up Monday.

1 **THE COURT:** Right.

2 **MR. WISNER:** And then he might go until
3 Tuesday, we'll see. And then after he's done, we're
4 just going to play the remaining videos. So, I mean,
5 and then our case will be done.

6 **THE COURT:** So you think that probably by
7 Wednesday you'll turn the case over to the defendant?

8 **MR. WISNER:** I think. I mean, if we don't
9 call Dr. Farmer, we'll be done probably Tuesday. But if
10 we call Dr. Farmer, then it will have to be Wednesday.

11 **MR. EVANS:** We're going to need to talk a
12 little bit about the schedule, Your Honor, because we --
13 at this point we're planning on calling our first
14 witness on the following Monday.

15 **THE COURT:** So you wouldn't need -- you
16 actually wouldn't have witnesses prepared for the
17 Wednesday and Thursday of that week.

18 **MR. EVANS:** Yeah, I think that's correct.

19 You know, we probably have some video that we
20 are going to need to play that we may be able to fill
21 some of that time. But I think if we could maybe pencil
22 in that Thursday as a day to just do motions work on the
23 JIs, et cetera, we're still very confident if we get the
24 case by this following Monday that we'll be done before
25 you told the jury on the 7th. So we could definitely

1 wrap it up by the 7th.

2 **THE COURT:** Okay. All right.

3 Yes, and we are going to need to talk about
4 jury instructions. I mean, now's the time, I think. I
5 haven't really approached it so far, but I think we're
6 getting to that point where we are going to need to talk
7 about that.

8 **MR. EVANS:** There are a couple of other issues
9 just for tomorrow. I think that Mr. Brown's got a copy
10 of the bench memo that we filed regarding Dr. Benbrook
11 that's been served on the other side.

12 You know, we think that he should be a narrow
13 witness. And in his prior testimony, there were several
14 issues that, you know, were -- needed to be addressed.
15 So we tried to produce those issues for you.

16 The other thing is, Your Honor, we submitted
17 the extended request for judicial notice on additional
18 regulatory documents which also may come up tomorrow
19 with Dr. Benbrook depending upon the scope of his
20 testimony.

21 **THE COURT:** So --

22 **MR. EVANS:** So we took from your prior rulings
23 your approach to, you know, sort of the category of
24 documents. But, you know, we may need to use additional
25 documents beyond what those you actually specifically

1 ruled upon.

2 **THE COURT:** Okay. Well, I only ruled on a
3 couple --

4 **MR. EVANS:** Right.

5 **THE COURT:** -- three or four.

6 And I was actually going to say because I saw
7 the size of those binders and I didn't know how you
8 wanted to approach that, if you just wanted me to say
9 yea or nay and then let the plaintiffs argue, you know,
10 once I made some decisions about what I thought.

11 So I thought as a general proposition, you
12 know, if it's a regulatory agency or science agency and
13 it's an official document, generally speaking in
14 summary, their work would be admissible but not the
15 underlying data and documents, as I've said so far.

16 But now you may have some disagreements about
17 that, you know, what constitutes an official, an agency
18 that -- or a body, a scientific body for which that
19 would qualify. But that would be my general approach.
20 And I can certainly -- if you want to pull out what you
21 want to talk about tomorrow, I can try to address it
22 first thing in the morning.

23 **MR. EVANS:** I think the EPA specifically
24 documents for tomorrow were the ones that we're most
25 focused on.

1 **THE COURT:** With that in mind, maybe you can
2 at least meet and confer. Because I'm very likely going
3 to say if they're the summaries or the work that they
4 did in terms of whatever conclusions they drew or
5 whatever analysis they did is likely to be admissible.
6 But all the rest of the stuff is usually quite a bit --
7 you know, if it's attached to it, that may not be.

8 So that's just a broad stroke.

9 **MR. EVANS:** Yeah, and I guess the question for
10 tomorrow's purpose, putting aside the RJN and the actual
11 admission of those reports, is just the
12 cross-examination and what can be, you know, displayed
13 to the jury.

14 **THE COURT:** Right.

15 **MR. EVANS:** And, you know, so that's really
16 what we need to decide for tomorrow. But we --

17 **THE COURT:** Well, generally that was what I --
18 that's the admissible part of it would be what I would
19 seek is what should likely be displayed. However, I've
20 noticed that both sides with respect to the documents I
21 already ruled that could be judicially noticeable have
22 cross-examined the experts on some of the underlying
23 information.

24 **MR. EVANS:** Right.

25 **THE COURT:** So I was going to bring it up just

1 so that maybe we could get ahead of a storm, so to
2 speak, since both sides have done it. And I thought,
3 well, maybe we should talk about this a little bit more
4 before it becomes a point of conflict on something that
5 you don't agree on.

6 And I have to say I see the utility in terms
7 of the cross-examination of why that might be the case,
8 where if you're asking the scientists about a particular
9 document, European documents, just as an example. It
10 was either Dr. Portier or Dr. Ritz or both talked a lot
11 about the underlying information in some of the
12 Canadians and some other things. They were criticizing
13 the approach that they took and that they didn't agree
14 with them and why. And it wasn't limited to just the
15 summary. It was actually going into, well, they looked
16 at this and here it is on page 97. And when I said
17 pages 1 through 20 were the part -- were the portions of
18 it that I thought could be judicially noticeable.

19 So I need to think a little more, maybe be a
20 little bit clearer in terms of giving you direction
21 about what I think is appropriate. That way we won't
22 have this problem down the line.

23 **MR. ESFANDIARY:** One point of clarification,
24 Your Honor.

25 The new motion for request for judicial

1 notice, it's actually a motion to take judicial notice
2 of documents that they haven't previously asked for
3 judicial notice, as well as a motion of reconsideration
4 of your existing order which said that only limited
5 portions of the EPA docs can come in. They're asking
6 you to reconsider that and admit the full document.

7 **MR. EVANS:** That's correct, Your Honor. So
8 the new RJN includes additional documents you've not
9 ruled upon, but on those ones that you did partial
10 admissions, we think that, you know, a better reading of
11 the law is that the entire document should come in. So
12 we've asked you to look at that again, that's correct.

13 **THE COURT:** So two things. I didn't see any
14 points and authorities with that. I just saw the -- did
15 you file a bench brief with it too?

16 **MR. EVANS:** Correct.

17 **THE COURT:** Okay, well, let me take a look and
18 see because I saw a number of exhibits and documents. I
19 thought that you were utilizing the same --

20 **MR. EVANS:** No, there's an additional brief.

21 **THE COURT:** There's another brief? Okay, I'll
22 have to find it then.

23 **MR. ISMAIL:** There's a motion, an opposition
24 and a reply. So it's actually a fully briefed set.

25 **THE COURT:** Okay, well, I want to make sure

1 that I have that because I was just going to say, gee, I
2 haven't seen an opposition. So let me make sure I can
3 put all that together. I'm glad you said that.

4 **MR. WISNER:** We have a threshold problem with
5 the judicial notice, and you'll see it in the briefing.

6 **THE COURT:** Okay. So -- all right.

7 **MR. WISNER:** Since they're not going to be
8 calling a witness next week, should we just pencil in
9 Thursday for jury instructions? The reason why I ask --

10 **MR. MILLER:** Hold up. I think we asked the
11 Court for Friday this week. I'd like to talk about jury
12 instructions before we close our case.

13 **MR. WISNER:** Fair enough.

14 **MR. MILLER:** That's what -- I was hoping the
15 Court had some time on Friday.

16 **THE COURT:** Let me look at my calendar.

17 **MR. MILLER:** I understand.

18 **THE COURT:** Because I pushed everything that
19 would ordinarily be on Friday, although I may have some
20 time. I don't know if -- because it's the holiday week
21 and people are leaving town.

22 **MR. MILLER:** And if it's a problem, it's a
23 problem. I would just like to talk about jury
24 instructions before the last witness.

25 **MR. EVANS:** I'm leaving town.

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THE COURT: Well, let me -- okay. Two things. Somebody give me a set that was in the *Johnson* case or in the federal case, the jury instructions that were read, if you don't mind.

MR. WISNER: Sure, we can get those to you.

MR. MILLER: Sure. Sure.

THE COURT: And then let me look and see if Friday is available.

MR. MILLER: Fair enough.

THE COURT: Before that I'd like you to tee up the issues, though, that you want to specifically talk about, not just all --

(Simultaneous colloquy.)

THE COURT: -- alert the Court so that we can kind of target the conversation because I'm not going to have lots of time.

MR. MILLER: I understand.

MR. EVANS: Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

(Proceedings adjourned at 4:29 p.m.)

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State of California)
County of Alameda)

I, Kelly L. Shainline, Court Reporter at the Superior Court of California, County of Alameda, do hereby certify:

That I was present at the time of the above proceedings;

That I took down in machine shorthand notes all proceedings had and testimony given;

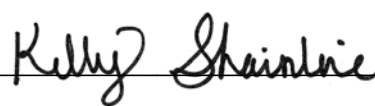
That I thereafter transcribed said shorthand notes with the aid of a computer;

That the above and foregoing is a full, true, and correct transcription of said shorthand notes, and a full, true and correct transcript of all proceedings had and testimony taken;

That I am not a party to the action or related to a party or counsel;

That I have no financial or other interest in the outcome of the action.

Dated: April 16, 2019



Kelly L. Shainline, CSR No. 13476