

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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	)	<b>JCCP No. 4953</b>
	)	
_____	)	
THIS TRANSCRIPT RELATES TO:	)	
	)	
Pilliod, et al.	)	<b>Case No. RG17862702</b>
vs.	)	
Monsanto Company, et al.	)	<b>Pages 5313 - 5454</b>
_____	)	<b>Volume 31</b>

Reporter's Transcript of Proceedings

Tuesday, May 7, 2019

Reported by: Lori Stokes, CSR No. 12732, RPR  
Stenographic Court Reporter



**BAY AREA REPORTING**  
SOLUTIONS

888.526.8243  
www.BayAreaReportingSolutions.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**APPEARANCES OF COUNSEL:**

For Plaintiffs:

THE MILLER FIRM, LLC  
108 Railroad Avenue  
Orange, Virginia 22960  
(540)672-4224  
**BY: MICHAEL J. MILLER, ATTORNEY AT LAW**  
mmiller@millerfirmllc.com

BAUM HEDLUND ARISTEI & GOLDMAN PC  
10940 Wilshire Boulevard, 17th Floor  
Los Angeles, California 90024  
(310) 207-3233  
**BY: R. BRENT WISNER, ATTORNEY AT LAW**  
rbwisner@baumhedlundlaw.com  
**PEDRAM ESFANDIARY, ATTORNEY AT LAW**  
pesfandiary@baumhedlundlaw.com

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

1        **APPEARANCES:**    (CONTINUED)

2        For Defendants:

3                EVANS FEARS & SCHUTTERT LLP  
4                2300 W. Sahara Ave, Suite 950  
5                Las Vegas, Nevada 89102  
6                (702) 805-0290

7                **BY: KELLY A. EVANS, ATTORNEY AT LAW**  
8                kevans@efstriallaw.com

9                HINSHAW  
10               One California Street, 18th Floor  
11               San Francisco, California 94111  
12               (415) 362-6000

13               **BY: EUGENE BROWN JR., ATTORNEY AT LAW**  
14               ebrown@hinshawlaw.com

15               GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP  
16               564 West Randolph Street, Suite 400  
17               Chicago, Illinois 60661  
18               (312) 681-6000

19               **BY: TAREK ISMAIL, ATTORNEY AT LAW**  
20               tismail@goldmanismail.com

21               (Multiple other counsel present as reflected in the  
22               minutes.)

23

24

25

26

27

28

29

30

31

32

33

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

Tuesday, May 7, 2019

E X H I B I T S

<u>TRIAL EXHIBITS</u>	<u>DESCRIPTION</u>	<u>IDEN</u>	<u>EVID</u>	<u>VOL.</u>
Exhibit 3106	Document		5396	31
Exhibit 4798	Email from Heydens to Kier re: meeting Prof Parry 15 Feb 2001 (Feb. 19, 2001)		5453	31
Exhibit 5194,	pgs. 1-79 IARC, Preamble: IARC Monographs on the Evaluation of Carcinogenic Risks to Humans (Jan. 2006), <a href="http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf">http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf</a>		5412	31
Exhibit 5629,	pgs. 1-16 NTP, Report on Carcinogens, Eleventh Edition: Carcinogen Profiles, U.S. Dept. of Health and Human Services (11th ed. 2004)		5393	31
Exhibit 6795	Photographs		5394	31

1 Tuesday, May 7, 2019

10:12 a.m.

2 (The following proceedings were heard out of  
3 the presence of the jury:)

4 **THE COURT:** Good morning, Counsel.

5 All right. Where do we begin?

6 **MR. EVANS:** I assume that was a rhetorical  
7 question, right, Your Honor?

8 **MR. WISNER:** I think we should probably lock  
9 down the jury instructions and the verdict form.

10 **THE COURT:** Yes. Delaying the inevitable.  
11 What's on the agenda besides the jury  
12 instructions and the verdict form? Have you guys met on  
13 the verdict form, or is that at issue? It may be driven  
14 by the final jury instructions, but assuming that it is,  
15 is a form of it worked out?

16 **MR. DICKENS:** I believe there is an issue.  
17 Plaintiffs are proposing a general verdict form, Your  
18 Honor, and I believe defendants are proposing a special  
19 verdict form. Other than that major issue, I think it's  
20 dependent on which the Court prefers. Certainly we  
21 believe with two cases here, a general verdict form is  
22 appropriate and it makes the most sense. But once the  
23 Court makes that determination, we can work on the  
24 language.

25 **THE COURT:** So verdict form, jury

1 instructions.

2 Do you have evidentiary issues you need to  
3 talk about?

4 I cut you off, Mr. Wisner, a little yesterday  
5 because you said we can go for a half an hour first and  
6 then do the jury instructions.

7 Did you have something particular in mind in  
8 terms of how we would proceed tomorrow?

9 **MR. WISNER:** Well, no. I think today. I just  
10 assumed they would file something last minute. I was  
11 correct. They filed the motion ten minutes ago, making  
12 all sorts of accusations against me and my law firm.

13 **THE COURT:** Is this for mistrial?

14 **MR. WISNER:** No, no. It's just general bad  
15 conduct. Don't let Mr. Wisner say certain things during  
16 closing. So they just filed, and I had a chance to just  
17 read it. I think it's the final version. They said  
18 they don't know if it is. But we're going to have to  
19 address that probably this afternoon after everyone has  
20 had a chance to read what they say and go through it,  
21 make sure we're on the same page. But, hopefully, we  
22 can get that done today. I would like to not have that  
23 happen tomorrow.

24 Another issue is there are some documents that  
25 Monsanto seeks to admit into evidence that we have

1 objections about. We need to quickly go through those  
2 and get your up and down on it. I don't think that will  
3 take more than ten minutes. They're pretty  
4 straightforward. But we do need to talk about that.

5 I do believe there are a couple of exhibits  
6 that we are seeking admission as well. I don't know if  
7 they're opposing it, though. So we have to know today  
8 if they're opposing it and, if so, get a ruling.

9 **MR. EVANS:** There's just a handful of  
10 documents that we can go through pretty quickly, I  
11 agree. And then we do have -- I think we submitted  
12 yesterday our special verdict form, but I think those  
13 are the issues.

14 **THE COURT:** I haven't seen the verdict form.

15 **MR. EVANS:** I have a copy I can hand up to  
16 Your Honor.

17 **THE COURT:** Just give them to Chris.

18 **MR. WISNER:** And to clarify, we are proposing  
19 two general verdict forms, not just one.

20 **THE COURT:** I just wanted to look at them  
21 first. Hold on to those. I want to work on jury  
22 instructions first so I don't lose track of it. Hold on  
23 to the verdict forms. We'll talk jury instructions  
24 first.

25 Actually, I don't think that's going to take

1 all that long. But pretty much determine what I was  
2 going to do, waiting until the end of the evidence. And  
3 I'm leaning towards everything I said I was leaning  
4 towards. Let's resolve all of that, and we can get a  
5 final version of the jury instructions after we're done.

6 I don't know who is scribing, but whoever is,  
7 maybe you can get whoever that person is to do it pretty  
8 quickly so, by the end of the day, we're looking at the  
9 final version word by word. And then if anybody has any  
10 objections, we can address any of them now.

11 So I'm really skipping over instructions  
12 denied to instructions taken under submission. So in  
13 the binder, it's at 1205, and we're on -- yeah, 1205,  
14 plaintiffs and defendants each proposed a version of  
15 CACI 1205.

16 And I think where we left this was I would  
17 give consideration to defendants' request to include the  
18 language used in accordance with and with widespread and  
19 commonly recognized practice. That was the last thing.  
20 I am going to include that language. That's the final  
21 word on that.

22 **MR. DICKENS:** Your Honor, if I can just  
23 address that for a second. Something I failed to raise  
24 last time. Actually, Judge Chhabria pointed out in an  
25 order that he issued -- the Court was going to include



1 that language because it was part of the fee for  
2 misbranding language. However, as Judge Chhabria  
3 pointed out in an order of March 7, 2019 -- it's  
4 364 F.Supp.3d 1085 -- is that phrase, "widespread and  
5 commonly recognized," does not come from the misbranding  
6 provision of FIFRA, but rather is cross-referenced in  
7 the registration provision.

8 So, specifically, he said, while a label must  
9 specify a product's use classification, nothing in the  
10 statute suggests that warnings should be limited to  
11 those relevant to the widespread and commonly recognized  
12 use of the product.

13 Mainly, because it is not actually in the  
14 FIFRA misbranding provision of the statute. And because  
15 it's not in that FIFRA misbranding, it should not be  
16 included under the Bates instruction where FIFRA  
17 misbranding and those regulations and statute that  
18 define what the misbranding provision is, this language  
19 is not within that. It's merely with respect to the  
20 registration provision.

21 I can hand up a copy of Judge Chhabria's order  
22 as well as the FIFRA statute, which includes  
23 misbranding, if the Court would like to take a look.

24 **THE COURT:** Sure.

25 Counsel, would you like to respond?

1                   **MR. MARSHALL:** Lee Marshall, Your Honor. This  
2 was addressed in our summary judgment motion. It is a  
3 complicated statutory regime, Your Honor, but the  
4 misbranding statute specifically requires a warning  
5 consistent with Section 136a(d), which is the  
6 misbranding portion, which says that the EPA must  
7 consider whether the pesticide will cause unreasonable  
8 adverse effects on the environment when the pesticide is  
9 used in accordance with a widespread and commonly  
10 recognized practice. That's 7 USC Section 136a(d).

11                   And then this misbranding statute specifically  
12 says that the label must -- that misbranding occurs if  
13 it does not contain a warning or cautionary statement,  
14 which may be necessary and if complied with together  
15 with any requirements imposed under Section 136a(d).

16                   So it's very clear that the misbranding  
17 statute here incorporates the requirement of the  
18 pesticide not causing unreasonable adverse effects on  
19 the environment when used in accordance with a  
20 widespread and commonly recognized practice.

21                   That's in the misbranding statute, and that's  
22 7 USC Section 136q(1)(F).

23                   It is a very complicated statutory regime,  
24 Your Honor, but it is specifically cross-referenced and  
25 specifically required.

1                   **MR. DICKENS:** Your Honor, specifically, Judge  
2 Chhabria -- and I'll point the Court to page 2, the last  
3 full paragraph and the last two sentences going into  
4 page 3, Your Honor, specifically address that provision.  
5 And, as Judge Chhabria points out, it states that the  
6 labels must include health warnings. And then, as he  
7 highlights, together with any requirements imposed under  
8 Section 136a(d).

9                   And, therefore, the "together with" language,  
10 as he points out, indicates that it's not necessary that  
11 it should be widespread and commonly recognized.

12                   Your Honor, the Court cannot commit error by  
13 using the CACI instruction, but it could by using  
14 language that is not approved. We, therefore, think the  
15 Court should stick with the language which is clearly  
16 approved and consistent with FIFRA's misbranding  
17 provision.

18                   **THE COURT:** Let me just take a look at this  
19 case, the order again real quickly. I'll come right  
20 back to it and make a decision quickly, but let me pass  
21 over that since I haven't seen this order.

22                   So when I was looking at this last night, two  
23 things. Skipping over to page 63, plaintiffs proposed  
24 instructions as Mrs. Pilliod or Mr. Pilliod claims.

25                   Is that a typo?

1                   **MR. DICKENS:** I believe and/or would be  
2 appropriate.

3                   **THE COURT:** I just was wondering. Was that  
4 intentional or --

5                   **MR. WISNER:** That's a typo.

6                   **THE COURT:** Okay. I didn't know what you  
7 meant by that, so I just wanted to be sure.

8                   My recollection is, when we were looking at  
9 1220, 1221, I had suggested combining just the first  
10 sentence defining negligence in, perhaps -- so I notice  
11 that it's 401 and 1221.

12                   Was this the result of the conversation we had  
13 where you were going to take the definition of  
14 negligence in the first sentence and then add that to --

15                   **MR. DICKENS:** It was, Your Honor. This was  
16 the initial instruction that was proposed by us, which  
17 includes those first two sentences of 401 with the  
18 entirety of 1221.

19                   And so what we had discussed is certainly we  
20 believe we can either separate those out and just  
21 include the first two sentences of 401 as a separate  
22 instruction, if the Court would prefer to do it in that  
23 way.

24                   But this, once again, includes the first two  
25 sentences of 401 in the 1221 instruction.

1                   **THE COURT:** That's what I thought. I do  
2 intend to read that.

3                   Does anyone want to be heard on that?

4                   **MR. EVANS:** No, Your Honor. Our position is  
5 there's not evidence of the standard of care, so the  
6 claim should not go to the jury. But I think you ruled  
7 on that.

8                   **THE COURT:** I did.

9                   1222. It was modified by Monsanto.

10                  **MR. EVANS:** This is the same issue with  
11 respect to the in accordance with --

12                  **THE COURT:** Yes, all right. So those two I'll  
13 come right back to.

14                  So 1200. When I look at the numbers that we  
15 hadn't argued yet, I thought we had already captured  
16 most of these. But 1200.

17                  **MR. DICKENS:** That one, I don't know if we  
18 addressed. I don't think there's much real dispute  
19 there. We included it just because it's a standard  
20 instruction that lays out the essential factual  
21 elements.

22                  I think the defendants' position is simply  
23 it's unnecessary. I don't know if we feel incredibly  
24 strongly one way or the other whether it's included or  
25 not. We do think it just lays out that there are two

1 separate positions for strict liability: design  
2 defect and failure to warn.

3 **THE COURT:** Well, I don't want to confuse the  
4 jury in any way with respect to...

5 Do you have any --

6 **MR. EVANS:** Again, our position is that it's  
7 not necessary, and it's confusing. The actual elements  
8 of the claims are laid out, and we don't think this adds  
9 anything.

10 **THE COURT:** I think you're right, it's  
11 appropriate. So I think I'm going to strike that.

12 So punitive damages. So I did a side-by-side,  
13 and it looks as though the difference between the two  
14 are that Monsanto left out fraud in the instruction, and  
15 that you also left out trickery or deceit.

16 **MR. EVANS:** Correct.

17 **THE COURT:** Plaintiffs said -- plaintiffs  
18 plural, as opposed to Mr. and Mrs. Pilliod, which should  
19 say Mr. and Mrs. Pilliod wherever it says "plaintiffs"  
20 just to make sure it's clear we're talking about two  
21 separate cases.

22 So I would include the entire instruction. I  
23 don't think there's any reason to take any part of it  
24 out if you want to be heard on it, but I'm inclined to  
25 read the standard instruction. I know you left out

1       trickery and deceit because you don't think there's any  
2       evidence of it. But it seems plaintiffs' theory is that  
3       the code of conduct of Monsanto and its employees  
4       included with the ghost writing and the other bad acts  
5       that they think constitute, I assume, fraud, trickery,  
6       or deceit.

7                So I think that, given that's the theory and  
8       they have presented evidence, the jury can weigh whether  
9       they think that it's fraud or they think that it is  
10       trickery or deceit. Although "trickery" is kind of an  
11       odd term. I'm not exactly sure why they would include  
12       that in the 20th century, why they would say trickery,  
13       but they did.

14               **MR. EVANS:** Our position, Your Honor, was we  
15       think it wasn't pled this way. We don't think the  
16       evidence supports those concepts. But we've argued that  
17       previously.

18               **THE COURT:** I think they're arguing that  
19       that's what the behavior amounted to. I think the jury  
20       is going to have to figure out for themselves what it  
21       is, what it was.

22               So I'm going to read the Instruction 2945 with  
23       the changes of Mr. and Mrs. Pilliod pretty much as a  
24       standard instruction, with all the language in it.

25               Let's see. So definition of Roundup.

1                   **MR. EVANS:** We don't have a problem with that,  
2 Your Honor. It's fine.

3                   **THE COURT:** Okay. One way or the other, I  
4 think they're pretty clear that Roundup is the  
5 glyphosate and the formulated product. I don't think  
6 there's any issue. But that's fine. I'll read that.

7                   So we're now down to the Monsanto special  
8 instructions and then the joinder claims instructions.  
9 So let me talk about the joinder claims first, and then  
10 we'll come back to the special instructions.

11                   I think some combination of this might work or  
12 will work because I think we need a little bit more than  
13 what plaintiff is proposing but maybe not all of the  
14 language that Monsanto is proposing.

15                   I think that, for example, you heard evidence  
16 that Mr. and Mrs. Pilliod each used different amounts of  
17 Roundup and were diagnosed with different cancers at  
18 different times, and I think that's a distinction I  
19 would want to instruct them on.

20                   **MR. WISNER:** I don't know if we agree  
21 factually that they had different cancers. That's a  
22 disputed issue of fact.

23                   **THE COURT:** If you want to dispute that, they  
24 were diagnosed at different times.

25                   **MR. WISNER:** Sure. That works.



1           **THE COURT:** I don't think that's important in  
2 terms of just communicating there's two separate cases.

3           **MR. WISNER:** I get that, Your Honor. I just  
4 didn't want to put a factual determination in the  
5 instructions that we didn't agree to.

6           **THE COURT:** Were diagnosed at different times.  
7 I would then skip down to "you may not  
8 consider evidence" and then to the end.

9 I don't know about --

10          **MR. EVANS:** I'm sorry, Your Honor.

11          **THE COURT:** I was going to delete the next two  
12 sentences.

13          **MR. EVANS:** "So when considering the  
14 plaintiffs' claims"?

15          **THE COURT:** Yes. And the reason is I think  
16 there's -- I think that there's room for a sentence  
17 which talks about considering the corporate conduct up  
18 until the time, you know, within the period that was  
19 used. But I'm not sure I would word it quite like that.

20          **MR. EVANS:** Well, we think that's a very  
21 important point given the different times of usage and  
22 diagnosis days.

23 So --

24          **THE COURT:** I'm just -- I would reword it  
25 slightly because I think it's -- as lawyers, we all know

1 what it means. I'm not sure the jury is going to read  
2 that and understand it the same way. I guess that's  
3 what I'm thinking.

4 Maybe that needs to be included just the way  
5 it is, but I'm not disagreeing that that concept needs  
6 to be conveyed to the jury. I'm just trying to think of  
7 a way to maybe somewhat simplify the language.

8 **MR. WISNER:** Could it just be you should only  
9 consider conduct that allegedly occurred during each  
10 plaintiff's use of Roundup? Wouldn't that capture the  
11 issue?

12 **THE COURT:** Well, I have to say that I think  
13 that part of the issue is what did Monsanto know and --  
14 what was their conduct based on? Which they're going to  
15 argue the state of the science at a particular time, and  
16 you're arguing the state of the science, much of which  
17 overlaps. But it is focusing on where the science was  
18 at the time -- where you're arguing the science. Each  
19 of you would be arguing where the science was at the  
20 time they were using it.

21 It could be that just including that sentence  
22 the way it is is fine. But I think we definitely need  
23 to convey that concept to the jury.

24 **MR. WISNER:** Sure. But I think the issue  
25 we're trying to solve here isn't that. The issue we're

1 trying to solve is that there's evidence of Monsanto  
2 conduct after Mrs. Pilliod stopped using but when  
3 Mr. Pilliod was still using the product. It's that  
4 two-year period of time. And that's the only issue that  
5 needs to be instructed on.

6 The other stuff here isn't really about that  
7 issue. It's simply about the overlap of that two-year  
8 period. So we really need to tie the instruction to  
9 when they stopped using.

10 I think if we just simply said, "In  
11 considering plaintiffs' claim for punitive damages, you  
12 should only consider conduct that allegedly occurred  
13 during each plaintiff's use of Roundup."

14 **MR. EVANS:** I appreciate that he wants to  
15 limit it to that one issue he's focused on, which is the  
16 conduct of the company. The state of the science is  
17 throughout many of the claims.

18 **MR. WISNER:** But that's not something the  
19 Court should instruct the jury about. That's something  
20 that we will argue.

21 **THE COURT:** So this is not about punitive  
22 damages as much as it is them understanding the concept  
23 of two completely different cases -- they should be  
24 looking at this as two different cases. I'm not  
25 actually wanting to focus on just punitive damages and

1 corporate conduct. It's just that you should look at  
2 the evidence -- and it could be as simple as saying  
3 that, you know, the evidence goes from here to here for  
4 Mrs. Pilliod and there to there, although there's some  
5 dispute, I guess, as to when each stopped using. So I  
6 wouldn't want to use a date, because I think each side  
7 is arguing a slightly different time period.

8 **MR. EVANS:** Correct.

9 **MR. WISNER:** But, Your Honor, I think that  
10 concern is addressed in the earlier sentences that we're  
11 in agreement about, right? That they're different cases  
12 that should be considered.

13 This specific sentence is about punitive  
14 damages. And, for that purpose, we are really just  
15 trying to correct that short period of overlap that they  
16 were worried about.

17 So if we simply tie it to, when they only  
18 consider for punitive damages, the period when they were  
19 using it, that's fine. Because I don't think Monsanto  
20 would argue, for example, that, in looking at causation  
21 for Mr. Pilliod, that the jury shouldn't consider any  
22 evidence after he stopped using. They're going to rely  
23 on the EPA report and other things to argue it doesn't  
24 cause cancer. I don't think they even want that.

25 I think what we're talking about is in the

1 context of punitive damages for looking at malicious or  
2 fraudulent conduct.

3 **THE COURT:** So maybe it should be in the  
4 punitive damages instruction as opposed to --

5 **MR. EVANS:** I disagree, Your Honor.

6 **THE COURT:** Okay.

7 **MR. EVANS:** The warnings issue, separate and  
8 apart from punitive damages, is absolutely tied to what  
9 we knew and when we knew it. So it's not just punitive  
10 damages; it's not just conduct; it's the state of the  
11 science. And we have every right to argue that to the  
12 jury.

13 If you look at the time Mr. Pilliod suffered  
14 his injury, what was the state of the science in 2011?  
15 And what did we warn at that point in time based upon  
16 the state of the science? If you want to talk about  
17 uses, they're different dates, et cetera. So it's not  
18 just about punitive damages, Your Honor.

19 **MR. WISNER:** Respectively, Your Honor, though,  
20 that issue, again, isn't a problem here. Because  
21 Mr. Pilliod was diagnosed before Mrs. Pilliod and  
22 because he continued to use it after Mrs. Pilliod was  
23 diagnosed, there's no issue of timing here. The  
24 evidence is coexistent on the state of the science after  
25 and before.

1           Now, if they want to argue, "Hey, in 2012 we  
2 couldn't possibly have known that it caused cancer;  
3 therefore, we didn't have to warn," that's a fine  
4 argument. This instruction has absolutely nothing to do  
5 with that.

6           What we're trying to deal with here in this  
7 sentence -- the previous sentences do deal with that,  
8 and that's something that I think is captured correctly  
9 in the instruction.

10           But this sentence isn't about that. This  
11 sentence is, okay, we have this weird construct, whether  
12 it's two years of corporate conduct, and there's  
13 evidence about what Monsanto did between 2015 and 2017  
14 the jury has heard, and they shouldn't consider that  
15 conduct in assessing punitive damages for Mrs. Pilliod,  
16 but they can consider it for Mr. Pilliod.

17           Now, obviously, we don't -- I don't think  
18 Monsanto wants us to characterize misconduct in an  
19 instruction. So the way to properly tell the jury that  
20 without stepping on any factual issues is to simply say  
21 conduct that allegedly occurred during each plaintiff's  
22 use of Roundup.

23           Now, what those periods of time are, that's a  
24 factual question we can argue to the jury. What  
25 occurred during that period is a factual issue. Again,

1 we argue that to the jury.

2 But that will give Monsanto the proper sort of  
3 instruction to argue to the jury in punitive damages,  
4 don't award any punitive damages for Mrs. Pilliod for  
5 any conduct that plaintiffs say occurred after she  
6 stopped using in 2015. They'll be able to say that with  
7 impunity with that instruction.

8 This really is about punitive damages. The  
9 other stuff captures the other concerns raised by  
10 Mr. Evans.

11 **MR. EVANS:** I don't think it does, Your Honor.  
12 I have someone -- we have suggested potentially  
13 alternative language. "You should separately consider  
14 the evidence for Mr. Pilliod and Mrs. Pilliod based on  
15 when Monsanto manufactured, distributed, and sold the  
16 product that each plaintiff used and is alleged to have  
17 caused their particular harm."

18 **THE COURT:** One of the reasons I started sort  
19 of carving this up is because I think it's a little  
20 confusing because, when you start talking about the  
21 product that each used, they essentially used the same  
22 products.

23 So it is a question not so much were the  
24 products that were manufactured at the time -- in other  
25 words, it is collectively the products that were

1 manufactured at the time.

2 So it's not so much for each use. They used  
3 the same product. It's a question of when they used the  
4 product, the timing of it, not the products themselves.

5 And I think that language -- and I saw it  
6 somewhere else -- suggests that they may have been using  
7 different products at different times, and that's not  
8 the case. They used the same thing.

9 I wanted to emphasize that we're talking about  
10 different time periods, not different products.

11 **MR. EVANS:** If we change the word "products"  
12 to "Roundup," does that fix that problem?

13 **THE COURT:** Read it again.

14 **MR. EVANS:** Okay. "You should separately  
15 consider the evidence for Mr. Pilliod and Mrs. Pilliod  
16 based on when Monsanto manufactured, distributed, and  
17 sold the Roundup that each plaintiff used and is alleged  
18 to have caused their harm."

19 So instead of "the product," it's "Roundup."

20 **THE COURT:** I think the problem is "each  
21 plaintiff used" suggests that they each used a different  
22 Roundup product, which they didn't. Although then I'm  
23 going to call them plaintiffs plural --

24 I'm sorry. Go ahead, Mr. Evans.

25 **MR. EVANS:** With respect to the exposure



1 issue, though, Mr. Pilliod actually -- they both sprayed  
2 the same stuff. Mr. Pilliod actually mixed the  
3 concentrate and apparently spilled some on him.

4 **THE COURT:** Right.

5 **MR. EVANS:** So there is a little bit of a  
6 difference there with respect to the product exposure  
7 issue.

8 **MR. WISNER:** Your Honor, there's another  
9 problem with this proposed sentence. We just have to  
10 look at it plainly.

11 It says "You may not consider evidence of  
12 Monsanto's conduct after Monsanto manufactured,  
13 distributed, and sold the product that each plaintiff  
14 used."

15 Well, that's actually not even legally  
16 correct.

17 **THE COURT:** We're not there yet.

18 **MR. WISNER:** Oh, okay. I thought he was just  
19 reading that exact sentence.

20 Did I misunderstand you?

21 **MR. EVANS:** We're focused on the same sentence  
22 we've been talking about --

23 **THE COURT:** No, it's the one before. We're  
24 not there yet. We're not down to that sentence. No,  
25 we're talking about the previous sentence.

1                    "You should separately consider Mr. and  
2 Mrs. Pilliod's use of Roundup."

3                    How about the language, "You should separately  
4 consider Mr. and Mrs. Pilliod's use of Roundup" during  
5 whatever. Let me think about the rest of the sentence.

6                    **MR. WISNER:** Yeah, that works.

7                    **THE COURT:** What about "Separately Mr. and  
8 Mrs. Pilliod's use of Roundup"? That just basically  
9 says the use of the product separately.

10                   **MR. WISNER:** Makes sense.

11                   **MR. EVANS:** Where are you at?

12                   **THE COURT:** I'm just making it up just to try  
13 to bridge that gap.

14                   What about the simple sentence, "You should  
15 separately consider Mr. and Mrs. Pilliod's use of  
16 Roundup"? That's pretty straightforward.

17                   **MR. EVANS:** But the rest of the sentence, Your  
18 Honor, was dealing with the issue of what Monsanto knew  
19 at the different times. That's the important part of  
20 that.

21                   **THE COURT:** Right. I understand.

22                   Okay. So...

23                   **MR. EVANS:** I mean, I -- maybe there was a  
24 disconnect between plaintiffs' counsel and what we were  
25 talking about, because if he was talking about the next

1 sentence, I agree that's -- in considering the  
2 plaintiffs' claim for punitive damages, that's a  
3 different sentence than the one we're going to focus on.

4 So you have a problem with the one we've been  
5 focused on?

6 **MR. WISNER:** Yeah. So why don't you read the  
7 proposal?

8 **MR. DICKENS:** Your Honor, I did. To combine  
9 the two, we could do, "When considering the plaintiffs'  
10 claims, you should separately consider the evidence for  
11 each plaintiff regarding what Monsanto knew or  
12 reasonably should have known in light of the science  
13 that existed at the time of Mr. and Mrs. Pilliod's use  
14 of Roundup."

15 And that includes the "knew or reasonably  
16 should have known," takes out Roundup, and just "at the  
17 time of their use of Roundup."

18 **MR. EVANS:** Well, again, the problem I have  
19 with that is, factually, Your Honor, the responsibility  
20 of the manufacturer is when we released the product.

21 As you saw from the photographs, there were  
22 some products that apparently the Pilliods purchased in  
23 2002, for example, that was still in their shed in 2019.

24 **THE WITNESS:** Uh-huh.

25 **MR. EVANS:** So, again, if the science changes

1 over time, then what we knew in 2002 applies to the  
2 product that was sold in 2002.

3 The separate issue of usage is a different  
4 issue. But if we sell something and put it into the  
5 stream of marketing in 2002, that is when the analysis  
6 of the warning needs to take place, not 17 years later.

7 Now, I'm not saying they didn't buy product  
8 after that, but that's why I'm concerned about "sold  
9 them into use," because I'm not sure that the evidence  
10 is clear as to purchase versus use time frame.

11 **THE COURT:** Well, I think, as I recall, the  
12 evidence is that they had that left in their shed, but  
13 they bought it and used it the whole time.

14 So whatever the warnings issue is, it would  
15 span the use. It's not like they bought one can in 2002  
16 and used that for 17 years or 30 years, however many  
17 years they used it.

18 Because the one from 2002 was well after they  
19 started and then well before they stopped. It just  
20 happens to be that that was what was left in their shed.  
21 So I'm not sure that 2002 -- I mean, I think the  
22 allegation -- and I think there's some evidence that  
23 they bought it continuously over a 30-year -- bought it  
24 and used it over a 30-year period. And then I guess  
25 Mr. Pilliod stopped using it in whatever year he stopped

1 using it. Was it 2015? '17?

2 **MR. WISNER:** End of 2016, early 2017.

3 **THE COURT:** Okay. So I think the plaintiffs  
4 will argue that it's all of those years, and not 2002 or  
5 1980 whatever, when Mrs. Pilliod, I guess, indicates  
6 that she actually looked at the label, paid attention to  
7 the label.

8 **MR. EVANS:** And, Your Honor, I don't -- I  
9 don't necessarily want to preview closing arguments and  
10 what we may or may not argue, but the reality is we've  
11 heard a lot of evidence about the latency period and the  
12 development of cancer over time.

13 So the concept that -- first of all, the  
14 concept that what Mr. Pilliod used after he had cancer  
15 is not relevant to anything. And what the warning was  
16 on a label in 2016 that -- what does it relate to his  
17 cancer that he had in 2011? There's no relevance.

18 So -- but, moreover, the point of cancer  
19 developing over years and decades is relevant to the  
20 issues of the warning. And so I don't think it's  
21 appropriate to simply say he stopped using it in 2016  
22 and, therefore, the science and the warnings all the way  
23 up to that point in time is what's relevant.

24 Now, Your Honor's rule with respect to what  
25 evidence is admissible, we certainly have the right to

1        argue. And we don't think the instructions should  
2        direct them one way or another with respect to that.

3                **THE COURT:** So I think that's going to be an  
4        issue of fact for the jury to resolve --

5                **MR. EVANS:** Right.

6                **THE COURT:** -- in terms of what period they  
7        think --

8                **MR. EVANS:** Is relevant.

9                **THE COURT:** And I'm not suggesting that the  
10       instruction include either dates, but I think that  
11       "during the period of use" is certainly a neutral enough  
12       way to put it to the jury so that they can make their  
13       decision about what that period of use is, for one  
14       thing.

15                So I'm not suggesting anything more definitely  
16       than "period of use." But let me follow up with  
17       Mr. Dickens.

18                **MR. EVANS:** But, Your Honor, just to finish,  
19       that's why we think it's important to include "and is  
20       alleged to have caused the particular harm."

21                Because the period of use after the alleged  
22       harm, we think there needs to be some nexus to the harm  
23       and the use and the "slash therefore" label, et cetera.  
24       So that's why we included that last clause.

25                **THE COURT:** I understand that, except that I

1 don't know -- without speaking for Mr. Wisner, I'm sure  
2 the plaintiffs are going to say they're harmed all the  
3 way to the end. As long as they're exposed to it, it  
4 continues to harm them.

5 **MR. EVANS:** Well, he can say that, but none of  
6 the doctors actually said that he's -- all they said was  
7 that he's in complete remission. And they have not  
8 talked about somehow his use post diagnosis and  
9 remission has put him at an increased risk. I think  
10 it's the opposite, actually.

11 **MR. WISNER:** Opposite, I don't know how that's  
12 possible. We're alleging that it's a carcinogen, and  
13 he's continuing to use it. That's in our expert  
14 testimony, unobjected to and unrefuted, frankly, from  
15 Dr. Sawyer and Dr. Portier that Roundup actually is a  
16 promoter and that it can take initiated cancer cells and  
17 promote them into cancer. There's clear scientific  
18 evidence supporting this fact about Roundup.

19 So the suggestion that he's not harmed by  
20 continuing to use a cancer promoter after he has  
21 sustained cancer, which puts him at an increased risk of  
22 later getting cancer, it's just nonsense.

23 **THE COURT:** So what I just want to do is  
24 instruct so that the jurors can figure out for  
25 themselves what they think of these facts without

1 tipping the balance one way or the other in the  
2 instruction. That's all I'm trying to achieve here.

3 So reread your sentence, and let's see if we  
4 can modify or amplify that and kind of tweak the balance  
5 without going either way.

6 **MR. DICKENS:** Sure. It would be, "When  
7 considering the plaintiffs' claims, you should  
8 separately consider the evidence for each plaintiff  
9 regarding what Monsanto knew or reasonably should have  
10 known in light of the science that existed at the time  
11 of Mr. and Mrs. Pilliod's use of Roundup."

12 **THE COURT:** And so "alleged to have caused  
13 their particular harm" adds what, Mr. Evans?

14 **MR. EVANS:** Well, again, I think a reasonable  
15 component of when we actually manufactured it, and I  
16 think the harm relates to when they were actually  
17 harmed.

18 I mean, again, there isn't any evidence that  
19 Mr. Pilliod, after his diagnosis of cancer, has been  
20 harmed in any way.

21 Now, I understand the promotion period --

22 **THE COURT:** I got that as an argument. I  
23 totally agree with that as an argument in terms of what  
24 you're permitted to argue. I think the sentence as read  
25 leaves all that open to the jury to figure out what that



1 is.

2 And so I'm inclined to incorporate that  
3 because I think it does satisfy the need to instruct  
4 them that it has to be during a period -- whatever  
5 Monsanto knew or reasonably should have known in light  
6 of the science -- taking into consideration the  
7 science -- during whatever period of time the Pilliods  
8 were using it. But they need to consider each case  
9 separately as to that use.

10 **MR. EVANS:** But, Your Honor, the problem I  
11 have with that is, if you take out the "sold,  
12 manufactured, distributed" part of it, then all that's  
13 left is the state of the science in 2016 for  
14 Mr. Pilliod. And we don't think that's appropriate.

15 That changes the direction, to simply say "all  
16 you have to do is look at the science at the time he was  
17 using it." And we don't think that's right. We think  
18 you also have to look at the science that existed at the  
19 time he was diagnosed and at the time the product was  
20 sold.

21 So, again, they were allegedly -- and  
22 testified that they were using the product over the  
23 course of 30 years. The only time that you look is not  
24 in 2016 when he's still using it.

25 **THE COURT:** Why do you think that communicates

1 that it's only 2016? My thought was that that would  
2 communicate the entire period they were using the  
3 product, from 1982 to 2016, and that gives them more  
4 room to consider whatever the state of the science was  
5 or whatever Monsanto knew or should have known during  
6 that entire period.

7 **MR. EVANS:** Because I think, by eliminating  
8 the part of it that's connected to Monsanto, which is  
9 when we were actually doing something, which is when we  
10 sold product, it eliminates that piece of it, and you're  
11 solely focused on when the plaintiff is using it.

12 And the relevant analysis --

13 **THE COURT:** But they're using it -- you're  
14 selling it and they're using it at the same time.  
15 They're buying and using it. They're buying and using  
16 it from 1980-whatever to 2016. So what's the  
17 distinction? So I don't think I understand the  
18 distinction.

19 **MR. EVANS:** Again, Your Honor, I think the  
20 issue is the latency issue. The science is that, for  
21 example, these folks would have had to have had the  
22 mutations; and the cancer that is diagnosed in 2011 and  
23 2015, they would have had that years before. I think we  
24 have an ability of arguing that that's the relevant time  
25 period, not just when they were using the product.

1                   **THE COURT:** I mean, you can argue that.

2                   **MR. EVANS:** But I think an instruction that  
3 leads them to think that the period of use -- that the  
4 period they need to be concerned about the state of the  
5 science is just when they were using it as opposed to  
6 when it was sold over this entire period of time.

7                   **MR. DICKENS:** And, Your Honor, I can point out  
8 a strict liability failure-to-warn instruction  
9 specifically concludes that at the time of manufacture,  
10 distribution, and sale.

11                   So this instruction will tell the jury how to  
12 apply that specific language, that they need to consider  
13 it for Mr. and Mrs. Pilliod. But it doesn't need to go  
14 back and reflect all of the separate causes of action.  
15 It's just separately, "You must consider their evidence  
16 separately."

17                   **THE COURT:** Yeah. Well, I agree with you, but  
18 I'm not trying to accomplish everything in one  
19 instruction. I want to get it right in terms of what we  
20 want to communicate to the jury. And I don't want to --  
21 I don't want to suggest that they are to consider a  
22 particular period of time.

23                   What I think is that the sentence that you  
24 read kind of nails it because it just tells them "during  
25 the period of use."

1           And I would agree with you -- and thank you  
2 for that suggestion -- which is, as you go through  
3 making a decision about whether there's liability on a  
4 particular cause of action, the instructions will tell  
5 them what they can and can't consider.

6           So this is just when they're using it,  
7 different times -- this is a supplement to the other  
8 instructions that are already very specific as to what  
9 they can consider in finding liability.

10           So this is just a reminder to them that they  
11 have to look at the claims differently as to Mr. and  
12 Mrs. Pilliod. They have to consider the period of use  
13 for each of them separately and Monsanto's conduct as to  
14 them separately.

15           That's really all I'm trying to accomplish  
16 here. And I think that that sentence does it with the  
17 last paragraph. And I think we're -- I think that  
18 works.

19           **MR. EVANS:** So are you deleting the next  
20 sentence, which is "In considering plaintiffs' claim for  
21 punitive damages"?

22           **THE COURT:** Well, yeah, because I don't want  
23 to reference punitive damages because punitive damages  
24 takes care of punitive damages.

25           I don't want to focus on punitive damages

1 because this isn't a punitive damages instruction. This  
2 is just "consider them separately."

3 And if you want to include "including punitive  
4 damages, consider them separately," maybe we can come up  
5 with that sentence. But...

6 **MR. WISNER:** We're fine with that, Your Honor.

7 **THE COURT:** Yeah. This includes Mr. and  
8 Mrs. Pilliod's claims for punitive damages. They have  
9 to be considered separately.

10 **MR. WISNER:** It would read thus: "When  
11 considering the plaintiffs' claims, including punitive  
12 damages, you should separately," and then I think that  
13 makes sense.

14 **THE COURT:** So read it again.

15 **MR. DICKENS:** So that sentence would read,  
16 "When considering the plaintiffs' claims, including  
17 punitive damages, you should separately consider the  
18 evidence for each plaintiff regarding what Monsanto knew  
19 or reasonably should have known in light of the science  
20 that existed at the time of Mr. and Mrs. Pilliod's use  
21 of Roundup."

22 **MR. EVANS:** Yeah, we don't like that, Your  
23 Honor.

24 We're not going to -- I mean, we don't think  
25 this entire paragraph should be focused on punitive

1 damages, which is what you end up doing if you put that  
2 in there.

3 **THE COURT:** But you put the sentence in there.  
4 You're the one that was asking --

5 **MR. EVANS:** Well, the next -- if it follows  
6 the first full sentence that we had -- and, again, we  
7 think it needs to be tied to the actual harm.

8 And when you instruct them --

9 **THE COURT:** Well, that assumes that the harm  
10 occurs when you think it occurs. I mean, I think what's  
11 happening is the plaintiffs will argue it occurred at  
12 whatever their definition of harm is. And Monsanto can  
13 argue what its definition of harm is.

14 **MR. EVANS:** That's fine. They can argue that.

15 But if you take out the harm component of this  
16 and you're just left with use only, then you don't have  
17 any obligation for the jury to consider harm as it  
18 relates -- or the state of the science related to use  
19 related to the harm allegation.

20 If they want to argue that he was harmed all  
21 the way up to until he stopped using it in 2016, then  
22 they can argue that. But when you eliminate that  
23 phrase, then you're just focused on use only, which we  
24 think is not --

25 **THE COURT:** Okay. So make a proposal for a

1 modification, then, that you think better articulates  
2 it, because that whole sentence is not in. But if you  
3 have a better suggestion, an additional warning that you  
4 think would --

5 **MR. EVANS:** If Your Honor doesn't like "at the  
6 time Monsanto manufactured," even though I think it's  
7 straight from the CACI individual instructions, then I  
8 think, if you pick up where they left off, "at the time  
9 of Mr. and Mrs. Pilliod's -- Mr. and Mrs. Pilliod used  
10 the product," and then it would continue, "and is  
11 alleged to have caused a particular harm."

12 **MR. WISNER:** Your Honor, that wasn't actually  
13 what the sentence we read was. So if they could modify  
14 our sentence, that would make sense.

15 Our sentence ends with "Mr. and Mrs. Pilliod's  
16 use of Roundup."

17 **MR. EVANS:** Right. "Use of Roundup and is  
18 alleged to have caused their particular harm."

19 **THE COURT:** Okay. So including that, read the  
20 whole thing. And we'll go through it one more time.

21 **MR. DICKENS:** Yeah. Okay.

22 So our sentence was --

23 **THE COURT:** Include the language that  
24 Mr. Evans just --

25 **MR. DICKENS:** Okay.

1           **THE COURT:** -- suggested, and then we'll read  
2 the whole thing back and hear what it sounds like.

3           **MR. DICKENS:** Okay. So read the whole  
4 sentence back, including the language that was just  
5 posed?

6           **THE COURT:** Yes.

7           **MR. DICKENS:** "When considering the  
8 plaintiffs' claims, you should separately consider the  
9 evidence for each plaintiff regarding what Monsanto knew  
10 or reasonably should have known in light of the science  
11 that existed at the time of Mr. and Mrs. Pilliod's use  
12 of Roundup and is alleged to have caused their  
13 particular harm."

14           **THE COURT:** I think that works.

15           **MR. WISNER:** I think we have to get rid of the  
16 "and."

17                    "Alleged to have caused their harm." It  
18 should say "Mr. Pilliod's use of Roundup that allegedly  
19 caused their harm," because that's the issue.

20           **THE COURT:** Okay. That --

21           **MR. WISNER:** Yeah. "That allegedly caused  
22 their harm."

23           **MR. EVANS:** Yeah.

24           **THE COURT:** Okay. So there we have it.

25           **MR. WISNER:** Okay.



1                   **THE COURT:** And so -- and include the last  
2 paragraph, and I think we've got it.

3                   **MR. EVANS:** Again, Your Honor, as you know, we  
4 stick by our proposed instruction, but we understand  
5 your compromise version gets us to the finish line.

6                   **THE COURT:** It does, and it's very well  
7 documented.

8                   All right. So let's go back, then. I think,  
9 except for the special instructions that Monsanto wants  
10 to include -- 5 is punitive damages. Except for 1, 2,  
11 and 3 -- no. I'm sorry.

12                   So there are two proposed instructions --  
13 Special Instructions Number 5: one mitigating  
14 evidence and one punitive damages. I don't know if  
15 that's misnumbered or --

16                   **MR. EVANS:** I'm sorry.

17                   **THE COURT:** There are two Monsanto-proposed  
18 instructions -- oh, I see, Proposed Instruction Number 5  
19 is a special instruction.

20                   So we're now on to Monsanto's proposed  
21 instructions. So in terms of -- 2 is out. 3 is out.  
22 When I say "out," I'm not going to read those.

23                   And 4 --

24                   **MR. WISNER:** Your Honor, we skipped over 1.

25                   **THE COURT:** Oh, yeah. That's denied.

1                   1, 2, and 3 are denied.

2                   4 -- I'll hear argument on 4. And, actually,  
3                   Number 6 is also denied.

4                   So I'll hear argument on 4 and 5. 5, I'm  
5                   inclined to no; but 4, I'm inclined to read.

6                   **MR. WISNER:** You know, for Number 4, Your  
7                   Honor, our proposal is to just take that first sentence  
8                   and put it in the punitive damages instruction so that  
9                   it captures the situation.

10                  The rest of that really is superfluous and  
11                  repetitive and actually potentially creates unnecessary  
12                  error.

13                  **THE COURT:** You mean the last sentence of  
14                  Number 4? Because there are only two sentences to  
15                  Number 4.

16                  **MR. WISNER:** There's three, I believe.

17                  **THE COURT:** There's just two sentences.

18                  **MR. WISNER:** The second sentence, we don't  
19                  want; but the first sentence would be fine putting that  
20                  into the punitive damages instruction. I think that  
21                  captures their concern.

22                  **MR. EVANS:** Well, I think there actually are  
23                  three sentences.

24                  "If you award compensatory damages to Mr. and  
25                  Mrs. Pilliod, your award will have fully compensated" --

1                   **THE COURT:** I'm sorry. You're right.

2                   **MR. EVANS:** "If you awarded compensatory  
3 damages to Mr. Pilliod and/or Mrs. Pilliod, your award  
4 will have fully compensated plaintiffs for any loss,  
5 harm, or damage that he or she has incurred or may in  
6 the future incur as a result of Monsanto's conduct.  
7 Accordingly, you must not include in an award for  
8 punitive damages any amount intended as compensation for  
9 loss, harm, or damage."

10                   And, again, I think it's appropriate to  
11 instruct the jury that compensatory damages are to  
12 compensate them for --

13                   **THE COURT:** No, no. I'm agreeing that we  
14 should read this.

15                   **MR. EVANS:** Okay.

16                   **THE COURT:** I think the only thing Mr. Wisner  
17 is saying is that we include 1 and 2 in the punitive  
18 damages instruction as opposed to a separate  
19 instruction.

20                   **MR. WISNER:** Yeah. I think if you go to --

21                   **THE COURT:** The third sentence essentially  
22 reiterates --

23                   **MR. WISNER:** I think where it would fit in  
24 nicely is, if you look on page 68, Your Honor, that's  
25 the punitive damages instruction that we're using. It

1 could actually go right after the first paragraph.

2 **THE COURT:** All right.

3 **MR. WISNER:** "The purposes of punitive damages  
4 are to punish a wrongdoer for the conduct that harmed  
5 the plaintiff and to discourage similar conduct in the  
6 future. Punitive damages are not intended to compensate  
7 Mr. or Mrs. Pilliod. If you award compensatory  
8 damages," and then the rest of it. Because it flows  
9 conceptually right there in that instruction.

10 **THE COURT:** Do you have any objection to that  
11 or concern?

12 **MR. EVANS:** No. It's good.

13 **THE COURT:** I think including it in the  
14 punitive damages section is good. So we'll do that.

15 **MR. EVANS:** That's fine.

16 **THE COURT:** So that leads us to Special  
17 Instruction Number 5. Just one second.

18 **MR. MARSHALL:** Your Honor, with regard to  
19 Special Instruction 5 -- and this comes straight out of  
20 federal case law, Supreme Court case law. It talks  
21 about the reprehensibility of the defendants' actions as  
22 well as mitigating conduct being relevant.

23 And the CACI instruction gives the jury a  
24 mechanism for assessing reprehensibility but does not  
25 mention anything about mitigating conduct. So that's

1 the basis for the proposal for Special Instruction 5.

2 **MR. WISNER:** Your Honor, we can address this  
3 individually -- I mean, I think the first threshold  
4 issue is I don't know what evidence of mitigating  
5 conduct they're referring to. I don't think we've heard  
6 any of that in this trial.

7 If they could point us to some evidence that  
8 would support this instruction at all, I think that  
9 would be a good starting point to understand why they  
10 need this instruction at all.

11 That said, the CACI instruction very clearly  
12 discussed all the elements under California law that the  
13 jury should consider in awarding punitive damages, and  
14 it talks about their conduct and whether or not it was  
15 really bad or not.

16 So there's really no reason to include this  
17 instruction in this case whatsoever.

18 **MR. EVANS:** Your Honor, with respect to that,  
19 the mitigating conduct, you're not allowing instruction  
20 with respect to, for example, compliance with EPA, but  
21 there is evidence in the record that the company was  
22 well aware of and followed the regulatory guidance and  
23 determinations.

24 And so there's testimony, for example, from  
25 Dr. Reeves, and we're going to look at that. It's one

1 of the issues we want to talk about, but the testimony  
2 has come in that they were following the -- after IARC,  
3 the course of what the regulators were saying about the  
4 product.

5 And so I think that's all -- with respect to  
6 mitigating their conduct. So, I mean, reprehensibility  
7 and mitigation.

8 **THE COURT:** Isn't that just an argument that  
9 their behavior was not either malicious or reprehensible  
10 as opposed to -- mitigating, I don't -- as I told you, I  
11 have to have a really good reason to, in my view,  
12 include a special instruction in addition to the  
13 instructions that have already been provided in CACI.  
14 And I think the punitive damages instruction is really  
15 pretty complete in terms of what the jury should  
16 consider.

17 So arguing within the framework of it wasn't  
18 reprehensible, it wasn't malicious, it wasn't anything;  
19 we were just doing what we were supposed to do and what  
20 the EPA told us we could do, and therefore you shouldn't  
21 assess punitive damages, as opposed to compliance  
22 mitigates anything you may conceive as being malicious  
23 behavior, which I don't think is -- I don't think that's  
24 what is -- I don't think that's how the legislature  
25 wanted the juries to consider punitive damages. I think

1 they want to make them determine things on what is  
2 malicious, what is reprehensible, what is trickery or  
3 deceit, whatever that is. And then, if it doesn't fall  
4 within that, then you don't award punitive damages.

5 **MR. EVANS:** But I think the case law --

6 **THE COURT:** Mitigation is a completely  
7 different concept, actually a very different concept.

8 **MR. EVANS:** The case law we're pointing to is  
9 that the jury should consider the evidence of -- it's  
10 not just what we did wrong or allegedly did wrong; it's  
11 also what we did right.

12 And I think with respect to mitigation, we've  
13 talked about all the testing we've done, we've talked  
14 about all the interaction with regulatory agencies, and  
15 we've talked about what the company's done from a  
16 positive perspective. We think that should be  
17 considered by the jury equally as the stuff they're  
18 going to point to that they say we did wrong.

19 **MR. DICKENS:** I think those are all arguments  
20 they can make. With respect to the reprehensibility  
21 factors, those are factors that need to be considered.  
22 And I will just point out, Judge Karnow in Johnson said  
23 exactly what the Court just said here, that CACI 3945 is  
24 sufficient. And he said, of course, any evidence that  
25 weighs against any of the factors could be considered

1 mitigating evidence or argument, but it's applied to  
2 those specific factors.

3 So they can make any arguments they want.

4 **THE COURT:** I'm not going to read it. My  
5 concern is the concept is mitigation as undercutting  
6 liability. You're basically saying, well, if we  
7 complied, then that's mitigation, as opposed to looking  
8 at the conduct and making a decision -- let me start  
9 over. Strike that.

10 I think if you begin to introduce mitigation  
11 and point to compliance with regulations as mitigation,  
12 I think it is then sort of redefining how they will look  
13 at liability. And I think looking at rather the  
14 evidence of liability, you're going to say, look, they  
15 comply, then there you go. As opposed to just look at  
16 all the evidence you have in front of you and make a  
17 determination whether there's liability, and in addition  
18 to whether there's liability, whether or not we should  
19 consider punitive damages.

20 No, I'm not going to read it. I think it's  
21 confusing the jury. I think it would set them on a  
22 different course in terms of how they're going to look  
23 at the evidence in a way that was not contemplated when  
24 they drafted 3945. So no.

25 And I think that completes our review of the



1 jury instructions.

2 **MR. DICKENS:** Your Honor, if we may address  
3 some of the ones that were tentatively denied, and  
4 specifically plaintiffs' proposed Instruction Number 5  
5 and 14, which is causation multiple causes.

6 **THE COURT:** No. Not reading that. 431? No.  
7 I'm not reading that.

8 **MR. WISNER:** Even after Dr. Levine's  
9 testimony? A substantial driver of risk is what she  
10 said. That sounds like a contributing factor, Your  
11 Honor.

12 **THE COURT:** No.

13 **MR. WISNER:** Okay.

14 **MR. EVANS:** Your Honor, I just wanted to make  
15 the record on a prior issue. You focused on the  
16 California legislature. The argument with respect to  
17 mitigation goes to Article 14, due process types of  
18 issues, and that's the citations to the case law. So I  
19 just wanted to make sure that was part of the record.

20 **THE COURT:** And in so doing, I'm really just  
21 trying to cover -- address that I think it's a complete  
22 instruction with respect to how the jury should balance  
23 and consider the evidence.

24 **MR. EVANS:** Understood, Your Honor.

25 **THE COURT:** I don't want to mislead you into

1 thinking it precedes federal law.

2 **MR. MILLER:** Your Honor, just one last time,  
3 you were going to revisit 3928 after Dr. Levine  
4 testified.

5 **THE COURT:** Hold on one second.

6 **MR. MILLER:** CACI 3928, more susceptible to  
7 injury than a normal healthy -- it's on page 55.

8 But, Your Honor, the facts that she testified  
9 clear as a bell in direct and in cross-examination,  
10 Mr. Pilliod had an immune system that was so deficient  
11 that it dramatically increased his opportunity to get  
12 non-Hodgkin's lymphoma. That is a hornbook case of  
13 3928. It couldn't be any clearer.

14 That's their argument. He was extraordinarily  
15 susceptible. I even went so far at the  
16 recross-examination for the third time. "It sounds like  
17 you think Mr. Pilliod is more susceptible to getting  
18 non-Hodgkin's lymphoma because of his immune system,"  
19 which the Court allowed her to answer over objection.

20 As the Court will remember, she said yes.  
21 It's not in the transcript because the court reporter  
22 didn't hear all of us talking at once. But even before  
23 that -- I see the smile on counsel's face. I know it's  
24 convenient the court reporter didn't write it down. But  
25 as an officer of the court, I heard it; I think the

1 Court heard it; I think Mr. Ismail heard it. She said  
2 yes.

3 That's just textbook. That's just straight  
4 out of the hornbook. She said at the close of her  
5 direct exam, "I feel very strongly that his immune  
6 system could not be functioning normally to have had all  
7 those illnesses that he's had over all of those years,  
8 and that would dramatically increase his risk of  
9 non-Hodgkin's lymphoma." That's a quote from the  
10 witness.

11 Even if Mr. Pilliod were more susceptible to  
12 injury -- this is CACI -- than a normal healthy person  
13 would have been and even if a normally healthy person  
14 would not have suffered a similar injury.

15 That instruction is the law in California, and  
16 we think it's square on point. We're asking the  
17 Court -- Your Honor said you would reconsider it after  
18 her testimony. I'm asking that you give that  
19 instruction.

20 **THE COURT:** Mr. Ismail?

21 **MR. ISMAIL:** Yes. Thank you, Your Honor.  
22 Nothing has changed from the Court's twice tentative  
23 denial of this instruction.

24 Dr. Levine, as has other witnesses in the  
25 case, identified risk factors that put Mr. Pilliod at an

1 increased risk of developing NHL. It's no different  
2 than any other case where medical causation is being  
3 disputed, whether it's a heart attack case, whether it's  
4 a cancer case, whether it's any other case. There's a  
5 discussion of risk factors. And Dr. Levine was quite  
6 careful in staying within that context on her testimony.  
7 It is no different than the conversation we had last  
8 week or two weeks ago on this very instruction.

9 Does the plaintiff have risk factors for  
10 developing the condition does not transform the case  
11 into an eggshell plaintiff instruction for -- in the  
12 damages section of the cases. That's a completely  
13 different construct. And nothing has changed in light  
14 of Dr. Levine's testimony. She identified his risk  
15 factors. We identified Mrs. Pilliod's risk factors.  
16 They did so in their case in chief. This has been twice  
17 denied by the Court, and nothing has changed.

18 We're not talking about -- their witnesses  
19 didn't put any susceptibility arguments in. Dr. Levine  
20 talked about risk factors, and that's not changing the  
21 construct of the case.

22 **THE COURT:** Okay.

23 **MR. WISNER:** Your Honor, I just want to say  
24 one quick thing. When we did argue this before, you  
25 specifically said, listen, we don't have any evidence

1 that Mr. Pilliod was uniquely susceptible to the impact  
2 of a carcinogenic, which is what this case is about.  
3 That's what the eggshell plaintiff instruction is about.

4 You said, "Let's see what Dr. Levine says."  
5 She said unequivocally that he was more susceptible.  
6 She even used the words.

7 They're going to argue to the jury that his  
8 immune system made him so compromised, and that's what  
9 ultimately led to his cancer.

10 Putting the 431 issue, the multiple causation  
11 issue, putting that issue aside, clearly --

12 **THE COURT:** Basically, your arguments have  
13 been all along he's not immunocompromised at all.

14 **MR. WISNER:** Sure. But it's not about what my  
15 arguments are. It's about the evidence that's came into  
16 the jury, and the instructions must conform to the  
17 evidence. They chose to go through. We straight-up  
18 said to them.

19 **THE COURT:** I just don't agree that this is an  
20 eggshell plaintiff instruction. I do not.

21 **MR. WISNER:** Okay. Let's say the jury agrees  
22 with Dr. Levine. They agree that Mr. Pilliod was an  
23 exceptionally immunocompromised individual, uniquely so.  
24 And she was emphatic about it, repeatedly yesterday.  
25 Let's say they agree with that.

1                   How in any universe are we not entitled to an  
2 instruction that the fact that he's more susceptible  
3 doesn't exonerate Monsanto, that they should consider  
4 him, with his susceptibilities, in assessing causation?  
5 That's the evidence that's come into the record.

6                   And the jury has to have an instruction on it.  
7 It came in. They went there. They made it their case.  
8 And now we've had the evidence, things have changed.  
9 And I think this is a clear-as-day example of when the  
10 susceptibility instruction really needs to be given,  
11 Your Honor. I don't see how we couldn't get it on these  
12 facts.

13                   **THE COURT:** The universe you're talking about  
14 is Department 21.

15                   **MR. WISNER:** I'm trying to change the  
16 universe, Your Honor.

17                   **THE COURT:** No, no. You are not changing this  
18 universe.

19                   **MR. WISNER:** Fair enough, Your Honor.

20                   **THE COURT:** Let's keep it moving. I think we  
21 have addressed everything we need to address. I'm going  
22 to take a look at this one last phrase --

23                   **MR. WISNER:** The verdict form, Your Honor,  
24 obviously, is really important. I think the threshold  
25 issue is do we submit to the jury two 17-, 18-question

1 verdict forms or do we submit to them two 5- or  
2 6-question verdict forms?

3 We submit that, in this context, the general  
4 verdict form makes a lot of sense because the elements  
5 of each claim were clearly defined in the instructions.

6 Having the jury going through 17 questions for  
7 each plaintiff --

8 **THE COURT:** I think general verdict forms are  
9 a minefield. It's just an invitation to a mess, in my  
10 view.

11 **MR. WISNER:** I actually think it's the other  
12 way around.

13 **THE COURT:** I think you're right about  
14 they're -- it being more complicated than usual because  
15 there are two plaintiffs. But I hate general verdict  
16 forms because I think they lead to a lot of trouble at  
17 the end of the day and a lot of uncertainty. And I  
18 think that a special verdict form is very clear.

19 Let me just take a look. I'm not objecting  
20 out of hand. But I think general verdict forms are just  
21 an invitation to problems in terms of trying to mine  
22 what the jury is actually doing.

23 Mr. Wright, would you hand me that material.

24 **MR. WISNER:** Your Honor, I would point out two  
25 really important points. The first, Your Honor, is

1 actually Judge Chhabria elected to use a general verdict  
2 form, and I think for good reason. It's actually the  
3 opposite reason. I think general verdict forms are more  
4 appellate-proof because it reduces the risk of getting  
5 inconsistent findings.

6 For example, the first three or four elements  
7 of all of these causes of action are almost identical  
8 for each plaintiff. And if we have element-by-element  
9 findings by the jury, you could lead to one saying yes  
10 on one and no on the other. And it's a needless risk  
11 for an inconsistent verdict.

12 General verdict forms here don't have that  
13 problem. It's, for strict liability, here are the  
14 elements over here on this page. Did they prove all the  
15 elements? If so, plaintiffs win. Yes -- or who you  
16 find in favor of, Monsanto or plaintiff.

17 The case law is very strong that general  
18 verdict forms are essentially appellate-proof because  
19 the appellate courts have to believe that the jury  
20 follows the instructions. Creating multiple questions  
21 that can potentially be conflicting, I think, actually  
22 invites chaos. It actually doesn't eliminate it. So  
23 that's why we really strongly believe a simple verdict  
24 form is important.

25 Moreover, Your Honor, we have a time



1 constraint. If I have to go through 17 questions or 18  
2 questions twice for each plaintiff and tell them what to  
3 do for each one, there is probability of  
4 miscommunication or misunderstanding. It's going to  
5 take 30 minutes. General verdict form will take 5. I  
6 think it fundamentally creates problems that don't need  
7 to be there.

8 So that's why I think -- normally, I  
9 understand your aversion and hatred, really, for general  
10 verdict forms.

11 **THE COURT:** Well, I don't think that's true.  
12 Aversion is good.

13 **MR. WISNER:** I think here, though, in light of  
14 the complexity of this case and the serious concern of  
15 inconsistent verdicts, I think this is where general  
16 verdict forms make sense. If you take a look at it, it  
17 really is a bulletproof verdict form for the purposes of  
18 the appellate record, which we know this is going to the  
19 court of appeals, whoever wins.

20 **THE COURT:** So I'll take a look at them, but  
21 I'm not inclined. It's not that complicated, quite  
22 frankly. But I'll take a look at it. I'm not inclined  
23 to use the general verdict form. But I'm not going to  
24 make a decision as I sit here.

25 **MR. WISNER:** We also have a proposed special

1 verdict form if you do want to go down that road.

2 **THE COURT:** All right. What I do with the  
3 verdict forms is I give each of the jurors a colored  
4 copy of the verdict form. I only have one for the  
5 managing juror, and then we collect them. I'm sure the  
6 jurors are going to get polled at the end of the day,  
7 and they're going to want to have kept track of  
8 everything. So that's why I give everybody a verdict  
9 form so they can follow along. All the other jurors  
10 have them in color, and only the presiding juror has the  
11 one that he or she will fill out.

12 **MR. MILLER:** When does Your Honor excuse the  
13 alternates?

14 **THE COURT:** When they begin deliberations.

15 **MR. MILLER:** Will people -- I don't  
16 particularly want to talk to them, but are people  
17 allowed to talk to them?

18 **THE COURT:** Absolutely not. When they're  
19 excused, they'll leave, and then they will be ready to  
20 be contacted if they're needed. But no one can talk to  
21 the alternate jurors until the case is completely over.

22 **MR. EVANS:** They'll be able to be contacted if  
23 they're needed. What does that mean, Your Honor?

24 **THE COURT:** If something happens. If we need  
25 an alternate for any reason. If somebody gets sick or

1       there's a problem.

2               **MR. EVANS:** So they're not being excused as a  
3 juror?

4               **THE COURT:** No, no, no, no. They just don't  
5 have to be in the courthouse. They have to be within,  
6 you know, an hour of the courthouse, you know,  
7 practically carrying a GPS signal.

8               **MR. EVANS:** I think --

9               **THE COURT:** They need to know that they are  
10 still jurors, and they need to be prepared to, you know,  
11 come in at a moment's notice.

12               **MR. EVANS:** To Mr. Miller's question,  
13 obviously, neither party can contact them.

14               **THE COURT:** Absolutely not.

15               **MR. EVANS:** Got it.

16               **THE COURT:** I'm going to warn them that,  
17 during the deliberation process, that no one should  
18 contact them, to report anybody that tries to contact  
19 them immediately. Don't walk out of the jury room  
20 talking about the case, all those things.

21               So I'll reiterate all of that before they  
22 begin their deliberation and warn any audience members  
23 who are here at that time -- and anybody that is here  
24 during any day of deliberation not to approach them. So  
25 that will be my last word to them.

1                   **MR. EVANS:** So we have a handful of exhibit  
2 issues that we need to address. Do you want to take a  
3 break and look at that issue?

4                   **THE COURT:** Yes. It's 11:30. Yes, let's take  
5 a 15-minute, 20-minute break. And then we'll come back.

6                   (Recess taken from 11:25 a.m. to 11:52 a.m.)

7                   **THE COURT:** I looked at the verdict forms. I  
8 needed to look at the model verdict forms and the CACI  
9 instructions to compare and contrast. I'm inclined to a  
10 special verdict form, but the plaintiffs' and  
11 defendants' are very different. So I've looked at those  
12 and compared and contrasted and propose something and  
13 let you know what I'm thinking, which I couldn't do in  
14 15 minutes.

15                   So you had some issues?

16                   **MR. EVANS:** We have a binder here, Chris, this  
17 guy with the exhibits that we need to move into  
18 evidence. I've got a copy there for plaintiffs'  
19 counsel.

20                   So I can put these in buckets, Your Honor, I  
21 think. The first one --

22                   **THE COURT:** All of these are at issue? The  
23 ones in this binder are all at issue?

24                   **MR. EVANS:** Yeah, correct, Your Honor.

25                   Exhibit 4900 is the 1991 cancer peer review

1 committee. That was actually part of the request for  
2 judicial notice that Your Honor has already granted.  
3 And we are moving, in connection with the Reeves  
4 deposition, for the admission of the entire document.

5 The same goes for the Heydens exhibits, 4939,  
6 4873, and 4895, because those were part of the  
7 deposition that has been played. But if Your Honor is  
8 saying that, with respect to the EPA documents or  
9 regulatory documents, what you've ordered with respect  
10 to the RJN is what's being admitted -- so we don't need  
11 to argue those.

12 **THE COURT:** That's my final decision.

13 **MR. EVANS:** I understand.

14 **THE COURT:** I don't want to reargue that.

15 **MR. EVANS:** For the record, we're proposing  
16 them. I understand your ruling.

17 The first thing to address in this binder is  
18 4649, which is the Reeves -- the second tab under the  
19 Reeves tab. And just for -- to make the record clear on  
20 this, the testimony that's played to the jury on  
21 page 824, he identifies Exhibit 99, which is  
22 Exhibit 4649 but Exhibit 99 to the deposition. He's  
23 asked the question:

24 "Q. Is Exhibit 99 a business record  
25 you prepared based on facts and had

1 researched and developed concerning IARC  
2 and the regulatory evaluations of what  
3 IARC had done?

4 "A. It is."

5 Question on page 825:

6 "Q. Did you create Exhibit 99 on or  
7 about the time that you acquired the  
8 facts and knowledge of what IARC had  
9 done and the world regulatory responses  
10 to it that you created around the same  
11 time?

12 "A. I did.

13 "Q. Was it part of your regular  
14 business responsibilities at the time?

15 "A. It was."

16 So, Your Honor, we think this is a proper  
17 document to be admitted. It's a business record. It  
18 goes to the state of the knowledge of Monsanto at the  
19 time regarding the actions in both IARC and regulatory  
20 bodies that are summarized in it. It certainly is  
21 relevant to punitive damages, but also just the course  
22 of over time that the knowledge of the company.

23 **MR. WISNER:** Your Honor, this is a document  
24 that Dr. Reeves wrote where he's speculating about what  
25 IARC thinks and what other regulatory agencies think and

1 do. It's nothing but hearsay.

2 In no universe -- pardon the phrase, Your  
3 Honor. This is not a business record; this is a  
4 document he made for his deposition that he wrote. And  
5 simply because he says "I wrote it as part of my work at  
6 Monsanto" does not somehow convert otherwise  
7 inadmissible speculative hearsay into an admissible  
8 document.

9 They're offering this for the truth of the  
10 matter asserted. On the first page, it talks about what  
11 IARC was thinking and what they didn't do. This is just  
12 argument.

13 I mean, if Mr. Pilliod wrote a Word document  
14 saying Monsanto is evil and they've done all these  
15 terrible things, and he says, "Yeah, I did this as part  
16 of my regular work as a retiree," it wouldn't come into  
17 evidence. It's just hearsay and speculation.

18 This is the same thing. This is doubly  
19 prejudicial in light of the fact that many of these  
20 documents that are even discussed in here are being  
21 taken judicial notice of or parts of them are being  
22 admitted in evidence.

23 So this has 352 issues all over it. Just  
24 because a person from a company says "I created a bunch  
25 of hearsay statements and speculation about what other

1 regulatory agencies did" does not somehow convert it  
2 into a business record that would be an admissible  
3 document.

4 **THE COURT:** Basically, it looks like he  
5 basically summarized --

6 **MR. EVANS:** Correct. IARC plus the  
7 regulatory -- different regulatory statements that came  
8 out. It was through the European -- the EFSA document,  
9 the PRA document, the Canadian document, the regulatory  
10 document of Japan, the JNPR, the ECHA, and the  
11 New Zealand, the United States.

12 And, Your Honor, the plain testimony is it was  
13 created at the time as part of his regular business  
14 responsibilities. And he testified -- asked the  
15 question, "Did the company rely on it in its regular  
16 course of business?"

17 "Yes, it did."

18 And then his title is the regulatory policy  
19 and scientific affairs manager. That was part of his  
20 job, was to understand what these different regulatory  
21 and scientific bodies were doing and to have  
22 understanding of that within the company. And that's  
23 exactly what he did.

24 **MR. WISNER:** We have no objection to the  
25 testimony he offered about what he thought and that he



1 was speaking for Monsanto. That's not the issue. The  
2 issue is they're seeking to admit into evidence a  
3 document that he created in anticipation of litigation,  
4 where he gives his own opinions and summaries about what  
5 different regulatory agencies and groups have done.

6 I mean, that's just -- just because he says,  
7 "I think it was made in the regular course of business,"  
8 that doesn't convert an otherwise clearly inadmissible  
9 document into a business record.

10 If that's how the evidence code worked,  
11 Monsanto could prepare anything they wanted, have a guy  
12 say, "Yeah, I prepared it in the regular course of  
13 business," and it would come into evidence. That's just  
14 preposterous.

15 **THE COURT:** Okay. So, as I look at this, this  
16 appears to be just a review of other information but not  
17 prepared in the ordinary course of business. That  
18 question was asked of a lot of the deponents about a lot  
19 of documents which were inadmissible. And this seems to  
20 just be his view of the science.

21 **MR. EVANS:** Well, it's his -- I'm sorry. Go  
22 ahead, Your Honor.

23 **THE COURT:** His view of the science. The  
24 thing about it is, if you admit this for the truth of  
25 the matter, I'm not sure what truth you're -- where

1 you're going with this, which is is this just what he  
2 thought when he told the other employees he thought the  
3 science is, or is this admitted for an evaluation of the  
4 science, which --

5 **MR. EVANS:** No. It's a summary, his  
6 understanding, his review of the science and the  
7 regulatory documents. And it's a summary that was used  
8 internally at Monsanto --

9 **THE COURT:** But it's based on hearsay. What  
10 he's reviewing -- "I think IARC did the following," and  
11 then it quotes things from what IARC did, but that's  
12 hearsay.

13 **MR. EVANS:** But it's not being offered for the  
14 truth of it, Your Honor. It's being offered for the  
15 understanding of the company with respect to those  
16 issues.

17 The allegation is that Monsanto acted with,  
18 quote, trickery. Well, this is part of what Monsanto  
19 understood with respect to the state of the science as  
20 these documents were being evaluated at the time.

21 **THE COURT:** Yeah, but I assume -- I can't  
22 recall all of Dr. Reeves' testimony, but he was asked  
23 about what -- essentially what Monsanto thought, and he  
24 answered those questions.

25 **MR. EVANS:** Well, again, Your Honor, we think

1 this is a business record. We think it's properly  
2 admitted. Mr. Wisner's argument that any document can  
3 be prepared, and it's not a business record.

4 Well, we heard the opposite argument with him  
5 when all these emails that have now been admitted came  
6 into evidence as business records. So --

7 **THE COURT:** Some did; some didn't. And I  
8 carefully looked at them to see what was actually at  
9 stake and what Monsanto was and wasn't doing, and a lot  
10 of peripheral nonsense which wasn't admitted.

11 Denied as to this particular document. I  
12 think it's hearsay. I don't think it falls within the  
13 meaning of business record.

14 **MR. EVANS:** All right. The next document in  
15 the binder, Your Honor, is the Martens tab. And it's  
16 4798. And my understanding was that the parties had  
17 agreed that the Martens deposition and exhibits would  
18 come in the same way they did in Johnson. This was  
19 admitted in Johnson. It's part of the stipulation the  
20 parties had. So I'm not sure if the plaintiffs have an  
21 issue with that or not.

22 **THE COURT:** So --

23 **MR. WISNER:** Your Honor, it's already in  
24 evidence. It's Exhibit 36.

25 **MR. EVANS:** Okay. It's already in evidence.

1           **MR. WISNER:** We just don't need to put it in  
2 twice is our objection.

3           It is. I checked. It's already in evidence,  
4 Exhibit 36.

5           **THE COURT:** Okay. Well, then, we don't need  
6 to have a conversation about this. It's either in  
7 evidence or it's --

8           **MR. WISNER:** You can double-check. But I  
9 looked it up yesterday, and it's in evidence.

10          **MR. EVANS:** The next on my list here -- if you  
11 skip down to the Portier tab, Your Honor, there are two  
12 documents that were referenced in his examination that  
13 were letters sent to him. The first one is dated  
14 January 13th, 2016 --

15          **THE COURT:** Uh-huh.

16          **MR. EVANS:** -- the second one dated August 5th  
17 of 2017.

18           And, again, this goes directly to  
19 Dr. Portier's credibility, to his statement of the  
20 science. He presented a lot of the same arguments and  
21 issues he presented to the jury to these regulatory  
22 bodies. They responded, rejecting them. And he was  
23 questioned about those by Mr. Ismail. And so we think  
24 these are properly admitted.

25          **MR. WISNER:** Your Honor, last I checked,

1 cross-examination doesn't admit a document that's  
2 otherwise hearsay. These are clearly hearsay documents,  
3 letters written to him by a foreign body. They were not  
4 written by him; they were out-of-court statements.

5 And they showed it to him; they cross-examined  
6 him on them. And the code is very clear that it does  
7 not even get published to the jury, let alone get  
8 admitted. So we've objected to hearsay, and there's  
9 been no evidence that this is not hearsay.

10 **MR. EVANS:** Again, Your Honor, with respect to  
11 what it's being offered for, it's not being offered for  
12 the truth of the matter; it's being offered to attack  
13 Dr. Portier's credibility with respect to his opinions.

14 **MR. WISNER:** Well, they have that testimony.  
15 So why is this document coming into evidence?

16 **MR. EVANS:** For that purpose.

17 **THE COURT:** I don't really recall -- when  
18 Dr. Portier was questioned -- maybe you can help out  
19 here, Mr. Ismail. You cross-examined him with respect  
20 to these letters. I know that he authored a letter with  
21 a number of other scientists. I think I recall that you  
22 questioned him about whether there was a response to the  
23 letter, but I have no real recollection.

24 **MR. ISMAIL:** So there are a couple of issues.  
25 There's a letter that was published which the plaintiffs

1 have referred to several times in their questioning.

2 **THE COURT:** Right.

3 **MR. ISMAIL:** A separate set of interactions  
4 with Dr. Portier existed with respect to his  
5 correspondence with and involvement with the European  
6 registrations and rereviews of glyphosate.

7 So these letters were questioned of  
8 Dr. Portier. The topic was introduced under direct  
9 examination. They were published without objection.  
10 They're part of an exchange that Dr. Portier had with  
11 those regulatory authorities as part of the registration  
12 process which resulted in the reviews that Your Honor  
13 has admitted portions of.

14 So he was questioned about them. They were  
15 published. I believe they were part of redirect  
16 examination as well.

17 So I hope that answered the Court's question.

18 **MR. WISNER:** Again, Your Honor, they have not  
19 explained how this overcomes the hearsay law. I  
20 understand they think it's relevant. And I understand  
21 they asked Dr. Portier questions about it. A lot of  
22 witnesses were asked lots of questions about  
23 inadmissible hearsay that's not going into evidence;  
24 namely, every single medical literature journal article  
25 that we showed to the jury.

1           But just because this was shown to the jury  
2 doesn't mean it's put into evidence. It's still  
3 hearsay. And it cannot be sent back to the jury's  
4 deliberation room for them to consider the truth of the  
5 statements made herein.

6           If it's attacking his credibility, they heard  
7 the cross-examination, they heard the testimony. And  
8 they're welcome to argue and reference that testimony  
9 all they want, but putting in the actual document is a  
10 clear violation of the hearsay law. And they still  
11 haven't articulated how this doesn't qualify as hearsay.

12           **THE COURT:** So are you arguing that it was  
13 authenticated by him in some fashion?

14           **MR. EVANS:** It was certainly authenticated by  
15 him. But, again, it's not being offered for a hearsay  
16 purpose; it's being offered to impeach his credibility  
17 with respect to his opinions.

18           He's expressed his opinions. They've been  
19 rejected. And that's what these letters establish.

20           **MR. WISNER:** That's the truth of the matter  
21 asserted.

22           **THE COURT:** Yeah. I don't think you get past  
23 the hearsay rule on this, because you can certainly  
24 impeach him and use any document to cross-examine and  
25 impeach him, but the admissibility of the same document

1 is a whole other story. We haven't quite gotten there.

2 I just don't think you can get over the hurdle  
3 of it being hearsay and on what basis it would be  
4 admissible. Because it's still hearsay. Granted,  
5 what's in it may impeach him. And he has been impeached  
6 to the extent that the jury is going to hear the  
7 impeachment about the opinions of EFSA and how they  
8 differ from his own, but I don't think that this gets  
9 you over the hurdle of the hearsay rule.

10 **MR. EVANS:** We just really like it, Your  
11 Honor.

12 **THE COURT:** I know you do, but it's not  
13 admissible.

14 **MR. EVANS:** All right. The Jameson documents,  
15 Your Honor. Those are 4455 and 5629.

16 **THE COURT:** Okay.

17 **MR. EVANS:** And these are official government  
18 reports. We did not file them as part of the request  
19 for judicial notice, but they fall under the same  
20 category. The first one is the glyphosate -- the NTP  
21 technical report by the US Department of Health and  
22 Human Services.

23 Dr. Jameson actually wrote at least part of  
24 that document and was questioned about it. So we think  
25 this is proper as a public record.



1                   **MR. WISNER:** So let's take them individually  
2 because I think those comments are different for each  
3 document.

4                   So the first document is an NTP technical  
5 report that was shown to the jury. It is essentially  
6 the equivalent of a medical literature article. It's  
7 just a study that the NTP did back in 1992.

8                   **THE COURT:** Does this represent  
9 decision-making on behalf of the --

10                  **MR. WISNER:** No. This is just the results of  
11 a study they did. And Dr. Jameson did not author this.  
12 He is not listed as an author in any of this. He did  
13 not testify to that fact.

14                  So the first issue is this one is clearly  
15 hearsay.

16                  The second issue is the report on carcinogens  
17 for 2004. Dr. Jameson did, in fact --

18                  **THE COURT:** Hold on one second. Are we  
19 talking about a different document other than 4455?

20                  **MR. EVANS:** So the next one I haven't gotten  
21 to yet, but Mr. Wisner is going to get there before I  
22 do, I guess. It's 5629.

23                  **THE COURT:** So 4455, is it the results of a  
24 study that was done by --

25                  **MR. EVANS:** It's an assessment of the

1 toxicity, the analysis that the NTP did, of glyphosate,  
2 and its analysis of that.

3 So, I mean, it's a peer-reviewed document,  
4 yes, but it's a governmental action -- official  
5 government act, just like the other RJN documents that  
6 you've taken judicial notice of.

7 **THE COURT:** Well, what I've done is taken  
8 judicial notice of whatever the decision was, not the  
9 underlying science or analysis. And I'm just trying to  
10 figure out where that is in this document.

11 **MR. EVANS:** Again, if you look at the  
12 abstract, it talks about what they did here, 13-week  
13 toxicity studies, groups of 10 male or female,  
14 et cetera, et cetera. So this is the results of the NTP  
15 with respect to glyphosate toxicity.

16 **THE COURT:** Okay. But it's a study, not a  
17 decision that the NTP is making on behalf of the  
18 government on behalf of the HHS. This is just a -- not  
19 just a -- but it is science as opposed to  
20 decision-making about the state of science, right?

21 **MR. EVANS:** Well, I don't think the  
22 distinction between something being, quote, science and  
23 a decision about science --

24 **THE COURT:** No, it is, because if they're  
25 doing a study, that's one thing. If they're making a

1 decision on behalf of HHS based on science, that HHS  
2 believes that glyphosate is a carcinogen and this is  
3 why, this is why we've made this decision, then that's  
4 one thing.

5 But for them to conduct a study, the results  
6 of which are in front of me, is like all the other  
7 studies that we looked at during the course of the  
8 litigation. It's another piece of the puzzle, but it's  
9 no more admissible than any of the other studies that  
10 aren't coming in. And I don't know if we're arguing  
11 that down the pike.

12 This just, to me, seems like it's a study, not  
13 the results of a decision-making process on behalf of  
14 the government, which I have in the past said, yes, I  
15 think that's admissible because I think it does  
16 represent a position the government is taking and one on  
17 which Monsanto may have relied in making its decisions  
18 on Roundup.

19 **MR. EVANS:** Understood, Your Honor.

20 **THE COURT:** So with respect to the report on  
21 carcinogens, what is this?

22 **MR. WISNER:** Well, Your Honor, this is a  
23 document that Dr. Jameson, in his capacity at NTP --

24 **MR. EVANS:** Am I moving this or are you?

25 **MR. WISNER:** Oh, I'm sorry. I thought she

1 asked me what the problem was, so I was responding to  
2 that question.

3 **THE COURT:** No. Let's let Mr. Evans explain  
4 why he thinks this is admissible, and we'll go from  
5 there.

6 **MR. EVANS:** Again, this is -- Mr. Ismail  
7 questioned Dr. Jameson about this. I misspoke earlier.  
8 This is actually the one that he wrote part of.

9 And I can just read the testimony regarding  
10 that foundational point.

11 "Q. You can confirm for the jury  
12 that this particular report on  
13 carcinogens was something that you had  
14 responsibility for, correct?

15 "A. Correct.

16 "Q. You actually wrote the  
17 introduction to this report, correct?

18 "A. Correct."

19 And then it was published, and then he was  
20 questioned about it.

21 And this is just the governmental report by  
22 the Health and Human Services NTP Report on Carcinogens  
23 and does not list glyphosate as a carcinogen.

24 **MR. WISNER:** So, Your Honor, we have -- so the  
25 problem with this document, I don't think this actually

1 overcomes the hearsay bar. But putting that issue  
2 aside, there's a relevance issue here.

3 This is a many-hundred-page -- 400-page  
4 document listing science about thousands of different  
5 chemicals. And I don't see how this -- none of them  
6 relate to glyphosate in any way.

7 So I don't know how this could possibly be an  
8 admissible document or a document we'd want to go back  
9 to the jury. It would clearly just confuse them.

10 Now, the point that Mr. Evans made, that  
11 glyphosate is not in here, well, that's in evidence.  
12 Dr. Jameson agreed that it wasn't in there.

13 So there is no relevance to this document  
14 being in evidence. I don't know why we would want to  
15 send back this massively complicated document related to  
16 thousands of chemicals that don't relate to glyphosate.  
17 It seems like the definition of an irrelevant document.

18 **THE COURT:** So what I would say may pass  
19 muster is the list -- or whatever it is -- that actually  
20 is the result of the decision-making. So if glyphosate  
21 is not on it, that may be a fair portion of the document  
22 that could be admitted because, just like the Prop 65,  
23 if it's on the list or off the list seems to have some  
24 significance.

25 But the whole document, no. You would have to

1 pinpoint something that represents -- I don't know where  
2 that is in here.

3 **MR. WISNER:** Well, it's an absence, though.  
4 And it's already in evidence. So there's no reason to  
5 put any document into evidence at all. It's cumulative  
6 and confusing, right?

7 That -- it's not in the 2004 report on  
8 carcinogens. That's in evidence, and it's even  
9 undisputed. So why do we need to add a document into  
10 evidence regardless?

11 That said, Your Honor, if we are going to go  
12 down the road of putting something into evidence, we are  
13 going to object to hearsay. They did not lay the  
14 foundation that this document, or any portion thereof,  
15 is not -- it's nothing but hearsay. It's literally just  
16 a compendium relating to science about chemicals.

17 **THE COURT:** So the list of -- I think it's the  
18 bottom right -- 13, 14, 15, and maybe 16 could be viewed  
19 as the decision regarding what is on or off the list.  
20 That may be admissible. But all the rest of it, I don't  
21 see that as being -- I do believe that all the rest of  
22 it is hearsay.

23 But I think that the list itself may  
24 reasonably be considered a government action or decision  
25 as to what's listed and what's not listed.

1                   **MR. ISMAIL:** So with respect to Mr. Wisner's  
2 argument, Dr. Jameson testified this is produced by  
3 operation of law by delegation from the Secretary of  
4 Health and Human Services and submitted to Congress.  
5 You don't get any more "governmenty" than that entire  
6 foundation which has been laid through the author of the  
7 document. So this is not one for which we moved RJN,  
8 because we had the author on the stand.

9                   So I understand the Court's concern. And  
10 Mr. Wisner keeps saying, well, you've got the testimony;  
11 why do you need the document?

12                   Well, that applies to all the exhibits that  
13 they moved into evidence too. So the fact that they're  
14 trying to keep the exhibit from going to the jury  
15 because it was testified to proves too much, because all  
16 the exhibits were testified to in one way or another.

17                   I understand Your Honor's concern about  
18 overwhelming with the girth of the document. And,  
19 indeed, that's part of the probative value of the  
20 document. This isn't a willy-nilly,  
21 back-of-a-cocktail-napkin list of carcinogens that NTP  
22 prepared and that Congress has received; it is a fulsome  
23 list, the absence of which is proof that the jury may  
24 consider.

25                   NTP, where Jameson and Portier worked, never

1 considered it a carcinogen. It hasn't made it into the  
2 list, as Dr. Jameson testified, going forward. And so  
3 the point -- the volume of it is part of its probative  
4 value. Glyphosate isn't in it, and there's a lot of  
5 things that are.

6 **THE COURT:** But I will say this to you,  
7 Mr. Ismail, in terms of evaluating whether or not the  
8 other documents that have been submitted or -- you know,  
9 they're government documents and survived the 1280.

10 As I've said all along, I believe the  
11 decision-making process and statement is one thing. I  
12 think all of the underlying science, aside from the fact  
13 that it's hearsay, it's also 352.

14 So the girth of the document may, in your  
15 view, give it more legitimacy and may, in and of  
16 itself -- making a statement to the jurors about the  
17 government's opinion about what is carcinogenic and what  
18 isn't.

19 My concern is that it would be -- it's 352.  
20 There's just a whole lot of ways that this could sort of  
21 confuse the jury about what is important.

22 Because what's important is that glyphosate is  
23 not on here. And whether or not other things I can't  
24 even pronounce -- hydrazine or hydrazine sulfate and  
25 another one I can't pronounce and four other ones I



1 can't pronounce -- are analyzed ad nauseam in here, I  
2 think is confusing.

3 So this is what I think would make a certain  
4 amount of sense, which is the introduction to the report  
5 on carcinogens, and then more information up to -- this  
6 is what I think might be admissible and would make some  
7 sense.

8 **MR. EVANS:** Is that pages 1 through 16, Your  
9 Honor?

10 **THE COURT:** Pretty much. Yeah, that's what it  
11 is. Yes, 1 through 16.

12 (Trial Exhibit 5629, pages 1-16, received in  
13 evidence.)

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

15 **THE COURT:** I think that kind of covers it.  
16 And then you can argue that, hey, this is really  
17 critical. This represents whatever the most important  
18 thing at the time is. And then they'll be able to say,  
19 hey, it's not on here. And there we go.

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

21 **MR. WISNER:** Just to be clear for the record,  
22 this is over our objection.

23 **THE COURT:** It is over your objection. I  
24 understand that.

25 **MR. EVANS:** The last exhibit that we're moving

1 is under the Phalen tab. And I don't think this is  
2 controversial. These are four photographs that he  
3 talked about that he took as part of his inspection and  
4 testified about.

5 **THE COURT:** Right. Any objection?

6 **MR. WISNER:** I do think it's cumulative.  
7 There's plenty of photos of the bottles. But it's fine,  
8 Your Honor. No objection.

9 **THE COURT:** Did you admit pictures of the  
10 bottles as well?

11 **MR. WISNER:** Dozens and dozens and dozens of  
12 pictures. So it seems like this is just needlessly  
13 cumulative. But if they really want to put it in, I  
14 don't care.

15 **THE COURT:** Okay. Well, that's fine.  
16 Admitted.

17 (Trial Exhibit 6795 received in evidence.)

18 **MR. ISMAIL:** Do we need to formally move and  
19 have the Court admit the RJN documents, or does your  
20 order --

21 **THE COURT:** My order, I think, covers it.

22 **MR. ISMAIL:** I believe so too, but you said --

23 **THE COURT:** No, no. I issued a final order on  
24 that. There was one -- honestly, I do recall now I put  
25 PTA, because I could not figure out -- not couldn't

1 figure out, but we hadn't discussed which pages were  
2 coming in and which weren't.

3 The structure of the document was such that it  
4 seemed as though, throughout the document, there were  
5 references to decisions made. And I just couldn't  
6 figure out a cutoff point where I thought it made sense.

7 So I meant to come back to that to clarify  
8 what pages of that particular document were going to be  
9 admitted and which weren't.

10 So there is one place where it says "PTA."

11 **MR. EVANS:** Yeah, I don't have that order in  
12 front of me.

13 **THE COURT:** We can come back to that. But,  
14 otherwise, that is the final order.

15 Are you looking at that order?

16 **MR. WISNER:** Yes, I am. And it's the European  
17 Chemicals Agency Committee for Risk Assessment parties  
18 to appear.

19 That's under the section about the  
20 admissibility of what goes to the jury. I'm not going  
21 to reargue it, Your Honor. We made our record.

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

23 **MR. WISNER:** I just want to correct a couple  
24 of things. We discussed this with counsel.

25 Exhibit 3106 should have been moved into

1 evidence previously. We've got it properly redacted,  
2 and we move it into evidence, I believe, over Monsanto's  
3 objection, but the Court has already ruled on it in our  
4 deposition transcripts.

5 **THE COURT:** I don't know what 3106 is, but  
6 that's fine.

7 (Trial Exhibit 3106 received in evidence.)

8 **MR. WISNER:** Also, I inadvertently admitted  
9 Exhibit 597 into evidence. We went back and confirmed  
10 that it was never shown to the jury or any testimony  
11 about it given, and it was never proffered for  
12 admission. So we are formally withdrawing 597. I don't  
13 think there's any problem with that.

14 The only remaining issue -- and we just need  
15 to hear back from the defendants on this. We moved to  
16 admit the entire IARC monograph and -- based on the  
17 Court's judicial notice rulings, and we think -- well,  
18 in any event, we think it's not hearsay because the  
19 foundation has been laid by a custodian, i.e., one of  
20 the authors.

21 So we moved it all into evidence. I don't  
22 know if there's a problem with that or not. We haven't  
23 heard back, but we need to get that resolved today.

24 **MR. ISMAIL:** Your Honor said half a dozen  
25 times the entire monograph isn't going back, only

1 portions thereof consistent with your rulings on other  
2 regulatory documents. And we've been waiting for them  
3 to tell us which pages they want to have go back, and  
4 now they're telling us the entire thing.

5 So we do object to the entire monograph. We  
6 don't believe it should go back to the jury in its  
7 entirety.

8 **THE COURT:** Actually, my recollection is that  
9 this call was made by both -- at least Judge Bolanos or  
10 Karnow. Didn't he make a ruling on that?

11 **MR. WISNER:** No. It came in in the Johnson  
12 case.

13 **THE COURT:** The entire monograph?

14 **MR. WISNER:** The entire monograph.

15 **MR. ISMAIL:** It wasn't objected to.

16 **MR. WISNER:** But it was because Monsanto  
17 didn't object to it.

18 But, Your Honor, first of all, we told them  
19 yesterday that we're moving the whole thing in, and  
20 we've been waiting for a response.

21 **THE COURT:** Let me go back and take a look --

22 **MR. WISNER:** Judge, if you go through it, it's  
23 all of IARC's analysis of it. And so there's statements  
24 about how they interpret and weigh the value of a  
25 specific study.

1           So this isn't a judicial notice issue --  
2 right? -- because we're not asking the Court to take  
3 judicial notice of the IARC monograph. We had a witness  
4 who authored it come here and say it was made in the  
5 regular course of IARC's business.

6           **THE COURT:** Does the document -- the entire  
7 document the monograph, or is it some portion of it?  
8 Does someone have a copy I can take a peek at real fast?

9           **MR. WISNER:** Yes, Your Honor. I'll give it to  
10 you right now.

11           Our position is, unlike a judicial notice  
12 document, where we're just taking the bottom line  
13 summary and opinions of IARC, this is properly in  
14 evidence because we laid the foundation for hearsay --  
15 for the truth of the matter asserted.

16           And the statements made by IARC about these  
17 various studies, all of which the jury has already  
18 heard, are being offered for the truth of the matter  
19 that, in fact, IARC did believe these things to be true.  
20 It was properly authenticated, and we actually brought  
21 in a human being who authored it to bring it into  
22 evidence.

23           So this is not like a situation where -- you  
24 know, the EPA report, whether it's sort of a disembodied  
25 document, we have no person to talk to about it. This

1 one, they cross-examined him on at length. And the jury  
2 has heard more detail than they probably ever wanted to  
3 know about how this document was created, both through  
4 Dr. Jameson as well as Dr. Blair, the overall chair of  
5 the monograph.

6 **MR. ISMAIL:** Your Honor, Mr. Wisner is  
7 conflating two points. We have a set of regulatory  
8 documents for which the hearsay exception was official  
9 government record. Once that threshold has been met,  
10 the document is admissible through the RJN process.  
11 Your Honor has ruled that you're going to let only  
12 portions in through those documents.

13 In the same context that we had this  
14 conversation, Your Honor stated multiple times portions  
15 of the monograph will come in consistent with what  
16 you're allowing with the regulatory documents.

17 So our position is, in the matter of  
18 consistency, that, if the entire monograph is coming in,  
19 then the entirety of the EPA or Health Canada or EFSA's,  
20 the same thing that Mr. Wisner just said about IARC can  
21 be said about pages from those regulatory documents that  
22 Your Honor has indicated will not go back to the jury.

23 So our position should be it's one or the  
24 other. If it's only going to be the final conclusion of  
25 IARC, which I believe to be consistent with the Court's

1 prior comments about this exhibit, then that's one  
2 thing.

3 If it's IARC's assessment of the science and a  
4 more fulsome discussion, then that same approach to  
5 going back to the jury should apply to the documents for  
6 which a hearsay exception was already found.

7 **THE COURT:** So I'm looking at this. And what  
8 it looks like is that -- I can't recall if I've seen the  
9 monograph and then all of the underlying documentation  
10 in a document before, which I may have.

11 But, in any event, what it looks like to me is  
12 that a lot of the underlying science is just  
13 referenced -- is referenced in the document by way of --  
14 so, looking at this, a lot of the references which on  
15 the other documents were sort of attached -- they're  
16 just referenced as links in the monograph.

17 **MR. WISNER:** Uh-huh.

18 **THE COURT:** So what I would exclude isn't  
19 accessible here anyway because it's a link as opposed to  
20 all of the compilation of the science, which some of the  
21 other documents are actually attached, which makes them  
22 as long as they are.

23 I'm not sure where you would -- I mean, if  
24 your suggestion, Mr. Ismail, is that simply saying the  
25 conclusion, which is it's not a -- it's a possible



1 carcinogen is all that's admissible with respect to the  
2 monograph, I don't think that's accurate.

3 **MR. ISMAIL:** And I was not suggesting that one  
4 page would go back, Your Honor. I think we would  
5 approach this document in the same spirit and precision  
6 that we approached the other documents, which are like  
7 for like in terms of assessing the underlying  
8 carcinogenicity of the compound. Same compound, same  
9 type of review. Portions of the documents that support  
10 the lack of carcinogenicity were excluded, and we would  
11 ask that the same standard be applied to the monograph.

12 **MR. WISNER:** I just want to clarify. They're  
13 not the same because I never got to hear testimony from  
14 somebody who wrote the Australian report or New Zealand  
15 report or the EPA even. Those are all disembodied  
16 pieces of evidence.

17 This one they heard from both of the authors,  
18 the chair as well as a guy that came live and testified.  
19 Monsanto had the right to cross-examine and ask  
20 questions about anything they wanted. And he  
21 authenticated and established the hearsay bona fides for  
22 this document.

23 I think at this point this is not the same.  
24 And trying to say that it's the same, then where was the  
25 witness who authenticated the EPA document? They could

1 have called a custodian. They didn't. And we could  
2 have cross-examined the author of it, but we weren't  
3 allowed to.

4 So we're in a completely different situation  
5 here. To suggest that they're somehow the same is also  
6 belied by repeated arguments by Mr. Ismail that IARC is  
7 different because -- than the regulatory agencies, as  
8 he's repeatedly said to the jury, that they're  
9 regulators and they do risk assessments and IARC is a  
10 hazard assessment. So it's fundamentally different.

11 **THE COURT:** I don't think we need to go there.  
12 I don't think that's really the issue.

13 **MR. ISMAIL:** Yes. So everything Mr. Wisner  
14 said, except for the last thing as to the weight, Your  
15 Honor has rejected. The idea we didn't have a  
16 sponsoring witness for the EPA, that was their argument  
17 to object to its admissibility, which Your Honor found  
18 that you could take judicial notice of the predicates  
19 for the hearsay exception.

20 And then you determined that you didn't want  
21 the entirety of the documents to go back under 352 and  
22 otherwise, and we had a conversation that you wanted it  
23 more limited. And all we're asking for is the same  
24 treatment for this document which, witness or not, we  
25 think should be treated the same way.

1                   **THE COURT:** But let me ask you this -- I think  
2 it was Dr. Portier, and I can't recall if anybody else  
3 testified. But he testified, essentially, as an author  
4 of this document. So that is different, because if I  
5 can testify that I created this document or I was there  
6 when it was created, other people participated, that  
7 this is exactly how it was created, and I authored it,  
8 why wouldn't the monograph itself be admissible?

9                   **MR. ISMAIL:** Again, that establishes, if the  
10 Court sees it as such, as a business record of IARC,  
11 and --

12                   **THE COURT:** No. Just as a document that's  
13 authenticated and authored. I authored this. I wrote  
14 it. This is my work.

15                   **MR. ISMAIL:** Well, sure. But it's hearsay.  
16 It's an out-of-court statement. I'm saying back to  
17 Mr. Wisner what he just told us 30 minutes ago. This is  
18 an out-of-court statement. It's a written document.  
19 They believe the hearsay exception has been met by --  
20 not because it's a government record, because IARC is  
21 not a governmental agency, but because they've  
22 established it as a business record of IARC.

23                   Okay. We've established the hearsay exception  
24 to the regulatory documents, as Your Honor has so ruled  
25 and has issued a final order.

1                   And then the question is not are these two  
2 sets of documents going to be admitted; it's what  
3 portions go back to the jury. And we're just asking  
4 that, if the entirety of this goes back, then the  
5 entirety of the documents for which a hearsay exception  
6 has been found would be similar. And if the documents  
7 we moved are limited, we would ask the same scope.

8                   **THE COURT:** Let me ask you, where would you  
9 draw the line? Because as I'm looking at this, most of  
10 it is sort of a recitation of how they got to the  
11 decision, which is kind of what I've admitted so far in  
12 the other documents, including sizable portions of the  
13 EPA documents which go through their thinking, none of  
14 the underlying science, but it analyzes the studies and  
15 why we think that, which is essentially what this  
16 monograph is doing.

17                   **MR. ISMAIL:** It does. And, in fact, we moved  
18 for reconsideration under the RJN, the second motion we  
19 filed, we identified particular additional sections that  
20 we thought met that same spirit where they're commenting  
21 not just overall on carcinogenicity, which we believe  
22 was sort of the scope of Your Honor's initial ruling,  
23 but particular thing: Does the mechanism data mean  
24 anything? Does the animal rodent data mean anything?  
25 There were portions of those documents we sought to

1 include, which --

2 **THE COURT:** Which I rejected because I thought  
3 they were the underlying science and hearsay. So I  
4 didn't take it any further because I didn't think it  
5 really represented the decision-making process.

6 But those portions -- and I guess I'd have to  
7 pull out one of the EPA documents, 50 or 60 pages  
8 long -- those are all included. They go through and  
9 mention the studies, they talk about the science, and  
10 they analyze it and say this is why we don't think  
11 glyphosate poses a cancer risk.

12 **MR. ISMAIL:** So the IARC monograph -- actually  
13 the IARC form of writing is specific and unique to them.  
14 And I think we even asked this of Dr. Jameson.

15 Everything in the brackets in a section is  
16 what IARC's interpretation of the study is. Everything  
17 outside the brackets is IARC saying what the study  
18 authors found. And that foundation was laid through  
19 Dr. Jameson. He said that that's exactly how IARC  
20 prepares its monographs.

21 So if the distinction is just commenting on  
22 the underlying science and assessment versus just laying  
23 out what the state of the science is, then we actually  
24 have the exact road map for how to assess the -- what  
25 portions are admissible through IARC. And I can give

1 Your Honor the exact citation where Dr. Jameson said  
2 precisely that. I'm sure Mr. Wisner won't disagree that  
3 that's how these things are prepared.

4 **MR. WISNER:** I do disagree on that it's  
5 factually correct. But one point that Mr. Ismail said  
6 at the beginning of this nails the nail on the head.  
7 And that -- he said, okay, we have these exceptions to  
8 the hearsay bar. Now the question is, under 352, what  
9 goes back to the jury?

10 And this is where things quickly depart.  
11 Because the EPA documents, we have no one to ask  
12 questions about. So we are really constricted on what  
13 we should give to the jury.

14 But for IARC, they got the person who wrote it  
15 to cross-examine him. So the 352 calculus is an  
16 entirely different animal. So this idea that they  
17 should be applied to the same standards of 352, when we  
18 offered a sponsoring witness and they did not, is highly  
19 unfair.

20 Your Honor, I think you're going through the  
21 document and telling us which pages are coming in. So  
22 I'll let you do that.

23 **THE COURT:** I'm not ignoring you. I am  
24 listening to you. Go ahead.

25 **MR. WISNER:** That's it, Your Honor. I think

1 that it's pretty clear that the document -- we offered  
2 three different witnesses who could testify competently  
3 about it: Dr. Jameson, who wrote it; Dr. Blair, who  
4 wrote it; and Dr. Portier, who didn't write it but he  
5 did advise it. So actually didn't author it, Your  
6 Honor. It was Dr. Jameson and Dr. Blair, who both  
7 testified and both authenticated and said this was made  
8 in the regular course of their business.

9 So I think that the document should come in,  
10 at least most of it, because it really is IARC's  
11 interpretation and it doesn't deserve the same treatment  
12 as the EPA documents insofar as the 352 analysis is  
13 concerned.

14 **THE COURT:** So I think that it's not the same,  
15 but it's still hearsay. A lot of this is hearsay. But  
16 trying to figure out how to carve it up is a whole  
17 different ball of wax. And it presents a little bit of  
18 a challenge.

19 So, Mr. Ismail, I'm just curious. If you're  
20 talking about what's in brackets, what exactly are you  
21 talking about? Because I'm looking for -- I see a  
22 couple of things in brackets, but what exactly are  
23 you --

24 **MR. ISMAIL:** So I didn't -- I don't know if  
25 you have a copy. So by memory, for example.

1           **THE COURT:** No, I'm not asking. I'm just --

2           **MR. ISMAIL:** So I was just commenting on the  
3 Court's observation that there's a distinction between  
4 just laying out what an article says that invokes sort  
5 of double hearsay concerns versus the authors or the  
6 scientific assessment of a particular piece of  
7 scientific literature.

8           And the interesting thing about the monograph  
9 is we don't have to guess which is which because you can  
10 see in their writing style that, wherever they have  
11 language inside brackets -- not parentheses but the  
12 brackets -- that is IARC's comment on that particular  
13 piece of science.

14           So to the extent that's relevant to the  
15 assessment, that would fit what the Court considers to  
16 be the admissible portions.

17           **THE COURT:** Except that, when I admitted the  
18 EPA documents, I -- if somebody could pull one of the  
19 documents. I don't still have them in my chambers.

20           There were several where the assessment was at  
21 the end of 60 pages of analyzing the studies, which is  
22 essentially what we're talking about here in this  
23 monograph.

24           So I didn't exclude reference to the science  
25 or the analysis they went through comparing and



1 contrasting studies, but the body of here's how we  
2 contemplated and made this decision and used the  
3 decision.

4 So I didn't limit it to the decision; I  
5 limited it to the portion of the document which sort of  
6 contemplated all the underlying science, which I  
7 excluded.

8 So that's the difference. And as I'm looking  
9 at this monograph, it is talking about the various  
10 studies, which, frankly, if the jury takes all this  
11 back, I'm not sure they're going to go back to the  
12 De Roos study and the flower study and the Andreotti  
13 study and Zhang analysis or whatever is or isn't in this  
14 document. Call me a cynic, but I think a lot of this  
15 represents sort of the cumulative decision-making of the  
16 body.

17 So your brackets, I see a couple of things in  
18 brackets, but I think that's just, well, here is our  
19 conclusion.

20 But I didn't limit the other documents to just  
21 that. And, actually, I'm having a hard time finding  
22 anything that's bracketed. I think there are some  
23 things. On page 33, I see bracketed. I see some  
24 bracketed material.

25 **MR. ISMAIL:** I understand the Court's

1 comments, Your Honor. I don't want to take too much  
2 time today just repeating myself. But I do believe the  
3 testimony is the brackets reflect IARC's assessment of  
4 the pieces of science being commented upon, not just  
5 their conclusion overall about the agent, but, indeed,  
6 the comment about -- their assessment of that piece of  
7 evidence.

8 And there are lots of pages from the  
9 regulatory documents where they're commenting on same or  
10 similar studies that IARC is commenting on that were not  
11 admitted. But I think I'm repeating myself, so I'll  
12 stop.

13 **MR. WISNER:** Your Honor, just by way of  
14 example, I'm looking at one of the exhibits that the  
15 Court has admitted portions of. This is the 2016 EPA  
16 report.

17 And, for example, on page 129 of that report,  
18 it discusses McDuffie and Eriksson, discusses its  
19 findings, greater than or less than ten days, discusses  
20 basically everything that IARC is discussing, and then  
21 it says EPA's conclusions. And you've admitted that  
22 into evidence. So I think you're right that you haven't  
23 just said, if it mentions the results of a study, that  
24 it's somehow excluded.

25 **THE COURT:** Part of the problem is the

1 structure of the report itself, which is very different  
2 than all the other documents. It's just put together  
3 very differently. I'm sort of getting a little better  
4 at finding just the bracketed parts. Some of it just  
5 doesn't make sense if you don't look at what they were  
6 looking at when they made the comment. So none of it's  
7 going to make any sense.

8 Quite frankly, I don't think that there's any  
9 real danger. I think that there are some graphs at the  
10 end there that references from 79 on, that doesn't need  
11 to come in. That's just the pages of references.

12 I don't think there's any danger of prejudice  
13 because I think that the -- that while, yes, it is a  
14 little different because the nature of the documents are  
15 very different, but I think in the spirit of how the  
16 decision-making process for both IARC and any of the  
17 other bodies that looked at this thing, in fairness --  
18 just aside from the hearsay rule, in fairness, up to  
19 page 79 should come in because it does give you an  
20 overall view of what IARC did.

21 I don't think it's prejudicial because I think  
22 the jury has heard ad nauseam now about what IARC did.  
23 I would be shocked if they looked at three pages of  
24 this, but that's another story only because I think it  
25 does reiterate and regurgitate a lot of what they've

1 already heard. I don't know that looking at the  
2 monograph in its entirety is going to prejudice  
3 defendants in terms of telling them again -- or reading  
4 what they've already heard from Portier, Jameson, and I  
5 can't remember all the witnesses. The woman scientist  
6 was there as well. I can't recall her name.

7 But, in any event, there were a number of  
8 scientists that went through this over and over and  
9 over.

10 **MR. ISMAIL:** Your Honor, I'm not rearguing  
11 that, your ruling there. For completeness, Your Honor,  
12 we believe the preamble should be included, then.

13 **THE COURT:** The preamble of the IARC --

14 **MR. EVANS:** 5194.

15 **MR. WISNER:** I don't think I've seen it.

16 **MR. ISMAIL:** It's been referenced in  
17 testimony.

18 **MR. WISNER:** No objection, Your Honor.

19 **THE COURT:** There you have that.

20 **MR. WISNER:** Do you have the exhibit number,  
21 just so we have it for the record?

22 **MR. ISMAIL:** 5194.

23 (Trial Exhibit 5194, pgs. 1-79, received in  
24 evidence.)

25 **THE COURT:** It is in up to and including

1 page 79.

2 **MR. EVANS:** A couple of things. We did file a  
3 motion regarding closing argument and what we think is  
4 proper limits of closing argument. But we also filed a  
5 directed verdict motion, which I believe we'll talk  
6 about briefly, if that's okay, just to frame the issue.

7 But I don't know, did you get a copy of the  
8 motion regarding either one of those?

9 **THE COURT:** I haven't gotten anything today.

10 **MR. EVANS:** Do you mind if I hand up a copy?

11 **THE COURT:** Sure.

12 Are you going to respond orally? I assume so.

13 **MR. WISNER:** Yeah, Your Honor. I don't think  
14 we need to have a written response, unless Your Honor  
15 would like one.

16 **THE COURT:** Give me ten minutes to read this.

17 **MR. WISNER:** Sure.

18 (Recess taken from 12:47 p.m. to 1:04 p.m.)

19 **THE COURT:** As far as the verdict form is  
20 concerned, I'm going to go with a special verdict form.  
21 And I think, as I just looked at them, I didn't have a  
22 chance to do side by side, but Monsanto starts with this  
23 question: "Did Roundup cause Alberta and Albert's NHL?"  
24 And then goes on to the verdict form per cause of  
25 action.

1                   And I think you changed a little of the  
2 language. Plaintiffs', I think, is pretty much straight  
3 out of the book.

4                   **MR. MILLER:** Straight out of CACI, Your Honor.

5                   **THE COURT:** So I'm going to adopt plaintiffs'  
6 special verdict form.

7                   **MR. EVANS:** There are a couple of issues, Your  
8 Honor, that I think they modified.

9                   You want to address this?

10                  **MR. MARSHALL:** Yes, Your Honor. We just got  
11 this. So we're doing the side-by-side in real time like  
12 you are. But there are some issues, for example, in  
13 their failure to warn -- strict liability, failure to  
14 warn where there was a choice between excluding  
15 scientific and medical knowledge, either/or or both, and  
16 they have simply chose scientific knowledge. We had  
17 scientific and medical knowledge in ours that we think  
18 is appropriate here.

19                  **MR. MILLER:** We can add the word "medical" in  
20 there. We're fine with that.

21                  **THE COURT:** You're right. We haven't had a  
22 chance to do side-by-side, but as I looked at  
23 plaintiffs', I think it was pretty much word-for-word  
24 CACI, which I wanted it to be. So if there are any  
25 other changes or other modifications that you've made,

1 then I'd want to --

2 **MR. WISNER:** In the CACI instruction it has  
3 "scientific and/or medical" as options, so we picked  
4 scientific. But if they want both, we don't care.

5 **THE COURT:** Both scientific and medical.

6 **MR. MARSHALL:** There's another change with  
7 respect to the negligent failure to warn instruction.  
8 And I'm looking at Questions 12 and 13 --

9 **THE COURT:** Okay.

10 **MR. MARSHALL:** -- where they've included both  
11 a negligent failure to warn of the potential danger of  
12 the product and, apparently, a theory involving  
13 negligent failure to instruct on the safe use of the  
14 product.

15 **THE COURT:** Is that included in the -- I think  
16 I left it on my desk.

17 **MR. MILLER:** We can delete the instruction on  
18 safe use.

19 **MR. MARSHALL:** That would come out of both 12  
20 and 13.

21 **MR. WISNER:** I believe that's part of the CACI  
22 instruction. For what it's worth, that is part of our  
23 cause of action. Do you have the CACI?

24 **MR. MARSHALL:** It's bracketed in CACI. We  
25 don't think it's appropriate here, Your Honor, based on

1       how they tried the case.

2               **MR. WISNER:** One of the allegations in this  
3 case, Your Honor, is that Monsanto didn't properly  
4 instruct how to properly use the product, namely to wear  
5 gloves, other sorts of things. So I think it actually  
6 squarely fits within the realm of failure to warn with  
7 regard to taking precaution, which is exactly what that  
8 instruction deals with.

9               **MR. EVANS:** Your Honor, this case has been  
10 about whether we needed to warn about the risk of  
11 non-Hodgkin's lymphoma. It's not a question about  
12 whether we should have told someone to wear a hazmat  
13 suit or something else.

14               So we just think the bracketed part is not  
15 appropriate given the evidence.

16               **MR. WISNER:** We heard testimony from  
17 Dr. Sawyer. We heard from Guard, their own corporate  
18 witness testimony. Dr. Sawyer said unequivocally, if  
19 they had been instructed to wear protective gear and if  
20 they had, in fact, worn it, their exposure would have  
21 been significantly reduced. It was an integral part of  
22 the dose calculations before by Dr. Phalen.

23               This idea that taking precautions isn't a  
24 central part of this failure to warn case is completely  
25 untrue. The evidence is clearly there.



1                   **THE COURT:** I'm sorry. Are you proposing to  
2 delete 12?

3                   **MR. MARSHALL:** Not 12 in its entirety, Your  
4 Honor. It's just the additional language "or instruct  
5 on the safe use of the Roundup products."

6                   **MR. WISNER:** That is from the CACI  
7 instruction --

8                   **THE COURT:** I know. I realize that.

9                   I don't have my book in front of me, but I  
10 think there was evidence about -- regarding whether they  
11 should have been warned to wear gloves, I guess, or  
12 Ms. Pilliod should have worn long pants or something  
13 else that would have given her some additional  
14 protection. So I'm going to include that danger or  
15 instruct in the safe use of Roundup. I think that's  
16 appropriate.

17                   Is there anything else that deviates from the  
18 standard or includes a bracket that anybody disagrees  
19 with?

20                   **MR. MARSHALL:** We haven't seen anything else  
21 yet, but I've not had a chance --

22                   **THE COURT:** Go ahead and keep looking while we  
23 discuss this motion. But I wanted to give you a  
24 heads-up that that's where I was going.

25                   **MR. EVANS:** Just for the record, Your Honor,

1 we do think the medical causation question is  
2 appropriate up front. I mean, you've got two individual  
3 plaintiffs. As Your Honor knows, we've been concerned  
4 about them being tried together from before we started  
5 this trial.

6 We think that this jury needs to answer  
7 fundamentally for each plaintiff the causation question  
8 first before it has to go through all of the issues that  
9 we've been concerned about with respect to prejudice.  
10 That's why we proposed it first. And we think it's  
11 appropriate for the jury to make that assessment.

12 Obviously, if they decide that issue, they  
13 move forward with the rest of it. If they decide no on  
14 that issue, then they are done deliberating.

15 We just think that, because of the nature of  
16 two cases being tried together, and to alleviate -- we  
17 still think there's been a lot of prejudice involved in  
18 trying the cases together; but to address that issue, we  
19 think it's important to have a medical causation issue  
20 first.

21 **THE COURT:** There's an element of causation in  
22 each of your causes of action. It might work to your  
23 disadvantage because, if they were to agree in the  
24 affirmative on medical causation, then they may  
25 automatically find causation with all the other causes

1 of action having made that decision as opposed to going  
2 through each element making a decision that, based on  
3 each cause of action, is each one met, and then does it  
4 result in a finding of causation and, potentially,  
5 damages.

6 **MR. EVANS:** Well, Your Honor --

7 **THE COURT:** I'm just throwing it out there.

8 **MR. EVANS:** We have a different assessment.

9 We think because of the nature of the prejudice with the  
10 combination -- everything else with respect to the  
11 prejudice we've articulated before. We think it's  
12 important for them to focus on the medical causation  
13 question first.

14 **THE COURT:** Okay. I don't agree with that. I  
15 really don't. I think that they need to go through and  
16 make a decision about each cause of action, which  
17 includes in it the question about causation. They don't  
18 have to be. There's certain point of it that will need  
19 to be aligned, but other parts may not.

20 So I disagree that that's really required. So  
21 I'm not going to ask that medical causation question  
22 first.

23 **MR. EVANS:** And just to be clear, Your Honor,  
24 I haven't looked at this, but we're having -- the  
25 plaintiffs' proposal is to have a special verdict form

1 for each plaintiff separate, correct?

2 **MR. MILLER:** Yes.

3 **THE COURT:** Two separate verdict forms.

4 **MR. WISNER:** The only difference, I believe,  
5 between them is the names and the past economic damages,  
6 which I believe has been stipulated to. So they should  
7 be identical in every other way.

8 **THE COURT:** Go ahead and continue to look at  
9 it as we're talking about this other motion.

10 So nobody told me that Daryl Hannah was here  
11 or that there were issues about taking pictures. Why  
12 didn't somebody tell me about all of this if you were  
13 concerned? I can understand why you might be concerned  
14 about it, but nobody alerted me that there was a  
15 problem.

16 **MR. EVANS:** Well, it happened at the end of  
17 the court day, primarily, Your Honor, and there was a  
18 concern because one of the jurors was asking about the  
19 option of taking a photograph with her.

20 **THE COURT:** That's why I should have been told  
21 this was happening. I wish somebody had told me so I  
22 could have addressed it.

23 **MR. EVANS:** Well, again, it happened after the  
24 court day.

25 **THE COURT:** As long as the jurors are in the

1 building, I should have been alerted. But anyway.

2 **MR. EVANS:** Yeah, we're concerned. We  
3 think -- obviously, anyone can come to court who wants  
4 to come to court.

5 But we think that, if that happens, this is  
6 not an opportunity to have -- literally right outside of  
7 Your Honor's door and right where the jurors walk out,  
8 to have a photo booth setup. We just think it's  
9 inappropriate and should not happen again.

10 And the -- anyway, that's the issue.

11 **THE COURT:** I understand the concern. As I  
12 said, when I read it, I thought somebody should have  
13 said something to me, and I would have addressed that.

14 Because any influence -- any juror that's in  
15 the presence -- that is either approached or is  
16 otherwise involved and any person who's attending, it  
17 could potentially be an issue. And I would have wanted  
18 to know about that.

19 But that's okay. That ship has sailed.

20 **MR. MILLER:** Your Honor, I'm concerned that  
21 defense -- they have untold amount of private  
22 investigators, and they follow me and everybody in the  
23 courtroom.

24 But they're following jurors and listening to  
25 jurors' conversations? I think that's something that

1       ought to be stopped.

2               **MR. EVANS:** What are you talking about,  
3 Counsel? It was said in the hallway.

4               **MR. MILLER:** There's an affidavit filed by an  
5 attorney that apparently she's listening to the  
6 conversations of jurors. And I just think that should  
7 not be condoned.

8               **THE COURT:** First of all, there's not going to  
9 be any conversations, because, when they start  
10 deliberating, they're not going to say another word.

11               But let's talk about the motion. And then  
12 we'll sort of address it there. If there are any  
13 security issues or issues that need to be addressed  
14 regarding everyone's behavior going forward, we can talk  
15 about that.

16               **MR. MILLER:** Sure.

17               **THE COURT:** So there are a number of things  
18 that the defendants -- that they're concerned about.

19               **MR. EVANS:** Your Honor, we can go through them  
20 quickly.

21               The first topic is just the water -- the jug  
22 of Roundup prop. If counsel is not going to plan on  
23 bringing it in again, we don't have to deal with that  
24 issue in closing.

25               We think the way it's been played out has been

1 prejudicial and inappropriate, and so we want to address  
2 that and make sure that's not --

3 **THE COURT:** Maybe I'll just ask Mr. Wisner, is  
4 that part of your closing?

5 **MR. WISNER:** I hadn't decided if I was going  
6 to have it. But if it's really a concern --

7 **THE COURT:** It is a concern because a juror  
8 asked a question about it. And I don't really want that  
9 to come up in any context. It's okay if it's sitting  
10 there. If you want them to look at the bottle, I'm all  
11 right with that. But handling the bottle or whatever  
12 other -- things get involved in how it's handled. I  
13 don't want that to be a concern.

14 **MR. WISNER:** Sure. I'm going to argue how it  
15 was handled, but I won't physically use it.

16 **THE COURT:** No, I'm not saying that. I'm just  
17 simply talking about physically you handling it, wearing  
18 the gloves, whatever. I mean, that raises a concern  
19 with --

20 **MR. WISNER:** Sure.

21 **MR. EVANS:** The next topic is the size and  
22 corporate status. We think there were some  
23 inappropriate arguments that were conducted in the  
24 Johnson case that we've articulated.

25 You know, again, this is a case -- fair

1 argument about whatever evidence has been presented.  
2 But the concept as articulated with respect to, you  
3 know, what's going on at Monsanto's headquarters while  
4 the jury is deliberating, et cetera, et cetera, we just  
5 think is inappropriate. Anyway, it's self-explanatory  
6 with regard to our concern about those arguments.

7 **THE COURT:** So maybe what I should say in  
8 general is that -- rather than sort of warning about  
9 what should and shouldn't be said, is that my  
10 expectation in closing argument is that the arguments  
11 are about the evidence, that no extreme language is  
12 used, anything that might be prejudicial. Just don't do  
13 it, not here.

14 And I think that maybe having had an  
15 experience -- if you have been admonished by -- either  
16 of you -- and I'm not going to call out people.

17 But if a Court has already said that isn't a  
18 good idea, then don't do it here. I'll leave it at  
19 that.

20 **MR. WISNER:** Well, here's the problem.  
21 Listen, I have every right to accuse Monsanto of  
22 engaging in malicious and outrageous conduct. I mean,  
23 that's literally our burden of proof. And I intend to  
24 argue the evidence to that effect.

25 Now, with regards to the ability to pay, I



1 have conflicting instructions. So Judge Bolanos  
2 objected to it. I think it was an improper objection in  
3 its entirety. And I think Judge Bolanos was wrong. And  
4 I've argued that to her face, and I'll argue it to this  
5 day.

6 I had this exact conversation with Judge  
7 Chhabria, and he said that's absolutely appropriate  
8 argument for closing argument. Saying that you want to  
9 send a message or that you should do something to have  
10 them change their conduct is literally the purpose of  
11 punitive damages. It's written in the CACI instruction.

12 **THE COURT:** I gather that wasn't really the  
13 concern. I mean, I would agree with telling them to  
14 send a message. You can tell them to send a message.  
15 That's what punitive damages are.

16 Whether or not telling them, I guess, that  
17 there's champagne popping and that sort of thing, I --

18 **MR. WISNER:** Well, I mean, let's go down to  
19 the extreme, right? I'm absolutely allowed to  
20 illustrate how sending a message is done, right?

21 And in this context --

22 **THE COURT:** Yes. It's a lot of money because  
23 we think that a lot of money will send a message, which  
24 is different from saying to the jury, "Hey, they're back  
25 there just with champagne on ice, so, you know, make

1       them" -- you know, that kind of thing --

2                   **MR. DICKENS:** That's --

3                   **MR. WISNER:** That's not what I said. So what  
4 I said is, "I imagine that there's a boardroom  
5 somewhere. And sitting in that room is a group of  
6 executives waiting to see what this jury does, waiting  
7 to see how much money they award."

8                   And if this jury comes back with a small  
9 amount of punitive damages, that will be a win for  
10 Monsanto because then they won't need to change their  
11 conduct, right?

12                   Whether I illustrate that through popping  
13 champagne, high-fives, celebratory gestures, all of  
14 those are just illustrations of a concept. That's  
15 totally proper argument. And you use illustrations all  
16 the time to describe concepts. And there is nothing  
17 improper about that.

18                   I didn't say there's a guy named Bill Smith  
19 sitting in a room wearing wire-rimmed glasses and saying  
20 X, Y, and Z. That's not in evidence. But I wasn't  
21 doing that.

22                   For the record, Your Honor, there's a lot of  
23 case law on this. For example, there's a California  
24 Supreme Court case from 2012, 54 Cal. 4th 952, People v.  
25 Tully.

1           In that closing argument, the prosecution in a  
2 criminal case accused a defendant of being a despicable  
3 individual, being a sucker, and being garbage. And the  
4 Supreme Court of California said that's fine. You can  
5 make those arguments. That's what argument is for.

6           So me talking about a hypothetical situation  
7 where executives are happy about a low punitive damage  
8 award clearly falls within the 10-yard lines. I  
9 understand Judge Bolanos didn't like my argument.

10           And, for what it's worth, there's been a lot  
11 of misunderstanding of what happened there. I don't  
12 want to relitigate it. But I thought the objection was  
13 to me pointing out to Mrs. Buck, who was sitting in the  
14 audience -- I don't think she's here -- yes, she is --  
15 point out to her during the Johnson case and saying,  
16 "She's right there. She's Monsanto's corporate  
17 representative."

18           Because they had introduced her at the  
19 beginning of the case in the Johnson case and she's on  
20 speed dial or whatever. And there was an objection. I  
21 thought, oh, don't talk about Ms. Buck. So I moved on  
22 with my analogy. And then there was an objection, no,  
23 it's the boardroom that's the problem. And that's when  
24 I stopped. I had misunderstood the objection. And I  
25 think the record is pretty clear on that.

1           But, in any event, you know, we're getting  
2 into the realm of limiting improper argument when the  
3 case law is pretty darn clear that you can use  
4 illustrations to illustrate important legal points.

5           **THE COURT:** Well, yes and no. I think there's  
6 also a fine line. I'm not suggesting that you can't use  
7 illustrations, but I think that -- I mean, what comes to  
8 mind is if your illustrations or your images are, well,  
9 they're happy back at Monsanto, and it's -- you know,  
10 poor Mr. and Mrs. Pilliod here, they have non-Hodgkin's  
11 lymphoma. And they don't care, they don't -- you know,  
12 you have to walk a fine line. Let me just say that.

13           And what's passionate and then what crosses  
14 the line, I think, you know where you should draw the  
15 line.

16           **MR. WISNER:** Well, that's my problem. That's  
17 why I'm raising this, Your Honor.

18           **THE COURT:** Don't set my hair on fire,  
19 Department 21. Don't do that.

20           **MR. WISNER:** Fair enough.

21           **THE COURT:** That's not a good idea. I'm just  
22 asking you to formulate your argument. It can be  
23 passionate, but I don't like inflammatory language. I  
24 don't like provocative language.

25           You know, you've been here eight weeks. You

1 kind of, I think, know me well enough to know that I'm  
2 okay coloring inside the lines and, you know, do so  
3 vigorously. You're entitled to do that as an advocate  
4 for your client.

5 But we're not setting this house on fire.  
6 What you're going to do is tell the jury about the  
7 evidence and why they should find for your plaintiffs,  
8 your clients, and why they should give them tons of  
9 money, and why you think they should punish Monsanto.  
10 I'm good with that.

11 But all this other stuff that is in between  
12 the lines but implies a lot of things that, you know,  
13 "use your imagination" or "be an advocate for good over  
14 evil," just don't do that. It just is not going to be a  
15 good idea.

16 And I don't want to have to get involved. I  
17 really don't. I don't like to interrupt counsel. I  
18 don't like to have a lot of objections. I like to allow  
19 the lawyers to argue their case and to present their  
20 case. I've tried to be fair in doing that. But if I  
21 see something that is really crazy, I will say  
22 something.

23 **MR. WISNER:** Sure. And I'm with you. I  
24 really have no interest in setting anyone's hair on  
25 fire.

1                   But this example of the boardroom, this  
2 illustration, in my mind, that's fully within the  
3 10-yard lines. Does Your Honor think it's not? Because  
4 that will help me gauge as I make my argument tomorrow.

5                   Listen, I'm a pretty passionate person; I  
6 think you've seen that. And because I'm so passionate,  
7 I actually invoke energy in other people. It's part of  
8 who I am. And I have every intention of getting this  
9 jury angry at them, getting them very angry at Monsanto  
10 within the confines of the evidence.

11                   And what I mean by getting them angry is we  
12 have mountains of evidence of rampant corporate  
13 malfeasance. And I'm going to go through all that  
14 evidence with them tomorrow. I'm going to walk them  
15 through the documents that are in evidence one by one,  
16 showing them what they have and making reasonable  
17 inferences from that.

18                   But, at the end of all that, I'm going to say,  
19 "I need you to take action. I need you to hold them  
20 accountable for what they've been doing for 45 years and  
21 make sure that this doesn't happen in the future.  
22 That's literally what the punitive damages instructions  
23 say."

24                   **THE COURT:** So far, so good.

25                   **MR. WISNER:** Okay. Then now we're good.

1                   **THE COURT:** But, as I said, just be careful  
2 and -- just be careful.

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

4                   **THE COURT:** Just be careful.

5                   **MR. WISNER:** Can I get a hard rule one way or  
6 the other on the boardroom just so I know, just so I get  
7 a sense of it?

8                   **THE COURT:** Oh, I'm not crazy about that one.

9                   **MR. WISNER:** Okay.

10                  **THE COURT:** That's not my favorite. I think  
11 because it invokes that they're happy, you know, sort of  
12 that -- I understand you think that they've acted  
13 maliciously. And you're going to tell the jury about  
14 that.

15                   But the suggestion that they're going to do  
16 attaboys around someone's pain and suffering. That's --  
17 you know, you don't need to go there to make your point  
18 about what you perceive as bad corporate behavior.

19                  **MR. WISNER:** That's helpful, Your Honor.  
20 Thank you.

21                  **MR. EVANS:** Your Honor, the rest of the motion  
22 addresses additional issues. And I think Your Honor can  
23 read that. I think your direction is helpful to -- with  
24 respect to drawing lines.

25                   Clearly, referencing or making up facts that

1 are not in evidence is improper. Everyone knows that.  
2 So, with that, I appreciate the Court's direction. And,  
3 hopefully, we won't have to have objections tomorrow.

4 **THE COURT:** Okay.

5 **MR. WISNER:** Your Honor, one issue in here  
6 that I think I need clarification on. One of the  
7 central themes --

8 **THE COURT:** I do want to say this: So let's  
9 talk about this case and not reference historical,  
10 impactful, because this is about the Pilliods. The  
11 jurors already know that there are other cases out  
12 there. So to sort of enlist them in some sort of  
13 movement is not what I want you to focus on or do.

14 That is prejudicial, particularly because  
15 there's been a lot of back-and-forth about mentioning  
16 other cases, other litigation, other proceedings.  
17 They're already aware of that. And I think it would be  
18 particularly problematic to then start talking about how  
19 important their actions in this case are to a bigger  
20 issue or a bigger movement or whatever.

21 **MR. WISNER:** Fair enough.

22 **THE COURT:** So just stay away from that.

23 **MR. WISNER:** But the line that I would walk is  
24 I will say that what they're doing is important for  
25 deterring future misconduct.



1                   **THE COURT:** And that's fine with respect to  
2 punitive damages. That's fair.

3                   **MR. WISNER:** Okay.

4                   One of the arguments that I'm going to be  
5 making tomorrow is calling out the fact that Monsanto  
6 has not disputed significant amounts of evidence that  
7 we've presented in our case in chief. And that's  
8 obviously fair argument.

9                   However, if you read this motion, it suggests  
10 that I'm not really able to do that. Because they say,  
11 you know -- for example, I plan to point out that they  
12 didn't call a single witness to talk about any of those  
13 EPA documents, not a single person to explain it in any  
14 context or explain the methods or processes of which  
15 they used.

16                   But we did. And it's undisputed that the  
17 criticisms that Dr. Portier levied against EPA, for  
18 example, that has not been refuted by a single witness.  
19 And when they're considering the weight to give the EPA  
20 assessment, they should realize that the only evidence  
21 in the record is that they didn't file their own --  
22 whatever. I'll make my arguments.

23                   But I'm worried that the way this is written  
24 can somehow preclude or I'm doing something wrong and  
25 that they put me on notice about that ahead of time. I

1 want to be clear that that's what I intend to do, and I  
2 don't think that's improper.

3 **THE COURT:** You can comment on the evidence or  
4 lack thereof. I don't think there's an issue, unless  
5 it's with time, but --

6 **MR. WISNER:** Okay.

7 **THE COURT:** I guess they're talking about  
8 personal attacks on Monsanto witnesses. I'm sure that  
9 your adjectives will be appropriate.

10 **MR. WISNER:** I'm just curious. If I tell the  
11 jury that this witness didn't tell the truth, is that a  
12 personal attack or attacking the credibility? It's sort  
13 of a vague line.

14 **THE COURT:** I don't think that was what this  
15 motion was addressing.

16 **MR. WISNER:** Well, so --

17 **THE COURT:** "Completely bonkers," discussing  
18 has no dignity, that kind of thing. It's a little  
19 outside the line.

20 **MR. WISNER:** It was a pretty outrageous thing  
21 the guy had said. It was a specific cause expert who  
22 told the jury that Mr. Johnson was not going to be sick  
23 anymore and he would live, and the evidence was clear  
24 that he was dying. So that was pretty disgusting, and  
25 that's what I told the jury. And so I don't think we

1 have that here, for what it's worth.

2 **THE COURT:** I haven't heard anything  
3 reprehensible, "completely bonkers," or -- so far. So I  
4 think that, certainly, you can describe or characterize  
5 the evidence. I just would be careful about how you  
6 describe people and witnesses. You know what I mean?

7 And if you're talking about a particular  
8 witness, you can talk about their testimony. You can  
9 talk about the evidence they offered. But in describing  
10 them, be careful, because it's not appropriate to  
11 describe a person as disgusting or whatever.

12 Maybe what they said was completely wrong,  
13 completely lacks evidentiary basis. There are a lot of  
14 things that you could say with passion that I think  
15 convey that. But as you're describing people, nothing  
16 that gets on the outside of insulting or -- I think you  
17 understand.

18 **MR. WISNER:** Absolutely, Your Honor. For what  
19 it's worth, these quotes that they've cited were I was  
20 referring to statements that were made by them. "That  
21 testimony was disgusting." I didn't say the person was  
22 disgusting or didn't look good or something. It wasn't  
23 a personal attack; it was about the evidence.

24 **THE COURT:** You can articulate that in a way  
25 that sends the message that you need to send without

1 borderline insulting whatever they said or the person  
2 that said it.

3 **MR. WISNER:** All right, Your Honor.

4 **THE COURT:** Now that I know that we've had  
5 some celebrities present, I'll -- and I'm not laughing.  
6 I don't want this to turn into some, you know, event,  
7 because it's not.

8 And I certainly don't want the jury to be  
9 influenced at all by anything that happens outside this  
10 courtroom or outside the jury room.

11 So if anything else comes up you think I need  
12 to know about, tell me about it, and we'll try to  
13 strategize how to prevent any undue influence or even  
14 putting the jurors in a position where, you know, they  
15 are in contact with something they shouldn't be that's  
16 unrelated to the case that might be prejudicial to  
17 either plaintiffs or defendants.

18 So I think that's probably all I need to say.  
19 Hopefully, everything will go smoothly tomorrow.

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

21 **MR. MARSHALL:** Your Honor, I did spot a couple  
22 of extra things on the plaintiffs' verdict form that I  
23 wanted to raise to the Court's attention.

24 On the punitive damages instruction, they're  
25 missing what shows up in the CACI verdict form 3902

1 dealing with officers, directors, or managing agents,  
2 which is a required finding for the jury.

3 And so the question is "Was the conduct  
4 constituting malice, oppression, or fraud committed by  
5 one or more officers, directors, or managing agents of  
6 Monsanto acting on behalf of Monsanto?"

7 That question does not show up in their  
8 special verdict form, and we think that's a straight  
9 CACI requirement.

10 **MR. WISNER:** No objection.

11 **MR. MARSHALL:** And, just for the record, I  
12 wanted to register an objection on due process grounds  
13 to the possibility of the jury awarding multiple  
14 punitive damages awards for each plaintiff based on what  
15 is essentially the same conduct by Monsanto.

16 And then, finally, on their special verdict  
17 form, they've entered an amount of damages for past  
18 economic losses. And while we had stipulated to that  
19 amount, we do not believe it should be included on the  
20 special verdict form because that implies that that's  
21 something that the jury is already basically -- that the  
22 Court is already asking the jury to award.

23 Of course, there are all sorts of predicate  
24 findings before the jury gets there, so we believe that  
25 should be left blank.

1                   **THE COURT:** I've already told them that the  
2 stipulation is a fact of the case.

3                   **MR. MARSHALL:** It is a fact of the case, but  
4 they still must award it by going through all of the  
5 other predicate findings. So we believe it should be  
6 left blank in --

7                   **THE COURT:** That invites all kinds of trouble  
8 because, if they get to that point and they find  
9 liability, then that's the amount they're going to have  
10 to award. And if they come up with some other number  
11 than has already been stipulated to, that's a problem.  
12 So they're not going to deliberate on the amount that  
13 everyone has agreed to is a fact in the case.

14                   I understand what you're saying.

15                   **MR. MARSHALL:** I think it could be modified  
16 post verdict if that was necessary, your Honor. But the  
17 point is we do not want to give the jury the impression  
18 that, somehow, there have already been findings made  
19 that the Pilliods are entitled to be awarded these  
20 amounts. And I think that's what this verdict form  
21 does.

22                   **MR. BROWN:** Yes, Your Honor. By putting that  
23 in, you're already saying they're liable.

24                   **THE COURT:** I understand that's a potential  
25 problem. My concern has also been what do I do.

1 Because, if they find liability, should I instruct them  
2 that, if they find liability, then that is the amount of  
3 past damages they must award?

4 **MR. BROWN:** Or, as Mr. Marshall says, Your  
5 Honor, we know what that amount should be. So if they  
6 put in an amount that is incorrect, we can modify that  
7 by agreement with counsel at the end, by modifying the  
8 verdict. And that's done all the time.

9 Because we've already agreed to that number.

10 **MR. WISNER:** Your Honor, just quickly.

11 This is routinely done, where you put in the  
12 stipulated amount of damages in the thing. They will  
13 not get to that question unless they have found  
14 liability on everything -- they don't even get to  
15 Question 15 until they've answered yes on everything  
16 else.

17 So the verdict form is designed to avoid any  
18 potential problem. This is what we did in Johnson.  
19 It's what they did in Hardeman. This is routinely done,  
20 where you put in the stipulated economic damages.

21 Leaving it open would potentially confuse the  
22 jury. "I thought this was stipulated to. Why are we  
23 even having to put a number in here? What's going on?"

24 Maybe we put in parentheses "stipulated" --  
25 that's probably not necessary. I think the way it's

1 done here is exactly what we always do.

2 **THE COURT:** I'm trying to remember. I had an  
3 asbestos case where it was stipulated to as to past  
4 economic damages. I don't remember if we put it in the  
5 verdict form or not.

6 **MR. BROWN:** Your Honor, I would doubt it  
7 seriously. I think, because we've stipulated to it, we  
8 know what that amount is. It doesn't matter what the  
9 jury puts in there because we've already agreed on it.

10 But by putting it in, what we're saying is  
11 "they're liable." And that's not what's happened here.  
12 They've got to establish liability before they can  
13 establish anything in terms of damages.

14 **MR. WISNER:** Can't we just tell the jury --  
15 I'm going to tell them in my closing, when I go through  
16 the damages portion, that the past economic damages are  
17 already stipulated to. And we obviously don't get here  
18 until you find liability. It's all going to be in my  
19 argument. I don't understand what the issue is here.  
20 It's already written there, but you'll only get to the  
21 damages, obviously, if you find liability. And I'm  
22 pretty sure that's going to be the heart and soul of  
23 their argument.

24 I don't think there's any potential confusion  
25 here. The only thing that they're doing is inviting the



1 jury coming back with a different number and then giving  
2 Monsanto an argument afterwards to say, well, the jury  
3 clearly wasn't weighing the facts because they didn't  
4 even get the stipulated damages right.

5 I mean, it just creates unnecessary potential  
6 error. There's no error putting it on here. It's done  
7 in every single Roundup trial so far. I don't  
8 understand why we could depart from that.

9 **THE COURT:** Okay. Here's what I'm going to  
10 do. My recollection is that I may have allowed the  
11 notation that, if liability is found, the stipulated  
12 amount is not filling in the blank, just putting an  
13 asterisk there, indicating that if they are to find  
14 liability, then this is the amount and not filling in  
15 the blank. Something like that. We came to some  
16 agreement, which I think was okay. I don't really want  
17 to leave it blank, but I do understand that filling it  
18 in for the jurors may suggest to them that this is an  
19 amount they need to award no matter what.

20 But what if they were to -- I don't know if we  
21 put an asterisk right before or right below the  
22 tabulation of damages, which is liability for if I find  
23 this stipulated amount of past economic damages for  
24 Albert and Alberta is the following, and then they get  
25 to figure that out or not. They are going to be

1 instructed to go through, in order, the questions,  
2 answer the questions in order to go through the verdict  
3 form. So hopefully they'll be skipping ahead.

4 **MR. WISNER:** Can we keep a number there, drop  
5 a footnote to it, and just say this is the amount of  
6 damages if liability is found?

7 **THE COURT:** Just put the amount in a footnote  
8 and with the statement "If liability is found, the  
9 amount stipulated to by the parties are for past  
10 economic damages is the following," in a footnote. And  
11 no line. And they can put it in themselves, but at  
12 least there's a footnote saying what's stipulated to.

13 I am concerned about, if they do find  
14 liability, I don't want a lot of crazy numbers and we  
15 have to change the verdict. So I think this is a good  
16 way to avoid that problem.

17 **MR. MARSHALL:** And, Your Honor, we did file a  
18 directed verdict motion. And I don't intend to go over  
19 old ground at this point, but there is an issue in that  
20 motion which we do believe the Court needs to rule on.  
21 And that has to do with the impossibility of preemption  
22 argument.

23 As you will recall in the summary judgment  
24 motion, you denied our summary judgment motion and held  
25 that there was a question of fact for the jury to decide

1 on whether or not there was clear evidence that the  
2 regulator would have denied a request to change the  
3 design or label.

4 And we are obviously not submitting that  
5 question to the jury. So we're in the uncomfortable  
6 position of not having a decision on that issue in the  
7 case.

8 So we raise that issue in the directed verdict  
9 motion, and we think that our argument on the Wyeth v.  
10 Levine clear evidence issue has gotten even stronger now  
11 with the EPA's interim decision in April of this year,  
12 just a few days ago.

13 And I --

14 **THE COURT:** Which they didn't admit, as you  
15 know.

16 **MR. MARSHALL:** No. But we've now decided that  
17 this is a question of law for the Court on the  
18 possibility of preemption.

19 **THE COURT:** I really resolved that. I  
20 resolved that issue. I thought we talked about that in  
21 the discussion of the jury instructions in addition  
22 to -- my sense that that really got resolved at summary  
23 judgment, but holding that open until I look at the  
24 language in the order, I thought we had that discussion  
25 during the course of jury instructions. And I don't

1 think it's an open question. I do not.

2 So to the extent that the motion for directed  
3 verdict is premised on that, it would be denied.

4 **MR. MARSHALL:** Well, Your Honor, in the  
5 summary judgment order, you said that the trier of fact  
6 would be required to infer. You cited the Fosamax case  
7 which said the impossibility of preemption is a fact  
8 issue for the trier of fact. And you denied the summary  
9 judgment motion.

10 But you did not -- at least in this order, you  
11 did not hold, in fact, that there was no impossibility  
12 of preemption defense for Monsanto. And so we don't  
13 have a ruling on that. We don't have it submitted to  
14 the jury.

15 And, as I said, the argument has gotten  
16 stronger as a result of the EPA's decision. One of the  
17 issues that you pointed to is the EPA studies were for  
18 glyphosate, not for Roundup. And so there was an issue  
19 of, well, would they have really changed the label for  
20 the formulation based on the decision about glyphosate?

21 But if you look at the EPA's decision, the  
22 April 2019 decision, they specifically said that there  
23 were no human health risks from exposure to any use of  
24 glyphosate. They were clearly looking at this in the  
25 context of the formulations because they were

1 determining label changes that would be appropriate for  
2 glyphosate-containing formulations.

3 They responded to questions about the  
4 formulations. They said that a multitude of studies,  
5 including on multiple formulations containing  
6 glyphosate, they weren't looking at those studies on the  
7 formulations. And they said that EPA thoroughly  
8 assessed risks to humans from exposure to glyphosate  
9 from all uses and all routes of exposure and did not  
10 identify any risks of concern.

11 They then went on to assess the label, and  
12 they decided that they were going to update all of the  
13 glyphosate labels to modern standards.

14 And, of course, in doing that, they did not  
15 suggest that there should be a risk on the label based  
16 on the alleged risk that they did not believe existed.

17 So, as I mentioned, I think our argument on  
18 impossibility of preemption has gotten stronger. I  
19 think there is clear evidence here for you to decide  
20 that, in fact, the state law claims put Monsanto in an  
21 impossible position here, where they're being asked to  
22 warn of a risk that the EPA would not allow them to warn  
23 of, based on the decisions the EPA is coming out with.

24 And so we're simply asking for a ruling on  
25 this, Your Honor.

1                   **THE COURT:** Do you want to respond?

2                   **MR. WISNER:** Sure, Your Honor.

3                   Just for the record, the impossibility of  
4                   preemption argument that is being put forward by defense  
5                   counsel has been roundly rejected by every court to  
6                   consider it, including this Court, Your Honor.

7                   Specifically, they have an affirmative  
8                   obligation to prove to the Court by clear evidence that,  
9                   had they taken any action whatsoever to inform consumers  
10                  of the risk that Roundup could cause cancer, that the  
11                  EPA would have deemed Roundup to be misbranded and would  
12                  have taken it off the market.

13                  We aren't even close to the realm of clear  
14                  evidence. Whether it's the Court deciding or the jury  
15                  deciding, doesn't make a difference.

16                  Fundamentally, Your Honor, we heard testimony  
17                  from Mr. Guard, Monsanto's 30(b)(6) witness specifically  
18                  on labeling issues, and their ability to disclose  
19                  information to consumers, specifically as it relates to  
20                  lawn and garden. And he said that they have the  
21                  opportunity to disclose risks outside of the labeling  
22                  context, of signage next to the brand. He actually went  
23                  out of his way to explain all the different ways they  
24                  communicate information to consumers. The EPA does not  
25                  in any way regulate that communication.

1           So impossibility requires that they prove that  
2 there is no humanly possible way for Monsanto to have  
3 ever disclosed a cancer risk to consumers. And that's  
4 just not supported by the record, whether it be as a  
5 matter of law or factual issue.

6           The Court has held that it is a matter of law,  
7 and you did conclude that in the context of jury  
8 instructions. And I believe that they haven't met their  
9 burden of showing clear evidence that, in fact, they  
10 were prohibited by the EPA from complying with  
11 California state law. The seminal case on this issue is  
12 the Bates case, which has soundly rejected this.

13           **THE COURT:** Well, what I haven't done is read  
14 the motion. So I'm not going to rule on it without  
15 reading it. So I will take that into consideration. I  
16 probably will have to email something later on in the  
17 day, but it is not likely.

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

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

20           **THE COURT:** So one last thing.

21           **MR. WISNER:** Oh, that last issue in the jury  
22 instructions.

23           **THE COURT:** Yes, the one last thing. And then  
24 after I rule on this, when do you think I can get a  
25 final set of the jury instructions with all the

1 modifications?

2 **MR. DICKENS:** We've been working together. I  
3 think that can be relatively quick, within 30 minutes  
4 once that decision is made.

5 **THE COURT:** Okay. Because then what we can do  
6 is have everybody look at it. If you have any  
7 questions -- I don't know whether everyone should hang  
8 around just to go through it and take one last look at  
9 that and the verdict forms to make sure we don't have  
10 any problems. I don't want to start tomorrow morning  
11 with a problem. That needs to be fixed.

12 **MR. MILLER:** We can be back here in a moment's  
13 notice if the Court needs us. But we're going to work  
14 together and get it done and should be to you within 30  
15 minutes.

16 **THE COURT:** Okay. That's fine.

17 **MR. WISNER:** There's one last legal dispute,  
18 right?

19 **MR. DICKENS:** On the failure to warn case, the  
20 widespread and recognized.

21 **THE COURT:** Right. That's what I'm saying.  
22 It's the last thing that I haven't really addressed and  
23 that needs to be addressed before these can be finished.  
24 And I am going to go with my original tentative. And  
25 that's it. Okay.



1                   So draft the -- send me a draft of the  
2 instructions. We'll review them. If I need you back  
3 here -- I actually have to leave a little early today.  
4 So whatever it is, I'm going to try to wrap it up by  
5 4:15 or 4:30. I have a meeting in the city, so I need  
6 to get going.

7                   **MR. EVANS:** Mr. Griffis had one issue he  
8 needed to raise, Your Honor.

9                   **THE COURT:** It's been a while.

10                   Let me just say this. A number of things have  
11 occurred in this trial that will inform JCCP going  
12 forward. This is probably not the last of a whole lot  
13 of issues.

14                   **MR. GRIFFIS:** You have a hearing set for  
15 Friday on confidentiality issues, and that has shrunk  
16 from about half a dozen distinct issues to a pretty  
17 narrow dispute about EU redaction. We handed up a joint  
18 brief on that yesterday.

19                   **THE COURT:** You did.

20                   **MR. GRIFFIS:** And so the sole issue remaining  
21 for Friday is about the EU redactions, and that falls  
22 into two camps: The trial documents, about which you've  
23 already issued a ruling, but we do need a final ruling  
24 on that, and the joint brief says that; and the other  
25 issue is nontrial documents; i.e., the documents that

1 were teed up for resolution that were not actually used  
2 at trial. And we briefed that.

3 And if you don't need to hear from us on  
4 Friday repeating what we said in the brief, then we  
5 don't need to have that hearing.

6 **THE COURT:** Yeah, I don't really think so.  
7 That's my first impression -- I haven't had a chance to  
8 get back to it. Strictly necessary -- thinking strictly  
9 necessary. My recollection is the ask was that the  
10 documents should, according to the EU rules, where I've  
11 already decided strictly necessary in the trial context  
12 meant that the names needed to be displayed so that the  
13 jury could keep track of all of the witnesses and make  
14 sure that they could follow the documents.

15 **MR. GRIFFIS:** Yes, Your Honor.

16 **THE COURT:** But, actually, outside the context  
17 of trial, it wouldn't be strictly necessary. Strictly  
18 necessary means strictly necessary.

19 **MR. GRIFFIS:** That was our argument.

20 **MR. BAUM:** So that's been my dialogue with  
21 them. I just ask you to read the briefing and the  
22 supplemental briefing that came in day before yesterday,  
23 I guess. Our point is that that's an EU standard. It  
24 doesn't apply to California courts. And you don't need  
25 to have that standard to just issue an order saying that

1 it's okay. Because it's confusing --

2 **THE COURT:** Can you speak up a little bit.

3 **MR. BAUM:** That standard that you were  
4 referring to as necessity is the EU standard; it doesn't  
5 apply to California courts.

6 So you can issue an order saying that the  
7 documents are more clear with those names in there and  
8 that it would be beneficial for academics and  
9 legislators and regulators for understanding what these  
10 documents said, and that it's a California standard you  
11 should be applying, not the EU standard.

12 So I'd just ask you to read those before you  
13 make your decision.

14 **THE COURT:** Okay. I will. Thank you. And I  
15 don't think I need any more argument on this. So don't  
16 worry about Friday. I'll figure it out between now and  
17 then.

18 **MR. BAUM:** Seating. There's going to be a lot  
19 of people here that want to come in tomorrow. We want  
20 to know if it's okay to bring in some chairs and how  
21 many can we bring in.

22 **THE COURT:** What did we do last time? I think  
23 we found chairs. What did we do? Bring chairs in?

24 **MR. BAUM:** Yeah, last time we brought in a  
25 whole bunch of chairs in from --

1           **THE COURT:** First, nobody go into any other  
2 courtroom and touch anything.

3           **MR. BAUM:** They let us.

4           **THE COURT:** Well, that's okay. Don't do it  
5 anyway. I will let my staff figure that out. So don't  
6 go into any other courtrooms and ask if you can bring in  
7 chairs. Let my staff figure out how many chairs that we  
8 will get probably from those courtrooms, but let me  
9 figure that out and let my staff work it out. And we'll  
10 bring as many as we can bring in. Probably about the  
11 same number that we had last time.

12           I guess somebody from the press was asking to  
13 reserve a few seats for the press. I'm fine with  
14 reserving a few seats for the press.

15           This isn't a big courtroom. The only large  
16 courtroom is Department 1, and it has no seating for  
17 jury. And, otherwise, the courtrooms are -- and then  
18 there's the criminal courtrooms, all of which are  
19 occupied. So there's really no other larger space. So  
20 we'll just have to work with the number of chairs that  
21 we can put in here.

22           Part of the problem is a lot of times, when I  
23 put different chairs, there's not as much equipment.  
24 There's a lot of spaces taken up with the equipment.

25           So it's probably not going to be more than

1 another 10, 15 chairs or 20 chairs that we were able to  
2 get in here last time. That's all I can do. And then  
3 beyond that, I don't know. Just tell people, I guess,  
4 if they want to sit down, they're going to have to come  
5 in early and take a seat. But the doors will probably  
6 open a little before 9:00. And then that will be it.

7 So if you think there's anything we need to  
8 talk about, let me know. We can open a little bit  
9 earlier, at 8:45, if there's something else we need to  
10 talk about, anything last-minute we need to clean up.

11 **MR. EVANS:** So the Martens exhibit that we  
12 thought was in on the plaintiffs' exhibit number was  
13 not. So we'll give it 4798 from the Martens deposition.  
14 We move for admission. I think there's no objection.

15 **MR. WISNER:** No objection, Your Honor.

16 **THE COURT:** Granted.

17 (Trial Exhibit 4798 received in evidence.)

18 (Proceedings adjourned at 1:54 p.m.)

19

20

21

22

23

24

25

1 State of California )  
2 County of Alameda )

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I, Lori Stokes, 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: May 7, 2019

  
Lori Stokes, CSR No. 12732