A155940 & A156706

In The California Court of Appeal

First Appellate District

Division One

Dewayne Lee Johnson,

Plaintiff and Respondent/Cross-Appellant,

v.

Monsanto Company

Defendant and Appellant/Cross-Respondent

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO
HONORABLE SUZANNE R. BOLANOS

Respondent/Cross-Appellant's Combined Response and Opening Brief

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TABLE OF CONTENTS

RESPONDENT'S BRIEF 14

I. INTRODUCTION 15

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY 22

A. Procedural History 22

1. Pre-Trial Proceedings 22

2. Trial Proceedings 24

3. Post-trial Proceedings 27

B. There Is Substantial Evidence Supporting the Jury's Finding That Roundup Caused Johnson's NHL. 28

1. Johnson's Experts Considered the Totality of the Evidence; Monsanto's Experts Did Not 28

2. Epidemiology Supports Causation 29

a. Case-Control Studies 30

b. The AHS study 31

c. Monsanto Misrepresents Neugut's Testimony. 32

3. There is Substantial Evidence Supporting the Jury's Finding that the Toxicological Data Supports Causation. 33

a. Portier's Qualifications are Impeccable. 33

b. The Animal Carcinogenicity Studies Support a Finding that Roundup is Carcinogenic. 34

c. Mechanism Data Supports a Finding that Glyphosate is Genotoxic and Causes Oxidative Stress. 35

4. Johnson's Experts Appropriately Assessed Causation Using the Bradford-Hill Criteria. 36

5. Unlike the EPA and other Regulatory Agencies, IARC Followed its Guidelines in Assessing the Carcinogenicity of Glyphosate and Roundup. 36

a. IARC Supports the Jury's Finding that Roundup Causes NHL. ... 36

b. There Is Substantial Evidence that Regulatory Assessments on Glyphosate are Flawed and Do Not Follow Established Guidelines. .. 39

6. There Is Substantial Evidence Supporting the Jury's Finding That Roundup Caused Johnson's Cancer. 41

a. Nabhan Properly Conducted a Differential Etiology in Formulating His Opinion That Roundup was a Substantial Factor in Causing Johnson's NHL. 41

b. Sawyer's Testimony Supports the Jury's Finding that Roundup Was a Substantial Cause of Plaintiff's NHL. 42

c. There Is Substantial Evidence That Johnson's Exposure to Roundup Caused His Cancer in 2.25 Years. 43

C. Johnson Suffered Unimaginable Emotional and Physical Suffering. .. 44

D. There is Substantial Evidence That Monsanto Has Long Been Aware of The Carcinogenic Risks of Roundup, but Chose to Prioritize Profits and Not Warn Consumers Such as Johnson. 48

1. The Primary Responsibility of Monsanto's "Safety" Scientists is to Defend the Glyphosate Business 48

2. Monsanto Knew That Roundup Was Toxic and That There Were Safer Alternatives But Refused to Conduct Carcinogenicity Tests or Use Safer Roundup Formulations. 49

3. Monsanto Sold Roundup From 1974 – 1981 Without any Valid Carcinogenicity Tests on Glyphosate. 50

4. Early Rodent Studies Demonstrate that Glyphosate Causes Tumors But Monsanto Refuses EPA's Request to Conduct Another Mouse Study. 51

5. Monsanto Never Conducted Studies Recommended by Their Own Epidemiologist. 51

6. A Monsanto Retained Genotoxicity Expert Raises Concern about the Genotoxicity of Roundup in 1999; His Report is Buried by Monsanto. . 52

7. Monsanto Ghostwrites Articles to Influence Regulators and Mislead the Public Regarding the Safety Profile of Roundup. 53

8. Monsanto Continues Ghostwriting Articles for Purposes of Regulatory Reviews, Product Defense, and Litigation Support. 55

9. Monsanto Was Aware of Studies Showing an Increased Risk of NHL But Failed to Warn the Public. 56

10. Johnson Relied on Monsanto's Representations of the Safety of Roundup. 57

11. Johnson Contacts Monsanto After Developing a Rash in July of 2014. 58

12. Monsanto Learned that IARC was going to Evaluate Glyphosate One Month Before Johnson First Called Monsanto. 60

13. Monsanto Was Developing a Plan to Attack the Anticipated IARC Classification One Month Before Johnsons' Second Call. 60

14. Monsanto Exercises its Influence With Government Officials in Wake of IARC Findings. 61

III. STANDARD OF REVIEW 62

A. Order Denying Motion for JNOV 62

B. Order Denying Motion for New Trial. 63

IV. LEGAL ARGUMENT 63

A. Monsanto's Arguments Based on the Sufficiency of the Evidence Should be Deemed Waived. 63

B. The Court Should Disregard References to the Trial Court's Tentative Order. 64

C. The Carcinogenic Risk of Roundup was Known or Knowable to Monsanto Before Johnson's Use of Roundup. 65

D. There Is Substantial Evidence to Support a Finding of Design Defect. 67

1. Johnson Did Not Abandon His Design Defect Claims. 67

2. The Court Properly Submitted the Consumer Expectation Test to the Jury. 68

E. There Is Substantial Evidence of Causation. 71

1. Legal Standard on Causation. 72

2. Epidemiology Supports Specific Causation. 73

3. Nabhan's Testimony Constitutes Substantial Evidence of Causation. 74

4. Sawyer's Opinions Were Not Speculative and they Support Causation. 78

F. The Compensatory Damages Were Not Grossly Disproportionate to Johnson's Extreme Suffering. 79

1. California Law Permits an Award of Damages for a Shortened Life Span. 80

2. It Must be Presumed that the Jury Followed The Court's Instructions. 81

3. An Inflamed Jury Does Not Deliberate for Three Days and Does not give Less Damages than Requested by Counsel. 82

4. The Size of the Award is not Evidence of an Inflamed Jury. 83

5. Non-economic Damages are Not and Cannot be Fixed to Economic Damages. 84

6. Statements in Closing Arguments did Not Inflame the Jury. 84

G. The IARC Monograph Was Admitted Without Objection From Defendant and the EPA Documents are Inadmissible Hearsay. 85

H. Johnson's Claims Are Not Preempted. 90

1. Monsanto Waived Its Express Preemption Arguments. 91

2. Johnson's Claims Are Not Preempted by the Express Preemption Doctrine. 92

3. Impossibility Preemption Does Not Apply to Johnson's Claims. 94

I. Substantial Evidence Supports the Jury's Punitive Damage Verdict... 98

1. The Substantial Evidence Standard of Review Applies. 98

2. There is Substantial Evidence that Monsanto Acted With Malice or Oppression. 98

3. There is Substantial Evidence Supporting a Finding that Monsanto Was Aware of the Probable Consequences of its Actions. 101

V. CONCLUSION 105

CROSS-APPELLANTS' OPENING BRIEF 107

I. INTRODUCTION 107

II. APPEALABILITY 108

III. STANDARD OF REVIEW 108

A. The Trial Court Erred in Concluding that the Jury's Punitive Damages Cannot Exceed the Compensatory Damage Award. 109

1. There was no Punitive Element in the Compensatory Damages. 109

2. A Jury's Award of Punitive Damages Can Exceed Even High Compensatory Damage Awards..... 110

B. Monsanto's Decision to Hide the Cancer Risk for Profit was Highly Reprehensible and Supports a 6.4:1 Ratio of Compensatory to Punitive Damages. 111

1. Monsanto's Tortious Conduct Evinced a Total Indifference to, and a Reckless Disregard for the Health and Safety of Individuals using Roundup. 112

2. The targets of Monsanto's Tortious Conduct Were Both Financially and Physically Vulnerable. 114

3. Monsanto's Conduct Involves Repeated Action Over Decades 114

4. Monsanto's Conduct Involved Trickery and Deceit. 114

5. Monsanto's Conduct was "Hard to Detect." 115

6. Monsanto's Conduct was Profit Motivated..... 115

7. Monsanto's Conduct Creates Potential Harm for Millions of People. 115

V. CONCLUSION 116

CERTIFICATE OF WORD COUNT 117

TABLE OF AUTHORITIES

Cases

Am. Indian Health & Servs. Corp. v. Kent (2018) 24 Cal.App.5th 772.....90
Am. Meat Inst. v. Leeman (2009) 180 Cal.App.4th 728.....93
Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal.3d 987 64
Angie M. v. Superior Court (1995) 37 Cal.App.4th 1217.....98
Ansagay v. Dow Agrosciences LLC (D. Haw. 2015) 153 F.Supp.3d 1270.94
Arnold v. Dow Chemical Co. (2001) 91 Cal.App.4th 698 .....69, 70, 95, 101
Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431 .....passim
Bauer ex rel. Bauer v. Mem'l Hosp. (Ill. 2007) 377 Ill. App. 3d 895 79
Bender v. County of Los Angeles (2013) 217 Cal.App.4th 968 78
Bertero v. Nat'l Gen. Corp. (1974) 13 Cal.3d 43.....78
Beyond Pesticides v. Monsanto Co. (D.D.C. 2018) 311 F. Supp. 3d 82.....93
Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276.....79, 80
Black v. Food Lion, Inc. (5th Cir. 1999) 171 F.3d 308.....76
Bland v. Verizon Wireless, (VAW) L.L.C. (8th Cir. 2008) 538 F.3d 893 76
Blitz v. Monsanto Company (W.D.Wis. 2018) 317 F.Supp.3d 1042 93
Boeken v. Philip Morris, Inc., 127 Cal. App. 4th 1640, 1703, (2005).....
.....99, 104, 110
Buell–Wilson v. Ford Motor Co. (2006) 141 Cal.App.4th 525.....passim
Bullock v. Philip Morris USA, Inc., (2011) 198 Cal. App. 4th 543,
566,..... ...106, 109, 110
Burge v. Department of Motor Vehicles (1992) 5 Cal.App.4th 384 85
Burton v. R.J. Reynolds Tobacco Co. (D. Kan. 2002) 205 F. Supp. 2d 1253
.....110
California Chamber of Commerce v. Brown (2011) 196 Cal.App.4th 233 65
Caltec Ag Inc. v. Dep't of Pesticide Regulation (2019) 30 Cal.App.5th 872
.....89
Carlin v. Superior Court (1996) 13 Cal.4th 1104.....64
Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780 80
Castro v. Melchor (Haw. 2018) 142 Haw. 1.....79
Chicago Title Ins. Co. v. AMZ Ins. Services, Inc. (2010) 188 Cal.App.4th
401.....62
Choctaw Maid Farms, Inc. v. Hailey (Miss. 2002) 802 So. 2d 911.....79
City of Scotts Valley v. Cty. Of Santa Cruz (2011) 200 Cal.App.4th 97.....91
Clausen v. M/V NEW CARISSA (9th Cir. 2003) 339 F.3d 1049 77

Cooper v. Takeda Pharm. Am., Inc. (2015) 239 Cal.App.4th 555.....passim
Davis v. Honeywell Internat. Inc. (2016) 245 Cal.App.4th 477 71
Diaz v. Shultz (1947) 81 Cal.App.2d 328.....63
Dickhoff ex rel. Dickhoff v. Green (Minn. 2013) 836 N.W.2d 321.....80
*Dickson v. National Maintenance & Repair of Kentucky, Inc. (*W.D. Ky. 2011) 2011 WL 12538613.....77
Dirosario v. Havens (1987) 196 Cal.App.3d 1224 82
Faigin v. Signature Group Holdings, Inc. (2012) 211 Cal.App.4th 726 62
Ferebee v. Chevron Chemical Co., (C.A.D.C.1984) 736 F.2d 1529 21
Ford Motor v. Trejo (Nev. 2017) 402 P.3d 649.....67
Garcia v. Duro Dyne Corp. (2007) 156 Cal.App.4th 92 82
Garza v. Asbestos Corp., Ltd. (2008) 161 Cal.App.4th 651 82
George F. Hillenbrand, Inc. v. Ins. Co. of N. America (2002) 104 Cal.App.4th 784.....103
Giglio v. Monsanto (S.D. Cal. 2016) 2016 WL 1722859 93
Gober v. Ralphs Grocery Co. (2006) 137 Cal.App.4th 204, 215.....108
Grimshaw, v. Ford Motor Company (1981) 119 Cal.App.3d 757 98
Hall v. Conoco (10th Cir. 2018) 886 F.3d 1308.....76
Hartt v. Cty. of Los Angeles, (2011) 197 Cal.App.4th 1391 .....15, 62
Hernandez v. Amcord, Inc. (2013) 215 Cal.App.4th 659.....77
Hernandez v. Monsanto (C.D. Cal. 2016) 2016 WL 6822311.....93
Howard v. Owens Corning (1999) 72 Cal.App.4th 621.....61
In re Actos (Pioglitazone) Prod. Liab. Litig. (W.D. La. 2014), 2014 WL 5461859.....102, 111
In re Asbestos Litigation (Del. Super. Ct., Jan. 31, 2019, No. CV N14C-08-164 ASB) 2019 WL 413660 81
In re E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation (S.D. Ohio 2016) 342 F.Supp.3d 773.....76
In re Farm Raised Salmon Cases (2008) 42 Cal.4th 1077.....93
In re Hanford Nuclear Reservation Litig. (9th Cir.) 292 F.3d 1124.....73
In re Marriage of Murray (2002) 101 Cal.App.4th 581 97
In re Roundup Products Liability Litigation (N.D. Cal. 2019) 364 F.Supp.3d 1085 .....passim
Jenkins v. 726 *St John v. Toyota Motor Corp.* (C.D. Cal., 2013) (unpublished) 2013 WL 5775081 85
Jenkins v. Whittaker Corp. (9th Cir. 1986) 785 F.2d 720 85
Johnson & Johnson v. Superior Court (2011) 192 Cal.App.4th 757.....99

Johnson v. United States Steel Corp. (2015) 240 Cal.App.4th 22 67
Jones v. John Crane, Inc. (2005) 132 Cal.App.4th 990 69
Junk v. Terminix Intern. Co. (8th Cir. 2010) 628 F.3d 439 85
Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202 98
Kilpatrick v. Breg, Inc. (11th Cir. 2010) 613 F.3d 1329 76
Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220 84
Loth v. Truck-A-Way Corp. (1998) 60 Cal.App.4th 757 79
Major v. Western Home Ins. Co. (2009) 169 Cal.App.4th 1197 ..... 83, 98
Mangini v. R. J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057 86
Mariscal v. Graco, Inc. (N.D. Cal. 2014) 52 F.Supp.3d 973 67
Mason v. Lake Dolores Group (2004) 117 Cal.App.4th 822 15
Maxton v. Western States Metals (2012) 203 Cal.App.4th 81 70
Meals ex rel. Meals v. Ford Motor Co., (Tenn. 2013) 417 S.W.3d 414 83
Medtronic, Inc. v. Lohr (1996) 518 U.S. 470 89
Mendoza v. Monsanto (E.D. Cal. 2016) 2016 WL 3648966 93
Merck Sharp & Dohme Corp. v. Albrecht, (2019) 587 U.S. ____ 95, 96
Miller v. Nat'l Am. Life Ins. Co. (Ct. App. 1976) 54 Cal.App.3d 331 107
Milward v. Rust-Oleum Corp. (1st Cir. 2016) 820 F.3d 469 76
Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306 98
Morson v. Superior Court (2001) 90 Cal.App.4th 775 70
Mortellite v. Novartis Crop Protection, Inc. (3d Cir. 2006) 460 F.3d 483 . 95
Munn v. Hotchkiss Sch. (Conn. 2017) 165 A.3d 1167 83
Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910 108
Nellie Gail Ranch Owners Assn. v. McMullin (2016) 4 Cal.App.5th 982 .. 90
Nickerson v. Stonebridge Life Ins. (2013) 219 Cal.App.4th 188 110
Oakland Raiders v. National Football League (2007) 41 Cal.4th 624 107
Paduano v. Am. Honda Motor Co. (2009) 169 Cal.App.4th 1453 93
Pannu v. Land Rover North America, Inc. (2011) 191 Cal.App.4th 129 62
Patrick v. Maryland Cas. Co. (1990) 217 Cal.App.3d 1566 97
People v. Ayers (2005) 125 Cal.App.4th 988 85
People v. Baeske (1976) 58 Cal.App.3d 775 ..... 19, 85
People v. Bradford (1997) 15 Cal.4th 1229 88
People v. Clark (1992) 3 Cal.4th 41 85
People v. Close (1957) 154 Cal.App.2d 545 84
People v. ConAgra Grocery Products Co. (2017) 17 Cal.App.5th 51 86
People v. Garvin (2003) 110 Cal.App.4th 484 ..... 84, 88

People v. Jurado (2006) 38 Cal.4th 72 ..... 15, 81
People v. McKinnon (2011) 52 Cal.4th 610 84
People v. Overstock.com, Inc. (2017) 12 Cal.App.5th 1064 61
People v. Price (1991) 1 Cal.4th 324 88
Perrine v. E.I. du Pont de Nemours and Co. (W. Va. 2010) 225 W.Va. 482 104
Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270 ..... 98, 102
Philip Morris USA v. Williams (2007) 549 U.S. 346 111
Quesada v. Herb Thyme Farms, Inc. (2015) 62 Cal.4th 298 90
Reckis v. Johnson & Johnson (Mass. 2015) 471 Mass. 272 83
Reckitt Benckiser, Inc. v. Jackson (D.D.C. 2011) 762 F. Supp. 2d 34 92
Roberti v. Andy's Termite & Pest Control, Inc. (2003) 113 Cal.App.4th 893 71
Roby v. McKesson Corp., (2009) 47 Cal.4th 68 109
Romo v. Ford Motor Co. (2003) 113 Cal.App.4th 738 97
RSB Vineyards, LLC v. Orsi, 15 Cal. App. 5th 1089 101
Rufo v. Simpson (2001) 86 Cal.App.4th 573 82
Saller v. Crown Cork & Seal Co. (2010) 187 Cal.App.4th 1220 .... 67, 68, 70
Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747 71
Schwarz v. Philip Morris USA, Inc. (Or. App. 2015) 355 P.3d 931 110
Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498 80
Sheppard v. Monsanto (D. Hawaii, 2016) 2016 WL 3629074 93
Silverado Modjeska Recreation & Park Dist. v. Cty. of Orange (2011)197 Cal.App.4th 282 63
Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal.4th 1159 107, 109, 110
Spielholz v. Superior Court (2001) 86 Cal.App.4th 1366 61
Sprietsma v. Mercury Marine (2002) 537 U.S. 51 90
State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408 ... 106, 110
Stephen v. Ford Motor Co. (2005) 134 Cal.App.4th 1363 87
Tamraz v. Lincoln Elec. Co. (6th Cir. 2010) 620 F.3d 665 76
Torkie-Tork v. Wyeth, (E.D. Va. Nov. 17, 2010) No. 1:04CV945, 2010 WL 11431846 114
Treadwell v. Nickel (1924) 194 Cal. 243 97
Trejo v. Johnson & Johnson (2017) 13 Cal.App.5th 110 ..... 65, 70
Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504 101

United States v. Anderson, (Del.1995) 669 A.2d 73 79
United States v. Keplinger (7th Cir. 1985) 776 F.2d 678 49
Waller v. Southern Cal. Gas Co. (1959) 170 Cal.App.2d 747 71
Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285 84
Webb v. Special Electric Co. Inc. (2016) 63 Cal.4th 167 67
Wendell v. GlaxoSmithKline LLC (9th Cir. 2017) 858 F.3d 1227 . 16, 71, 73, 74
West v. Johnson & Johnson Prod., Inc. (1985) 174 Cal.App.3d 831 .. 67, 70, 98
Westphal v. Wal-Mart Stores, Inc. (1998) 68 Cal.App.4th 1071 .... 62, 80, 83
Whiteley v. Philip Morris Inc. (2004) 117 Cal.App.4th 635 15
Whitlock v. Pepsi Americas (9th Cir. 2013) 527 Fed.Appx. 660 77
Williams v. Philip Morris Inc. (2006 Or.) 127 P.3d 1165 110
Williams v. Superior Court (2017) 3 Cal.5th 531 107
Wilshire Ins. Co. v. Tuff Boy Holding, Inc. (2001) 86 Cal.App.4th 627 15
Wilson v. Southern California Edison Co. (2015) 234 Cal.App.4th 123 98
Yung v. Grant Thornton, LLP (Ky. 2018) 563 S.W.3d 22 109

Statutes

7 U.S.C. § 136(q)(1)(G) 92
7 U.S.C. § 136v 90, 92, 94, 95
7 U.S.C.A. § 136a 86, 90, 93
7 U.S.C.S. §136 90
Cal. Evid. Code § 450 87
Cal. Evid. Code, § 1280 86
California Civ. Code § 3294 98
Code of Civ. Pro. § 904.1(a)(4) 108

Other Authorities

CACI 3905A 79
CACI 3945 111
Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 28 74
The Federal Judicial Center's Reference Manual on Scientific Evidence (3rd. Ed.) 66

Regulations

40 C.F.R. §156.10(a)(1) 90

40 C.F.R. 155.52(a) 104
40 C.F.R. 156.70(b) 92
53 Fed. Reg. 15952 90

Constitutional Provisions

Cal. Constitution, art. VI, § 13 63
Cal. Constitution. art. I, § 16 16

In The California Court of Appeal

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Defendant and Appellant/Cross-Respondent

RESPONDENT'S BRIEF

In June of 2012, Mr. Dewayne Lee Johnson (Johnson) was hired as an Integrated Pest Manager by the Benicia Unified School District in Benicia, California. His job included spraying thousands of gallons of Monsanto's glyphosate-containing pesticides RangerPro and RoundupPro (collectively referred to as Roundup). Monsanto knew of the risk of cancer but never warned Johnson that Roundup was carcinogenic.

On August 13, 2014, after three spraying seasons, Johnson was diagnosed with mycosis fungoides, a rare subtype of non-Hodgkin Lymphoma ("NHL") which forms in the lymphocyte cells near the skin surface. After his diagnosis, Johnson called Monsanto twice to ask if Roundup could be a cause of his cancer. No one returned his calls even though Monsanto knew for decades that Roundup carried a risk of cancer. Johnson therefore continued spraying Roundup for another season. By September 17, 2015, Johnson's NHL transformed into an aggressive and deadly variant that typically kills people within a few years. Johnson's NHL has left his skin covered in open lesions and scars.

Johnson was 43-years-old at the time of his cancer diagnosis. Now 47, Johnson is living on borrowed time. His emotional and physical pain is immense.

Johnson sued Monsanto seeking compensatory damages for failure to warn, design defect, and punitive damages due to Monsanto's reprehensible conduct.

On August 10, 2018, after a week of voir dire, four weeks of testimony, and three days of deliberation, a unanimous jury concluded that Roundup was a substantial factor in causing Johnson's NHL. The jury awarded Johnson $39,253,209.32 in compensatory damages. 32-RT-5325:15-5326:7. The jury unanimously concluded there was clear and convincing evidence that Monsanto acted with malice or oppression in its conduct. *Id.* The jury awarded (11-1) $250 Million in punitive damages. *Id.* The Trial Court denied Monsanto's JNOV motion and conditionally denied Monsanto's New Trial Motion contingent on Johnson's acceptance of a remittitur of the punitive damages to $39,253,209.32. 6AA6154. Johnson accepted the remittitur intending to avoid an appeal. 6AA6156-6157. Monsanto appeals the verdict; Johnson cross-appeals the reduction in punitive damages. 6-AA-6164.

Johnson is filing a combined brief under California Rules of Court, Rule 8.216. Johnson first responds to Monsanto's opening brief and then sets forth his arguments on cross-appeal. The same Statement of Facts and Procedural History relate to both arguments.

I. INTRODUCTION

Monsanto received a fair trial by an independent, highly educated, and engaged jury. Monsanto's request to overturn the jury verdict runs counter to Johnson's "constitutional right to a jury trial" and California's "policy of judicial economy against willy-nilly disregarding juries' hard work." *Cooper v. Takeda Pharm. Am., Inc*. (2015) 239 Cal.App.4th 555, 572; Cal. Const.

art. I, § 16. Monsanto carries a "daunting burden," when asserting a lack of substantial evidence to support the jury's verdict. *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678. On appeal, evidence must be viewed "in the light most favorable to the verdict." *Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 829-830. Monsanto must also "fairly state all the evidence, not just the evidence favorable to the appellant." *Hartt v. Cty. of Los Angeles*, (2011) 197 Cal.App.4th 1391, 1402. Monsanto has not fairly stated all the evidence and has wholly failed to meet it daunting burden to reverse the trial court's ruling denying the JNOV.

A central tenet of Monsanto's appeal is that the "tentative" order on JNOV is controlling in this matter. (AOB 36-39). However, a "tentative opinion has no relevance on appeal." *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 638. Monsanto's assertion that the trial court cannot change a tentative ruling contravenes this well-established principle. Monsanto also protests, without evidence, that the trial court was "unduly influenced" by an editorial published by a musician. These arguments are meritless. If anything, the tentative order shows that the Trial Court fairly considered the arguments of both parties and the voluminous record before arriving at its final conclusions denying JNOV.

The jury's well-considered verdict, and the Trial Court's affirmation of that verdict, was based upon substantial evidence presented at trial that Roundup caused Johnson's cancer and Monsanto willfully manipulated scientific evidence and hid the risk of cancer from consumers and regulators.

The jury's verdict was not based on passion or emotion; it was based on reason. An inflamed jury would not have taken three days to deliberate (*See e.g. People v. Jurado* (2006) 38 Cal.4th 72, 134), or have requested during deliberations items such as "all of the medical records," and "historical controls in the CD-1 Mouse studies." 31-RT-5304:3-7. An inflamed would not have awarded only two-thirds of the punitive damages

requested by counsel. 29A-RT-5118:11-16. The jury's verdict was reasonable and necessary to punish Monsanto for its despicable disregard for human safety; and deter such future conduct.

The jury's damages award was reasonable and necessary to compensate Johnson for his horrific injuries. Johnson lives in constant pain. At times, he cannot sleep or wear a shirt due to the unbearable pain caused by open lesions on his skin. He has lost his livelihood, his enjoyment of life, and a future with his wife and two sons.

Monsanto does not challenge the admissibility of the opinions of Johnson's experts. Johnson's experts applied the best scientific scholarship, through application of the Bradford-Hill criteria, which strongly supports the conclusion that Roundup causes NHL. The Bradford Hill methodology is "well accepted in the medical field for making causal judgments." *Wendell v. GlaxoSmithKline LLC* (9th Cir. 2017) 858 F.3d 1227, 1235, fn. 4. Johnson's experts reviewed the totality of the evidence and opined that: the epidemiological studies show Roundup users have an increased risk of developing NHL; glyphosate causes cancer, including malignant lymphomas in animals; Roundup damages DNA in human lymphocyte cells; and Roundup caused Johnson's NHL. See *Cooper*, 239 Cal.App.4th 555 at 589–90 (requiring that the "body of studies be considered as a whole.").

The opinion of Johnson's expert, Dr. Chadi Nabhan, that Roundup caused Johnson's cancer is also in accordance with California law. "Under the applicable substantial factor test, it is not necessary for a plaintiff to establish the negligence of the defendant as the proximate cause of injury with absolute certainty so as to exclude every other possible cause of a plaintiff's illness..." *Id.* at 578. This is true even where the expert offering the differential diagnosis cannot typically identify a cause of cancer in most patients. *Id.* at 576, 593 (opinion admissible even where pathology cannot

distinguish plaintiff from "the myriad of bladder cancer patients he treats with no known causes.").

The opinions of Johnson's experts are supported by the findings of the International Agency for Research on Cancer ("IARC"). IARC is the "prime arbiter" in determining whether a chemical is carcinogenic. 16A-RT-2550:12-17. From March 3-10th, 2015, after months of carefully evaluating the available data, a panel of seventeen experts convened and unanimously determined that Roundup is a probable human carcinogen. 5-AA-5737-5738. These seventeen experts included Dr. Lauren Zeise, Head of California's Office of Environmental Health Human Assessment (OEHHA); and renowned epidemiologist Dr. Aaron Blair, retired chief of cancer epidemiology at the National Cancer Institute, and lead investigator of the Agricultural Health Study ("AHS"). 12A-RT-1726:6.

IARC's assessment was based on real-world exposures to applicators such as Johnson and represents a real risk to human health. 12-RT-1741:21-24; 16A-RT-2600:8-2601:21. IARC's findings are not theoretical but rather should "raise a red flag to those charged with protecting Public Health" and should "trigger immediate remedial action" such as bans or "labeling of carcinogenic hazards." 16A-RT-2604:7-18.

The consensus among independent scientists is that IARC follows the proper methodology and that glyphosate is carcinogenic. In 2015, 125 independent scientists co-authored a peer-reviewed article supporting the scientific methodology utilized by IARC. 16A-RT-2606:20-2609:19. In 2016, 94 independent scientists co-authored a peer-reviewed article supporting IARC's assessment of Roundup; concluding that assessments by European regulators were flawed and that Roundup is a probable human carcinogen. 13A-RT-2016:3-2019:25.

The primary studies relied upon by Johnson's experts and IARC were available to Monsanto before 2012. Any proper review of these materials

should have prompted Monsanto to warn Johnson and others that Roundup was carcinogenic. *In re Roundup Products Liability Litigation* (N.D. Cal. 2019) 364 F.Supp.3d 1085, 1089 ("there is sufficient evidence for the plaintiffs to argue that Monsanto could have reached this conclusion on its own had it investigated the issue responsibly and objectively.").

The jury rejected the regulatory reviews relied upon by Monsanto. Those agencies are legally restricted to only evaluating one ingredient in Roundup, the chemical glyphosate, whereas IARC evaluates the entire formulation (including the genotoxic surfactants in Roundup). 22A-RT-3920:16-25. In fact, an independent Scientific Advisory Panel (SAP) concluded that the EPA violated its own carcinogenicity guidelines in its draft assessment of glyphosate. 13A-RT-2010:4-25; 13B-RT-2071:21-24; 26B-RT-4607:23-4608:13, 26B-RT-4610:1-4611:11 26B-RT-4613:1-3; 26B-RT-4629:15-20, 26B-RT-4631:23-4632:4. Accordingly, the jury was entitled to assign more credibility to Johnson's experts and IARC than to the EPA.

European agencies' glyphosate assessments were likewise flawed. In Europe, Monsanto wrote the first draft of the carcinogenicity review utilized by the European regulatory agencies. 13A-RT-2012:5-2014:23. The evidence supports an inference that these regulatory reviews are not the result of scientific scholarship. Instead they result from Monsanto's influence on government regulators. Monsanto engaged in a massive campaign targeted at "Regulators" to "Orchestrate Outcry with IARC Decision." 6-AA-6430; 6-AA-6587-6598. Monsanto received commitments by EPA employees to conclude that glyphosate was not carcinogenic prior to a review being conducted (6-AA-6601), used its connections to get "key democrats on the hill" to pressure the EPA and let them know "they're being watched" (6-AA-6589), and used its EPA contacts to delay and kill other government regulatory agency reviews of glyphosate. (6-AA-6601). According to

IARC, Monsanto "deliberately and repeatedly misrepresented the agency's work." 16A-RT-2597:15-18.

There was no error in admitting the IARC monograph as Monsanto did not object to its admission at trial. 12A-RT-1740:15-23. And for good reason. Two of the authors of the IARC monograph testified via videotaped deposition and were cross-examined on the contents of the monograph. Monsanto decided not to elicit the testimony of any EPA employees who authored the EPA reports.

Furthermore, "[A] public employee's writing, which is based upon *information obtained from persons who are not public employees*, is generally excluded because the 'sources of information' are not 'such as to indicate its trustworthiness.'" *People v. Baeske* (1976) 58 Cal.App.3d 775, 780–781. Here, the EPA conducts no testing of its own; it relies mainly on the results of tests conducted and reported by glyphosate manufacturers. It was Monsanto that asked that the EPA documents be sent back to the jury with a limiting instruction they were not to be used for the truth of the matter asserted. 24A-RT-4301:7-12. There was no error by the Trial Court

Monsanto benefitted overall from the Trial Court's evidentiary rulings. The Trial Court allowed Monsanto to repeatedly reference and read from the regulatory documents of the EPA and Europe as well as Japan, New Zealand, and Australia. 5-AA-568. However, the Trial Court excluded any reference to the fact that California's EPA declared glyphosate a known carcinogen. RA236. The Trial Court also excluded the fact that Roundup was approved by the EPA in 1974 based on fraudulent carcinogenicity studies. RA46-47; RA74.

Monsanto wrongly asserts there is no evidence supporting punitive damages because the Trial Court did not cite to the record in denying Monsanto's Motion for JNOV. However, the Trial Court is not required to specify its reasons, or provide any reasons, when denying a Motion for New

Trial or JNOV. Cal. Civ. Proc. Code § 657. The Trial Court correctly determined that "the jury could conclude that Monsanto acted with malice by consciously disregarding a probable safety risk of [Roundup] and continuing to market and sell its product without a warning." 6-AA-6651.

There is substantial evidence to support a claim for punitive damages. Indeed:

> ...there is strong evidence from which a jury could conclude that Monsanto does not particularly care whether its product is in fact giving people cancer, focusing instead on manipulating public opinion and undermining anyone who raises genuine and legitimate concerns about the issue.

In re Roundup, 364 F. Supp. 3d at 1085.

Punitive damages are particularly warranted in Johnson's case. Johnson called Monsanto twice looking for answers. The operator for the second call noted, "he has concerns about continuing to use Roundup as part of his job and questions if Roundup could be a source of his cancer... **The caller's level of fear is rising over his continued use of Ranger Pro."** 6-AA-6519 (emphasis added). At this time, Monsanto knew of IARC's conclusion that Roundup was a probable human carcinogen, and knew it had to report Johnson's call to the EPA as an adverse event report. 5-AA-5659-5660. However, Monsanto did not call Johnson back to advise him that Roundup was associated with NHL. That is not merely negligence; that is a reckless disregard for Johnson's life. Johnson kept spraying Roundup and his NHL progressed from a manageable cancer to a deadly cancer.

The jury's verdict is consistent with the role of punitive damages in California. "The law in California is that punitive damages are permitted in product liability actions precisely because **'[g]overnmental safety standards…have failed to provide adequate consumer protection** against the manufacture and distribution of defective products.'" *Buell–Wilson v. Ford Motor Co*. (2006) 141 Cal.App.4th 525, vacated on other grounds in

Ford Motor Co. v. Buell-Wilson (2007) 550 U.S. 931, and disapproved of on other grounds in *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21 (emphasis added).

The jury's verdict is also consistent with the U.S. Supreme Court's emphasis that "tort suits can serve as a catalyst" in identifying risks of pesticides not yet recognized by the EPA. *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 451. As the Supreme Court explained, "... a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products…" *Id. (*quoting *Ferebee v. Chevron Chemical Co.,* (C.A.D.C.1984) 736 F.2d 1529).

In *Bates,* the Supreme Court rejected the very preemption arguments asserted by Monsanto. In light of the controlling precedent from *Bates,* the Trial Court, consistent with every state and federal court that has considered the issue, properly rejected Monsanto's preemption arguments.

In denying Monsanto's JNOV, the Trial Court correctly concluded there is substantial evidence, particularly when weighed in a light most favorable to the prevailing party, to support the jury's verdict. This Court should affirm the jury's findings on liability and compensatory damages and affirm the availability of punitive damages.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Procedural History

1. Pre-Trial Proceedings

Johnson initiated the present action on January 28, 2016. 1-AA-34. On May 17, 2018, the Trial Court (Hon Curtis E.A. Karnow) denied Monsanto's motion for summary judgment on causation holding that, "most of the opinions of Johnson's causation experts are admissible. These suffice

as evidence of both general and specific causation." 4-AA-3207. The Trial Court discussed the opinions of Johnson's experts' regarding epidemiology (4-AA-3181-3182), animal studies (4-AA-3184), genotoxicity (4-AA-3186), and the Bradford-Hill criteria. (4-AA-3189). The Trial Court found that the opinions of Johnson's experts on these topics were reliable and admissible. Regarding Johnson's case-specific expert Dr. Chadi Nabhan (Nabhan), the Trial Court specifically considered the case law on idiopathic causes and determined that Nabhan properly conducted a differential etiology. 4-AA-3193-3194. *Id.* Monsanto has not appealed the Trial Court's order on the admissibility of experts.

The Trial Court also rejected Monsanto's preemption arguments. On implied preemption, the Trial Court held that "[i]t does not appear that any court has extended the Wyeth line of cases to FIFRA." 4-AA-3211. The Trial Court found that FDA cases are not relevant to this case because a "state cannot outlaw the sale of [an FDA approved] prescription drug." AA3210. "Under FIFRA, on the other hand, Congress has spoken." *Id.* FIFRA expressly allows tort claims, and "a state is expressly permitted to ban" an EPA-approved pesticide. 4-AA-3210-3211.

Finally, the Trial Court rejected Monsanto's arguments on punitive damages, holding:

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

4-AA-3213-3214.

2. Trial Proceedings

The Honorable Suzanne R. Bolanos was assigned as the trial judge. 5-AA-4979. At the outset, Judge Bolanos stated that "I think that [Judge Karnow] made the right decisions with respect to all of his orders." 3-RT-297:18-298:1.

Voir dire lasted four days. Opening arguments commenced on July 9, 2018, and the parties presented four weeks of evidence. The jury heard live testimony on behalf of Plaintiffs from:

- Dr. Cristopher Portier (Portier), (Ph.D. in Biostatistics and M.S. in epidemiology) one of the chief scientists in assessing carcinogenicity of chemicals at the National Toxicology Program. 26B-RT-4585:12-19; 12A-RT-1697:1-23; 1704:19-1706:9-12.

- Dr. Alfred Neugut (Neugut), a practicing oncologist and professor of epidemiology and oncology at Columbia University, with a Ph.D. in chemical carcinogenesis. 16A-RT-2535:12-15. Neugut has published over 600 peer-reviewed papers and received the lifetime achievement award from the leading cancer epidemiology organization. 16A-RT-2540:2-6; 16A-RT-2547:19- 2548:23; 16A-RT-2543:10-12.

- Dr. Chadi Nabhan (Nabhan), an oncologist specializing in lymphoma and medical director at the University of Chicago treating 30-40 lymphoma patients per week. Nabhan has published 300 peer-reviewed articles primarily focused on NHL. 17A-RT-2778:15-23; 17A-RT-2779:13-24, 2784:3-2785:15, 2785:15-2786:15.

- Dr. William Sawyer (Sawyer), a toxicologist with a Ph.D. in toxicology and a Masters in molecular and cellular biology. Sawyer regularly consults on toxicological issues for federal and state agencies. 21A-RT-3586:4-22, 3588:7-12, 3592:2-21.

- Dr. Charles Benbrook (Benbrook), an agricultural economist, who has extensive experience in pesticide regulatory matters. 22A-RT-3853:14-18, 3857:18-3864:22.

- Dr. Ope Ofodile (Ofodile), a medical doctor, and Johnson's main treating physician. 18A-RT-3155:3-3156:1

-Johnson and his wife Areceli Johnson.

The jury also heard videotaped testimony from Dr. Aaron Blair (Blair), the Chair of the IARC Working Group that evaluated glyphosate (23B-RT-4155:16-21) and Dr. Matthew Ross, a genotoxicity expert and member of the IARC working group. (23B-RT-4155:4-11). These witnesses reaffirmed their opinion that Roundup was a probable human carcinogen. The jury also heard videotaped testimony from five Monsanto employees. 5-AA-5505

Without objection from Monsanto, Johnson moved for admission of the IARC monograph which detailed IARC's findings on glyphosate. 12A-RT-1743:19-30. The Trial Court permitted Monsanto to repeatedly reference and read quotes from EPA and foreign agency documents to the jury. [1] 9-RT-1299:20-1308:1

The Trial Court correctly did not allow foreign regulatory and draft EPA documents to go back to the jury because "many of them are outdated, they're not final reports…they contain the opinions of numerous different individuals. **They don't meet the exception under Evidence Code Section 1280 as business records**." 20-RT-3529:3530:18. Monsanto subsequently requested that two recent draft EPA documents be admitted for non-hearsay

[1] 13A-RT-2034:25-2035:2; 2037:7-2037:9; 2042:13-2042:23; 2047:15-2048:4; 2049:17-2051:17; 2052:24-2053:4; 2054:10-2055:9-2055:25; 13B-RT-2065:25-2066:3; 2075:23- 2082:18; 2085:2-11; 2087:22-2089:1; 2091:14-2106:11; 2105:16--2122:17; 2125:3-2125:19; 2127:16-2129:6; 2132:18-2134:22 ; 2136:18-20; 2137:25-2139:4; 2147:9-17; 2154:6-2155:1; 2161:9-2164:23; 23B-RT-4147:11-13; 26B-RT-4631:19-22; 26A-RT-4557: 19-21; 29B-RT-5170:1-4; 5174:3-5175:11; 5178:19-5179:14; 5182:13-17; 5187:3-5188:20; 5196:16-5200:4; 5221:1-3

purposes with a limiting instruction that they could not be considered for the truth of the matter asserted. 20-RT-3536:7-3538:18.

The Trial Court excluded several key pieces of evidence proffered by Johnson. The Trial Court excluded any reference to the fact that, on July 7, 2017, California declared glyphosate to be a known carcinogen. 8B-RT-1201:21-1202:2. The Trial Court also excluded the fact that EPA's approval of Roundup in 1974 was based on fraudulent studies. 2-RT-106:14-18.

The jurors were permitted to submit questions to the witnesses throughout trial. A multitude of questions were focused on scientific issues including: "How are micronuclei related to cancer? Supporting data?" and "Were control animals given vehicle solvent alone?" RA287, 290, 296.

The Trial Court denied Monsanto's motions for non-suit and directed verdict on all counts. 23A-RT-4052:9-12; 29A-RT-5025:15-17; 28-RT-4915:7-17.

During closing arguments, Monsanto did not object when Johnson's counsel reminded the jury of the Court's limiting instruction on the EPA draft documents. 29A-RT-5064:23-5065:5. Monsanto did not object when Johnson's counsel told the jury that their verdict would change the world. 29A-RT-5058:1-5. Monsanto did not object when Johnson's counsel asked the jury to award Johnson $1 Million for each year he will suffer in the future or for each year of his life that will be lost. 29A-RT-5110:3. When Monsanto did object during closing arguments, those objections were sustained and Johnson's counsel was admonished. 29A-RT-5073:21-24; 5117:8-22. Johnson's counsel requested $373 Million in punitive damages. 29A-RT-5118:11-19.

The jury deliberated for three days and their questions demonstrated a deep consideration of the evidence. 30-RT-5279:2-5, 5279:7-10; 31-RT-5291:11-25, 5296:6-10. After the jury asked for testimony regarding

historical controls in the CD-1 Mouse studies, the Trial Court noted that the jury was "really sifting" through the evidence. 31-RT-5304:4-10.

On August 10, 2018, a unanimous jury concluded that Roundup was a substantial factor in causing Johnson's NHL and that Monsanto acted with malice and oppression in its conduct related to Roundup. 32-RT-5325:15-5326:7. The jury awarded Johnson $39,253,209.32 in compensatory damages and $250 Million in punitive damages. *Id.*

3. Post-trial Proceedings

The full 180 pages of briefing on post-trial motions were not completed until Friday, October 5, 2018. 6-AA-6082-6137. On October 10, the Trial Court issued a brief tentative ruling outlining its initial thoughts to focus the arguments of counsel. 6-AA-6140. After a two-hour hearing, the Trial Court requested each side to submit additional briefing in the form of proposed orders. 1B-RT-96:11-19.

After full consideration of briefing, argument of counsel, and the voluminous trial record, the Trial Court denied Monsanto's Motions for JNOV, and denied Monsanto's Motion for a New Trial contingent on Johnson's acceptance of a remittitur of the punitive damages to $39,253,209.32. 6-AA-6154.

In denying JNOV, the Trial Court determined that "Nabhan's methodology in this case is similar to the differential diagnosis accepted by the Court of Appeal in Cooper." 6-AA-6148. The Trial Court rejected Monsanto's idiopathy arguments stating: "Nabhan explained that because Johnson was much younger than the average patient who developed the disease this raised a 'red flag' that his cancer is not likely to be idiopathic and more likely to be caused by an exposure." *Id.*

The Court concluded that the "jury is 'entitled to' reject the claims of Defendant's experts in reaching a verdict on punitive damages. *Id*. Thus, the

jury could conclude that Monsanto acted with malice by consciously disregarding a probable safety risk of [Roundup] and continuing to market and sell its product without a warning." 6-AA-6151.

Johnson accepted the remittitur intending to avoid a lengthy appeals process. 6-AA-6156-6157. Monsanto still appealed the verdict; and Johnson now cross-appeals the reduction in punitive damages. 6-AA-6164.

B. There Is Substantial Evidence Supporting the Jury's Finding That Roundup Caused Johnson's NHL.

1. Johnson's Experts Considered the Totality of the Evidence; Monsanto's Experts Did Not.

Plaintiff's experts are eminently qualified to offer causation opinions. After exhaustive review of the totality of the scientific evidence and the case-specific medical facts, Plaintiff's experts concluded that Roundup caused NHL and was a substantial contributing factor in causing Johnson's NHL. This testimony, considered in the light most favorable to the verdict, provides substantial evidence of causation.

Based solely on the epidemiology data, Portier concluded that "causality is reasonable here" as "there's a demonstrated association." 13A-RT-1964:1-17. Based on all of the data and applying the Bradford-Hill criteria, Portier concluded that "glyphosate is carcinogenic, causing NHL in humans." 13A-RT-1994:19-21. Neugut agreed that the totality of the evidence demonstrates "a causal association between glyphosate and NHL." 16B-RT-2646:16-23.

Portier explained that scientists should review the totality of the evidence before rendering an opinion on causation. 13A-RT-1965:11-1966:7. Neugut concurred. 16B-RT-2736:25-2737:17. Nabhan studied the Roundup literature for several months before even agreeing to be retained by Johnson's counsel. 17A-RT-2790:12-21. He explained that "[f]rom a

patient perspective, as a clinician, you have to take all of this body of evidence in context of what's impacting patients…" *Id.*

Defense experts did not review the totality of the evidence. Dr. Mucci only considered epidemiology studies. 24B-RT-4317:22-4318:5. Dr. Foster only considered animal carcinogenicity studies. 26A-RT-4493:17-4494:4. Dr. Kuzel (Kuzel), who was called to rebut Nabhan, reviewed only one study on Roundup, provided by Monsanto, and had no opinion as to whether or not Roundup was a human carcinogen. 27A-RT-4793:13-4794:4.

Monsanto attempts to rely on deposition transcripts of Johnson's treaters who did not testify in person or via deposition. However, Johnson's treaters, including Dr. Kim, testified at deposition they had not reviewed the literature on Roundup and NHL. 17A-RT-2790:12-18. Nabhan was likewise unaware of the link between Roundup and NHL until he spent months studying the issue. *Id.*

2. Epidemiology Supports Causation

Johnson offered substantial evidence that the epidemiology supports causation, through his experts, the testimony of Blair, and the IARC monograph. Testifying about the multiple studies on Roundup, Neugut explained:

> ...the studies that were done in different context, different populations, different countries under different circumstances…across all the studies, they were consistently positive…that's a very important criterion in causal associations.

16B-RT-2644:17-20. Johnson's experts considered potential flaws in these studies and still considered them strong evidence of causation. 13-A-RT-1965:3-5; 16A-RT-2612:3-18.

Both Neugut and Blair agree that most errors in epidemiology studies push the relative risk down closer to one. 16A-RT-2584:21-2589:14. This

means the risk estimates of the studies on Roundup and NHL are "an underestimate of truth." 16A-RT-2585:5-6.

a. Case-Control Studies

Even though studies underestimate the actual risk estimate, the results of the case-control studies on Roundup still demonstrated high odds ratios (O.R.):

McDuffie (2001): Study evaluating the risk of NHL among Canadians who used Roundup more than two times a year finding **an O.R. of 2.12**, i.e. **doubling the risk for NHL**. 12B-RT-1880:15-1885:2;

Hardell (2002): Pooled study demonstrating a **statistically significant O.R. of 3.04** in a univariate analysis and a non-statistically significant O.R. of 1.85 in a multivariate analysis factoring in other pesticides which showed a "fairly strong signal." 12B-RT-1885:9-1886:8; 24B-RT-4360:5-4361:16;

De Roos (2003): Pooled analysis of three studies conducted by the National Cancer Institute adjusting for several pesticides and demonstrating a **doubling of the risk for NHL** for people who ever used Roundup. 12B-RT-1886:9-23, 1889:6-12; 24B-RT-4382:2-21;

Eriksson (2008): Study demonstrating a **statistically significant O.R. of 2.02** for ever-never use of Roundup in the univariate analysis and a non-statistically significant O.R. of 1.5 in a multivariate analysis. 12B-1894:13-1896:3. For people who used Roundup over ten days there was a **statistically significant increased risk of 2.36.** 12B-RT-1897:1-22; 17B-RT-3027:6-9;

NAPP (2015) – Pooled analysis of De Roos and McDuffie. Monsanto's claim that the NAPP study shows no risk of NHL is contrary to the evidence. The authors of the study specifically state that:

> Our results are also aligned with findings from epidemiological studies of other populations that found an elevated risk of NHL for

> glyphosate exposure and with a greater number of days per year of glyphosate use. As well as a meta-analysis of glyphosate use and NHL risk. From an epidemiological perspective **our results were supportive of the IARC evaluation of glyphosate as a probable Group 2A carcinogen for NHL.**

14B-RT-2388:1-11; 24B-RT-4415:3-4416:19.

Blair, an author of the NAPP study, reported that in a dose-duration analysis "those who handled glyphosate for **greater than two days/year had significantly elevated odds of non-Hodgkin lymphoma overall, odds ratio of 2.66.**" 5-AA-5534; *see also* 24B-RT-4409:22-4411:14. (doubling of the risk after adjustment for other pesticides.).[2]

b. The AHS study

Blair, who is also an author of the AHS study, further testified that the case-control studies outweighed the (negative) AHS cohort study. 5-AA-5533. Dr. De Roos, another author, agreed that the AHS study alone does not outweigh the case-control studies. De Roos co-authored an article with Portier and 93 other scientists concluding that the overall evidence shows that Roundup is associated with NHL. 5-AA-5553; 113A-RT-2015:5-2018:25. IARC also agreed that the AHS findings did not outweigh the case-control studies concluding that overall that a "positive association has been observed for NHL." 6-AA-6902.

The jury heard substantial evidence that problems with the AHS study limits its utility. IARC noted "that non-differential exposure misclassification biases relative risk estimates towards the null in the AHS." 6-AA-6811-6816; AA6811. Exposure misclassification refers to a situation where some Roundup users who developed NHL are errantly classified as non-users. Dr. Blair studied the effect of misclassification in the AHS and

[2] Neugut describes Dr. Blair as one of the "leading scientists in this country in this area." 16A-RT-2586:5-7.

concluded that it "may diminish risk estimates to such an extent that no association is obvious which indicates false negative findings might be common." 16B-RT-2635:8-14.

The updated AHS data is less reliable than the initial AHS data considered by IARC. Blair testified that there was a problem with loss to follow-up. 5-AA-5533-5534. Neugut explained that this problem led to the use of an imputation methodology which introduced an additional 17% relative error rate on top of a substantial the baseline error rate. 16B-RT-2731:20-2732:13. Neugut stated:

> ...between all the errors, which are all going to be conservative, as I said, they're all going to reduce the observed risk ratio to 1 or below 1, so you're not going to see anything. That's why I think that the AHS study is really, to a large degree, uninterpretable and really doesn't give us any information with regard to the association between glyphosate and NHL.

16B-RT-2636:19-2637:11. Neugut explained that the AHS study found no association for two other known carcinogens, demonstrating that the "fact that it missed glyphosate is not remarkable. It goes along with its failures in other instances." 16B-RT-2640:1-18.

Portier agreed that there were "very serious flaws" in the updated AHS due to the approximately 40% loss to follow-up. 13A-RT-1954:3-1959:17. These flaws were compounded by a dramatic increase in the use of Roundup from the beginning of the study to the present. *Id*. These two factors would lead to exposure misclassification. *Id.* For these reasons, Johnson's experts put more weight on the case-control studies which consistently demonstrate an increased risk of NHL.

c. Monsanto Misrepresents Neugut's Testimony.

Neugut flatly refuted Monsanto's claims that there are no statistically significant studies that adjust for pesticides. 16B-RT-2700:24-2701:4. Neugut did not concede that the appropriate O.R. for Johnson was 1.3.

Rather, Neugut testified that the O.R. for ever using Roundup (even one day a year) from the combined epidemiology studies (including the AHS) was about 1.3 - 1.5 for any use of glyphosate but that "if you start to look at dose response of people who are really significantly exposed to glyphosate, got exposed in a more dramatic way, for longer periods of time, for higher doses, they're going to have a significantly higher risk." 16A-RT-2617:1-2618-4, 16B-RT-2644:21-2645:1. Neugut testified that in comparing the epidemiology to frequent users: "[t]hat's where the dose response issue comes into play." 16B-RT-2738:10-21.

Neugut presented a chart from a Monsanto-funded meta-analysis in which the authors did not use the appropriate O.R. from De Roos (2003). 16B-RT-2700:6-21. Neugut critiqued that decision and testified that the ever-never analysis in De Roos (2003) showed an O.R. of 2.1 and was adjusted for other pesticides. 16B-RT-2736:13-19; 16A-RT-2614:9-14 ("they should have taken one where the risk estimate was [2].1[3]..."). However, even this meta-analysis showed a statistically significant increased risk of NHL among Roundup users. 16B-RT-2685:12-13. IARC agrees that the O.R. of 2.1 is the most appropriate number to use. 6-AA-6818. The Trial Court also concluded that De Roos "controlled for other pesticides and still found a statistically significant association..." 4-AA-3181.

3. There is Substantial Evidence Supporting the Jury's Finding that the Toxicological Data Supports Causation.

a. Portier's Qualifications are Impeccable.

Portier's Ph.D. thesis "was on the design and analysis of animal cancer studies." 12A-RT-1692:2-8. Portier served as Director of the Report

[3] There is a typo in the transcript. It is made clear later in his testimony that the De Roos (2003) study showed a 2.1 statistically significant increased risk. 16B-RT-2736:13-19.

on Carcinogens at the National Toxicology Program. 12A-RT-1697:17-23. *See e.g. AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, 436 (Prop 65 mandates inclusion of carcinogens by "the most highly regarded national and international scientists: the U.S.'s National Toxicology Program and [IARC]"). After retiring from government service, Portier participated in a six-month research project at IARC evaluating "mechanistic information" in reviewing the risk of cancer. 12A-RT-1707:15-21. Based on his experience, Portier was an invited specialist at the IARC working group on glyphosate. 12A-RT-1720:14-1721:3.

Portier's entire career has been dedicated to "using scientific evidence to make decisions primarily about the carcinogenicity of compounds." 13A-RT-2010:16-22. Portier participated in drafting the guidelines used by IARC and the EPA to assess carcinogenicity. 12A-RT-1705:15-20; 1706:7-19. In evaluating animal studies, Monsanto's expert Dr. Foster relies on Portier's peer-reviewed papers. 26B-RT-4585:12-19.

b. The Animal Carcinogenicity Studies Support a Finding that Roundup is Carcinogenic.

Portier explained that "to assess the chronic effect of chemicals in humans, we use what's called an animal carcinogenicity study." 12B-RT-1803:2-1808:25. Portier reviewed all five mouse and seven rat carcinogenicity studies of acceptable quality on pure glyphosate. There have been no such studies on Roundup. Following established guidelines, Portier noted that a 1983 study demonstrated that pure glyphosate induced increased rates of kidney tumors and splenic lymphomas. 12B-RT-1817:23-1818:12, 1824:24-1825:13. In four additional studies conducted between 1990 and 2010, **each showed an increase in the incidence of lymphomas**; and two replicated the kidney tumor results. 12B-RT-1825:19-1836:4. Observing lymphomas in every mouse study lends strong support to causality in humans

as does seeing multiple tumors of the same type in multiple studies of the same species. 12B-RT-1834:18-1837:14, 1837:1-14. The thirteenth study, George (2010), demonstrated that dermally applied glyphosate "has the potential to be a promoter of carcinogenesis." 12B-RT1861:19-1862:5, 1859:4-1861:13, 1861:20-1862:19, 1863:19-20.

c. Mechanism Data Supports a Finding that Glyphosate is Genotoxic and Causes Oxidative Stress.

Portier testified there was strong evidence that Roundup could cause cancer through mechanisms of genotoxicity and oxidative stress. 13A-RT-1967:12-1968:1, 1993:5-15. Genotoxicity means "direct damage to genetic material in the cells." *Id.* Oxidative stress is a breakdown in the cellular repair process which can also lead to cancer. 13A-RT-1967:12-1968:1. Monsanto employees concede that these mechanisms can cause cancer. 5-AA-5633; 5-AA-5813. Monsanto presented no expert at trial to refute Portier's opinions on mechanism.

There are various genotoxicity studies with Roundup utilizing different methodologies. 13A-RT-1971:6-1973:25. Roundup exposure caused a statistically significant increase in DNA damage in the blood cells and lymphocyte cells in live humans. 13A-RT-1975:4-1976:15, 1976:18-1979:10; 6-AA-6870. These studies were completed before 2009. *Id.* In a meta-analysis of genotoxicity studies, researchers concluded that genotoxicity is greater in studies showing dermal exposure to Roundup versus dietary exposure to Roundup. 13A-RT-1983:19-1988:9. Dr. Ross testified that "the fact that exposed humans showed evidence of genotoxicity, and cultured cells of human origin showed evidence of genotoxicity…Those then showed that this mechanism may operate in humans." 5-AA-5876; 5-AA-5877.

Portier concluded that several studies demonstrated that Roundup causes oxidative stress in mammalian system. 13A-RT-1990:5-1992:7.

Nabhan testified that oxidative stress can lead to NHL because studies show "there is more oxidative stress in non-Hodgkin lymphoma patients." 17B-RT-2882:3-7.

4. Johnson's Experts Appropriately Assessed Causation Using the Bradford-Hill Criteria.

The Bradford-Hill criteria are a well-accepted methodology for determining causal associations. 16B-RT-2642:22-2643:3. These criteria are used by IARC and "across the board by epidemiologists." *Id.* Neugut explained how an examination of the Bradford-Hill criteria led to his conclusion "that there is indeed a causal association between glyphosate and NHL." 16B-RT-2643:9-2646:23. Portier did the same. 13A-RT-2023:3-5.

A central premise of Bradford-Hill is that assessments are not made on epidemiology alone. As explained by Neugut: "you have to incorporate the dose-response relationship, the biological evidence like the toxicology that Portier spoke about...you have to look at..., the specificity and the other factors, consistency, the strength of association, et cetera." 16B-RT-2737:4-17.

5. Unlike the EPA and other Regulatory Agencies, IARC Followed its Guidelines in Assessing the Carcinogenicity of Glyphosate and Roundup.

a. IARC Supports the Jury's Finding that Roundup Causes NHL.

IARC was established in 1965 for the purpose of "identify[ing] the causes of human cancer." 5-AA-5515. IARC "Monographs do not overstate the strengths of available evidence" but are "conservative in nature." 16A-RT-2602:1-5.

IARC conducted a robust review of the evidence on glyphosate and Roundup. 6-AA-6903-6916. Monsanto's own observer at IARC reported that, "[i]n my opinion, the meeting followed the IARC guidelines. Dr. Kurt

Straif, the director of the monograph's program, has an intimate knowledge of the IARC rules and insists that these are followed." 5-AA-5739-; 6-AA-6565. Neugut testified that "I would say that within the scientific and academic cancer community, IARC is recognized as -- the prime arbiter of what constitutes a carcinogen or a cancer-causing agent. …." 16A-RT-2550:12-17. IARC's preeminent role in identifying carcinogens was supported by a publication authored by 125 scientists. 16A-RT-2607:22-2609:21.

Monsanto's own expert, Dr. Mucci, agrees that IARC "can be used as a benchmark for the identification of human carcinogens." 24B-RT-4331:22-4336:14; 4336:14-4337:8. Dr. Mucci's textbook on Cancer Epidemiology references IARC 475 times, whereas it references the EPA only twice. *Id.*

Due to the prestigious nature of IARC, world-renowned experts volunteer their time for the honor of participating in the working groups. 5-AA-5516-55177; 5-AA-5582; 12A-RT-1720:23-25-1721:1. IARC's working group for glyphosate included seventeen international scientists led by Blair." 12A-RT-1724:13-14. Other participants included scientists at the EPA and the current head of California OEHHA. 12A-RT-1725:4-1726:7.

IARC's evaluation of glyphosate was a year-long process that culminated with an eight day in-person meeting of the experts in March 2015. 12A-RT-1718:24-1719:8; 2028:16-18; 2438:4-20. At the end of the meeting, the experts concluded there was "limited" evidence in the epidemiology that Roundup caused NHL. 12A-RT-1753:25-1754:3; 1757:9-24. IARC defines "limited" as "a positive association has been observed between exposure to the agent and cancer for which a **causal interpretation is considered by the Working Group to be credible,** but chance bias or confounding cannot be ruled out with reasonable confidence." 12A-RT-1735:16-25. (emphasis added).

IARC found that there was sufficient evidence of carcinogenicity in the animal and mechanistic data. 12A-RT-1758:1-11. IARC concluded that "there is strong evidence that exposure to glyphosate or glyphosate-based formulations is genotoxic based on studies in humans[4], *in vitro* and studies in experimental animals;" and strong evidence of "oxidative stress" "in humans in vitro." 6-AA-6901-6903.

After considering the totality of the evidence, IARC concluded that "Glyphosate is probably carcinogenic to humans." 6-AA-6902. This conclusion was unanimous among the seventeen independent experts. 12A-RT-1759:4-6.

Following publication of their conclusions, IARC scientists who volunteered to evaluate glyphosate were subject to attacks in the media. 12A-RT-1760:19-25. Monsanto tried and failed to get IARC to retract their findings. 5-AA-5518-5519. IARC issued a rare public comment refuting the Monsanto attacks stating:

> Since the evaluation of glyphosate by the IARC Monograph's program in March 2015, the agency has been subjected to unprecedented coordinated efforts to undermine the evaluation, the program and the organization. These efforts have deliberately and repeatedly misrepresented the agency's work.

3-AA-2597.

IARC also addressed Monsanto's misleading arguments that IARC has concluded that only one chemical is not a carcinogen (AOB 22) stating:

> The criticism is misleading, because the Monographs do not select at random the agents evaluated for carcinogenicity... agents are selected for review on the basis of two main criteria, A, there's evidence of human exposure, and, B, there is some evidence or suspicion of carcinogenicity

[4]Monsanto ignores the fact that IARC's conclusions on genotoxicity were based in large part on studies in live humans exposed to Roundup. AOB 22.

16A-RT-2598:4-2600:1. Out of the thousands of chemicals reviewed by IARC, only ten percent are classified as known carcinogens, and only ten percent as probable carcinogens. 12A-RT-1713:23-1714:3, 1714:11-14.

IARC also addressed Monsanto's erroneous arguments that IARC does not consider human exposure. (AOB 22) IARC explained that Monograph evaluations take into account "real-world exposures by evaluations of epidemiological studies." 16A-RT-2600:8-2601:7.

IARC further refuted Monsanto's arguments that the Agency simply engages in an "academic" and "theoretical" exercise (AOB 22-23) stating:

> ...identifying carcinogenic hazards is a crucially important and necessary first step in risk assessment and management...[and] should trigger immediate…remedial action, for example...or labeling of carcinogenic hazards."

16A-RT-2604:4-14.

While IARC is an important piece of evidence, it was only one part of the review by Johnson's experts. Johnson's experts reviewed the underlying studies and actually had access to more data than IARC. 13B-RT-2063:19-2066:3; 21A-RT-3598:10-12; 16B-RT-2654:2-19; 17A-RT-2789:7-2790:18. IARC's conclusions provide further evidence supporting the jury's verdict.

b. There Is Substantial Evidence that Regulatory Assessments on Glyphosate are Flawed and Do Not Follow Established Guidelines.

Despite Monsanto's arguments to the contrary, regulatory agencies have not conducted a more thorough review of glyphosate than IARC. The EPA and foreign regulatory agencies only evaluate one ingredient in Roundup, glyphosate, whereas IARC evaluates the entire formulation. 22A-RT-3920:16-25. The EPA acknowledges that "glyphosate formulations are hypothesized to be more toxic than glyphosate alone. 7-AA-7244. And yet,

EPA's evaluations are limited to "the genotoxic potential of glyphosate technical." *Id*.

The EPA has not reached any final conclusions about whether glyphosate causes NHL. Instead, one branch of the EPA, the Office of Pesticide Products ("OPP"), has offered "Proposed Conclusions Regarding the Carcinogenic Potential of Glyphosate." 7-AA-7147-7286. Even the OPP states that "a conclusion regarding the association between glyphosate exposure and risk of NHL cannot be determined based on the available data." 7-AA-7441. In fact, an EPA scientist was on the IARC working group concluding that glyphosate was a probable human carcinogen. 1-AA-643.

The OPP's conclusions were subject to a review by an independent SAP. Portier, who previously served as chair of the SAP, explained that "[t]he EPA Science Advisory Panel is mandated in the law...[to] advise them on the way in which they are evaluating pesticides." 12A-RT-1704:1705:7. For glyphosate, "the panel concluded that the EPA [evaluation] does not appear to follow the EPA cancer guidelines..." 14B-RT-2395:6-12. The SAP reported that "many panel members believe that the EPA did not provide convincing evidence of a lack of carcinogenic effects." 26B-RT-4640:13-19.

European regulators use almost identical guidelines established by IARC. 13A-RT-2014:1-3. However, Monsanto wrote the first draft of the European carcinogenicity reviews. 13A-RT-2012:5-2014:23. The flaws in the assessment of pure glyphosate by European regulators were "almost identical to what the EPA did." 13A-RT-2014:15-19. Portier and 94 other scientists highlighted the flaws in EFSA's analysis in a peer-reviewed publication. 13A-RT-2016:3-2019:25, 2012:5-2014:23.

Portier was appropriately astonished at the poor quality of these analyses by regulators. 13A-RT-2010:16-25, 13B-RT-2110:23-2112:11; 13B-RT-2138:3-24; 14A-RT-2231:23- 2234:3. As Portier testified:

> I spent my entire career working on the best ways to evaluate and analyze and present data on carcinogenicity and help the interpretation of it, and I participated in a lot of the guideline developments, and they just weren't following them....Like I said, it's what I've dedicated my entire career to doing, and it seems to have been completely unraveled in some of these reviews.

15A-RT-2439:22-2440:4, 2441:6-8. Because of this evidence, it was within the jury's discretion to reject these flawed regulatory analyses.

6. There Is Substantial Evidence Supporting the Jury's Finding That Roundup Caused Johnson's Cancer.

a. Nabhan Properly Conducted a Differential Etiology in Formulating His Opinion That Roundup was a Substantial Factor in Causing Johnson's NHL.

Nabhan, a highly qualified oncologist specializing in the diagnosis and treatment of NHL, conducted a proper differential diagnosis. 4-AA-3194; 17A-RT-2773:10-21, 2776:22-24; 2779:6-12; 2785:13-2786:4. Nabhan testified that mycosis fungoides is simply a form of NHL.[5] 17A-RT-2780:7-17. As such, it is appropriate to rely on scientific literature relating to NHL generally in reaching causation opinions. 17B-RT-2900. Neugut concurs. 16B-RT-2656:6-21.

In reaching his opinions, Nabhan reviewed epidemiology studies, animal studies, toxicology studies, thousands of pages of Johnson's medical records, correspondence from Johnson's employer, and relevant deposition transcripts. 17A-RT-2789-2795. Nabhan met and examined Johnson. *Id.* Nabhan considered the amount and duration of Johnson's exposure. 17A-RT-2831, 2834-2836; 18B-RT-3256:7-10; 3256:24-3257:15.

[5] Two studies do look specifically at T-cell lymphoma (which is comprised mainly of Mycosis Fungoides). The Eriksson study showed a non-statistically significant O.R. of 2.29 for T-cell lymphoma. 17A-RT-2828:4-20. The AHS study demonstrated a non-statistically significant quadrupling of the risk for T-cell lymphoma. 15A-RT-2447:10-2449:19.

Nabhan compared Johnson's exposure to the epidemiology studies noting that McDuffie, Eriksson and De Roos (2003) all showed a doubling of the risk. 17A-RT-2825:9-18, 2827:15-2830:5. McDuffie showed that "if you're exposed more than two days, you also have double the risk of developing non-Hodgkin lymphoma." 17A-RT-2827:17-25. Eriksson showed that if you're exposed to Roundup over ten days it more than doubles the risk of NHL. 17A-RT-2830:3-5.

Nabhan considered and ruled out all other possible causes of NHL including age, race, immunosuppressant therapies, autoimmune diseases, skin conditions, occupation, occupational exposures, and viruses. 17A-RT-2841-2853. Nabhan concluded that Johnson's only risk factors were his race (African American) and Roundup exposure. Nabhan therefore opined that Roundup was the most substantial contributing factor to Johnson's NHL. 17A-RT-2853:24-2854:2.

Nabhan determined that Johnson's NHL was not idiopathic. 17B-RT-2997. Nabhan testified that because Johnson was far younger than the typical mycosis fungoides patient this would constitute a "red flag" suggesting to him there was something behind the NHL. 17A-RT-2843:2-2844:19. Nabhan was certain that if Johnson had not been exposed to Roundup, he would not have developed mycosis fungoides. 17A-RT-2849:9-21.

b. Sawyer's Testimony Supports the Jury's Finding that Roundup Was a Substantial Cause of Plaintiff's NHL.

Sawyer, a forensic toxicologist, undertook a review in order to determine whether Johnson's exposure was substantial enough to have caused his NHL. 21A-RT-3601:20-3602:8. In reaching his opinions, Sawyer spoke with Johnson by telephone and reviewed medical records, deposition transcripts, published studies, animal studies, and internal Monsanto documents. 21A-RT-3587-3598. Sawyer testified that Roundup would have been absorbed through Johnson's skin every time he sprayed and not just

during accidental spills and leaks. 18B-RT-3240:22-3241:10; 21A-RT-3593:21-2, 3649:8-20. The nozzle Johnson used would produce a huge aerosol resulting in substantial spray drift. 21A-RT-3663-3664. Johnson's sweat would have created an "immediate diffusion pathway to the skin." 21-RT-3673:2-11.

Sawyer testified that Johnson's total exposure (even without spills) was sufficient to have caused his NHL and that he was "heavily exposed" at a rate far higher than the applicators in scientific studies. 21A-RT-3596-3597; 21B-RT-3746:7-19, 3747:2-16, 3747:13-19, 3791:12-25. Sawyer further explained that Johnson's "Tyvek" suit would have done "very little" in protecting him from exposure to Roundup. The Tyvek suit only keeps out dust, so liquid pesticides can penetrate the material. 21A-RT-3658:24-3663:9; 27B-RT-3672:1-16.

c. There Is Substantial Evidence That Johnson's Exposure to Roundup Caused His Cancer in 2.25 Years.

Latency is measured from the time of first exposure until diagnosis. 21B-RT-3677:4-12. The latency for Johnson's cancer is 2.25 years. 21B-RT-3676:8-3677:16. Both Sawyer and Nabhan agree that the latency for NHL can be much shorter than two years and can vary depending on the individual. 21B-RT-3676-3677, 3781; 17A-RT-2855-2859.

The Center for Disease Control concluded that NHL can develop in 0.4 years after first exposure to carcinogens. 17B-RT-2858:4-2859:13, 21B-RT-3777:21-3779:16. Johnson's latency would likely be far shorter than the median latency as he received a very high dosage of Roundup in a short period of time. 21B-RT-3678-3679. The aggressive nature of Johnson's cancer also evidences a short latency period. 17B-RT-3050.

Nabhan testified that Johnson's first rash from NHL likely started in the spring of 2014 based on the totality of the evidence. 17A-RT-2836:14-2837:6. He noted that the contemporaneous medical records from September

to December 2013 did not reference a rash on Johnson's body. 17B-RT-2954:8-25, 3030:3-3032:2. Ofodile, who first saw Johnson in October 2014, testified that she was skeptical that the rash started in 2013. 18A-RT-3127:4-23. She confirmed that the only contemporaneous evidence of a rash in September 2013 was following multiple wasp stings. 18A-RT-3131:3-23. In any event, Nabhan's causation opinion would not change "even if [Johnson] had a rash that was related to his mycosis fungoides, in the fall of 2013." 17B-RT-3041:1-16.

C. Johnson Suffered Unimaginable Emotional and Physical Suffering.

The jury heard testimony from Johnson and his wife Araceli about Johnson's pain and suffering.

In June 2012, Johnson became an Integrated Pest Manager for the Benicia Unified School District. After taking care of his sick grandmother for several years, Johnson had a very difficult time getting into the workforce. 18B-RT-3212:24-3213:6. When Johnson finally got a job he was incredibly happy telling himself "I'm going to do the best I can. I'm winning this thing. You watch." *Id.* Johnson posted videos on Facebook describing how fortunate he felt to be working. 6-AA-6188 (video admitted at trial: https://www.dropbox.com/s/b81mjmyvqeyhm5k/0014b.mp4?dl=0),

Johnson described the gratification he felt from his job. 18B-RT-3211:14-3212:20. Students created posters for him such as "Mr. Lee, thanks for getting rid of the skunks from under our class." 18B-RT-3211:14-3212:20. Johnson won the employee of the year award, and his supervisor stated he had "one of the best work attitudes." 18B-RT-3218:12-13.

Johnson's wife, Araceli, testified that she and Johnson were at their happiest during the period before his cancer diagnosis. "It was no worries, no stress. None of that. Life was beautiful. Simple." 18A-RT-3185:1-8. The

family would "Go out to dinner, go to the park so the kids can play basketball, sports, take a ride, go to the beach." 18A-RT-3169:10-11, 3174:6-14.

Monsanto does not contest that in August 2014, Johnson was diagnosed with mycosis fungoides. This diagnosis changed Johnson's life and he has suffered, and continues to suffer, physically and emotionally.

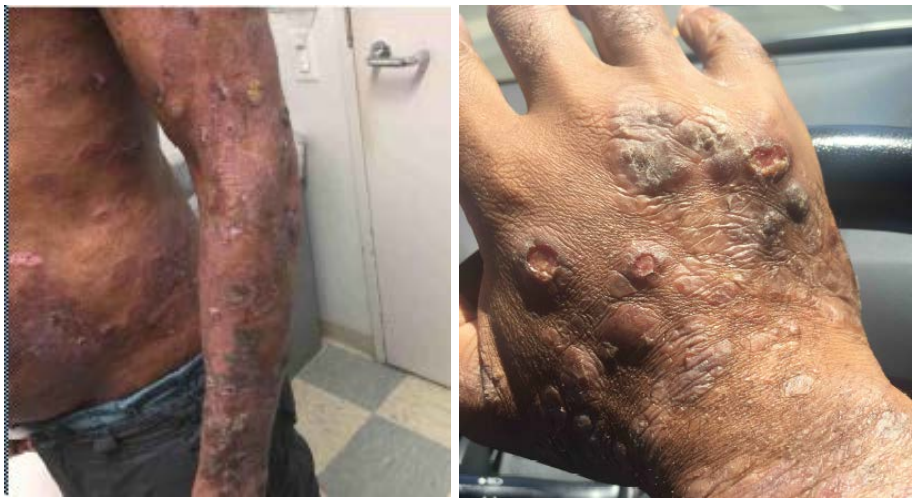
Johnson's job "was everything to him" and it was "tremendously" difficult to keep his job due to cancer. 18A-RT-3174:6-14. Johnson's inability to work deprived him of time with Araceli because she had to get a second full-time job to support the family. 18A-RT-3177:18-23. Araceli works fourteen hours days with a 45-minute commute each way. 18A-RT-3173:3-24.

According to Araceli, Johnson always puts his kids first. 18A-RT-3184:5-9. Now, Johnson must watch his children suffer. To appear strong, Johnson cries at night when he doesn't think his children and wife can hear him. 3175:11-3176:1. His two young sons "hate cancer. They hate it like it's the 20-foot purple monster with fangs." 18B-RT-3291:16-27. However, his youngest son still thinks he can save Johnson by "trying to come up with a cure" and even concocted a potion to cure his dad's cancer. 18B-RT-3293:13; 3189:23-3190:16 (it did not taste good). Araceli had a private talk with their children "to remind them that he was sick, to spend time with him as much as you can, you know, just spend time with him, get to know your dad." 18A-RT-3180:5-8.

There were times when Johnson, "couldn't sleep. He was, you know, in a lot of pain, just very depressed, upset for everything." 18A-RT-3177:8-11. Araceli remembers the day when Johnson was too sick to go to his uncle's funeral, so he "just started crying and crying, and he said, 'I just want to die.'" 18A-RT-3181:10-13. When Johnson could not attend his uncle's funeral "it just kind of dawned on me, it sunk in, like you're really sick. You know what I mean. And I just broke down." 18B-RT-3290:15-17.

Johnson's mind does not function like it used to and his wife describes it as "dementia." 18B-RT-3204:11-14, 18A-RT-3178:9-16. There were times after chemotherapy that Johnson was in "a lot of pain and [] just couldn't function." 18B-RT-3289:22-24. Johnson "lost over a hundred pounds at one point while taking chemo." 18B-RT-3297:16-17.

Johnson endured a brutal lesson in learning to deal "with pain since the last few years." 18B-RT-3285:6-18. He regularly has open flesh wounds over his entire body, to the point where a cotton t-shirt is too painful for him to wear. *Id.* 18B-RT-3285:19-3287:25. He calls those wounds "stingers." 18A-RT-3194:1-4. At times, he couldn't wear shoes due to the pain. 18B-RT-3290:12-14. He has no relief at night "[b]ecause when you lay down, it hurts more..." 18B-RT-3290:25. Even the chemotherapy treatment is painful. 18B-RT-3289:22-24.



6-AA-6190; 6223; 6227; 6230.

Johnson gets embarrassed when he goes out in public because "[y]ou can see people, you know, looking and staring." 18B-RT-3289:14-15; 18A-RT-3182:7-14. He is afraid to go swimming because people will think he is contagious. 18B-RT-3288:3-11. He can't spend time in the sun with his children at their sporting events. 18B-RT-3288:24-25. He can't be intimate with his wife because "[y]ou can't even suggest that somebody would be intimate with you when you're looking like that." 18B-RT-3298:2-4. Johnson misses taking his wife out dancing, to "parties, get-togethers." 18B-RT-3292:1-4.

Nabhan has a grim prognosis for Johnson stating "I, unfortunately, don't believe he has longer than December 2019, if I have to guess." 17B-RT-2887:4-19. But Nabhan hopes he is wrong. *Id.* Kuzel, Monsanto's expert, testified that Johnson could live for years and have a normal life expectancy and could ultimately be cured if he qualified for a stem cell transplant. 27A-RT-4784:6-4787:18; 27B-RT-4854:8-10.

Johnson will continue fighting the cancer until his "time's written in the sky." 18B-RT-3291:22-23. He hopes he will qualify some day for a

bone marrow transplant. 18B-RT-3293:9-10. If his life is not extended by a transplant, Johnson faces a horrific death.

Johnson had been in denial that he is dying, but with his latest relapse he explained that: "it's pretty scary, because…I'm going back to chemotherapy." 18B-RT-3299:8-12. "[I]n reality, I am not better. And I'm not getting any better, that I keep going back and forth with this up and down of halfway getting clear skin and then back to the thing again full-fledged. So it's...a roller coaster, and it just -- just never stops." 18B-RT-3299:14-19.

D. There is Substantial Evidence That Monsanto Has Long Been Aware of The Carcinogenic Risks of Roundup, but Chose to Prioritize Profits and Not Warn Consumers Such as Johnson.

Monsanto has publicly proclaimed for forty-five years, and in its briefing, that its product Roundup is safe and does not cause cancer. The evidence tells a radically different story.

1. The Primary Responsibility of Monsanto's "Safety" Scientists is to Defend the Glyphosate Business.

It was reasonable for the jury to have found that Monsanto's primary goal was to protect the sales of Roundup; not the health of consumers. In 1985, when concerns were first raised that glyphosate was causing tumors in mice, Monsanto was "concerned that even the initiation of formal regulatory action would have serious negative economic repercussions." 22A-RT-3851:20-22.

Dr. Donna Farmer (Farmer), a Monsanto toxicologist and "one of the spokesperson[s]" for the safety of Roundup (5-AA-5537) confirmed that the top goal of Monsanto's **"Product Safety Center**" was to **"Defend and maintain the global glyphosate businesses**." 6-AA-6405.

Dr. William Heydens (Heydens) is Monsanto's "product safety assessment strategy lead" and Farmer's boss. 5-AA-5699. His role was to reach out to scientific experts and have them "directly or indirectly/behind-

the-scenes work on our behalf" with the goal to **"get 'people to get up and shout Glyphosate is Non-toxic[.]'"** 6-AA-6656. [T]his plan included "[g]et[ing] our data out there so it can be referenced and used to counter-balance the negative stuff." *Id.*

Dr. Daniel Goldstein (Goldstein) is Monsanto's Director of Medical Toxicology. 5-AA-5669-5670. By 2004, Goldstein was already managing "punitive damage liability associated with Roundup. 5-AA-5625.

Steven Gould is in charge of sales of Roundup products for school districts and other professional uses in California. 6-AA-6422-6424. Upon learning about IARC's classification, he became concerned that "school districts are another big risk..." due to lost sales. 6-AA-6425. He wrote that "several bay area cities and school districts" "have already stopped using Glyphosate since the IARC ruling." *Id.*

2. Monsanto Knew That Roundup Was Toxic and That There Were Safer Alternatives But Refused to Conduct Carcinogenicity Tests or Use Safer Roundup Formulations.

Roundup contains several chemicals including: glyphosate; the surfactant polyethoxylated ethyl amine (POEA); and trace amounts of other known carcinogenic contaminants. 21A-RT-3609:3-3610:16; 22A-RT3880:6-30. Surfactants enhance the ability of glyphosate to penetrate the outer layer of plants and human skin. 21A-RT-3609:14-20, 3611:8-3612:25, 3616:4-3618:13. Surfactants are genotoxic and cause oxidative stress in cells. 21A-RT-3613:21-3616:3. In 2002, Monsanto scientist, Martens acknowledged internally that "[s]urfactants are biologically not "inert", they can be toxic and this must be addressed." 6-AA-6300.

Monsanto never adequately addressed the toxicity of POEA. There has never been a carcinogenicity test of the surfactants in Roundup. 21A-RT-3614:11-3615:16. In fact, there has never been a carcinogenicity test conducted on the formulated Roundup product used by Johnson. 22A-RT-

3850:12-21; 3879:21-3880:2; 3882:8-13. Monsanto internally acknowledges, "**you cannot say that Roundup does not cause cancer … we have not done carcinogenicity studies with 'Roundup.'"** 6-AA-6466-6468. (emphasis added).

Monsanto could have sold safer formulations of Roundup to Johnson. 21A-RT-3626:15-3627:16. In 2008, Monsanto internally debated whether to defend the "impending demise" of POEA in Europe because as one of Monsanto's scientists noted "there are non-hazardous formulations, so why sell a hazardous one?" 6-AA-6563. Nonetheless, Heydens decided to defend POEA to prevent the issue from "coming across the Atlantic" to the "American Hemisphere." *Id.* Monsanto still sells Roundup containing POEA in the U.S. without a cancer warning despite Heydens' internal admission that the "surfactant played a role" in promoting tumorsa 2010 study. 6-AA-6535-6538. POEA is now banned in Europe. 5-AA-5781.

3. Monsanto Sold Roundup From 1974 – 1981 Without any Valid Carcinogenicity Tests on Glyphosate.

Monsanto received a permit to sell Roundup from the EPA in 1974. 22A-RT-3882:15-18. However, the first valid carcinogenicity study on pure glyphosate was not completed until 1981. 22A-RT-3883:12-13. Hence, Roundup was approved with no valid carcinogenicity (or genotoxicity) studies on the formulated product used by consumers.[6]

[6] No evidence of pre-1981 carcinogenicity or genotoxicity studies were presented at trial because they were based on fraudulent studies conducted by IBT laboratories. RA42, RA46-47, RA74. The Trial Court excluded this evidence from trial. A Monsanto employee Paul Wright was convicted for his role in the IBT scandal. *United States v. Keplinger* (7th Cir. 1985) 776 F.2d 678, 684.

4. Early Rodent Studies Demonstrate that Glyphosate Causes Tumors But Monsanto Refuses EPA's Request to Conduct Another Mouse Study.

The first valid mouse carcinogenicity study on glyphosate was not completed until 1983. 12B-RT-1816:16-25. This study showed increased rates of kidney tumors and splenic lymphomas in mice exposed to pure glyphosate. 12B-RT-1817:23-1818:12, 1824:24-1825:13. The EPA recognized that the kidney tumors were caused by glyphosate and intended to label glyphosate a possible carcinogen. 12B-RT-1817:17-1818:12. Monsanto's pathologist re-analyzed the kidney tissues, found a new kidney tumor in the control group of mice, and then argued the results were no longer statistically significant. 12B-RT-1818:18-1819:25. The EPA disagreed with Monsanto's arguments and re-assessment of the kidney slides. 22A-RT-3893:14-23, 3895:7-15. An SAP panel was convened and it recommended that Monsanto conduct another mouse study to evaluate the kidney tumor issue. 22A-3895:16-3897:17. Monsanto never conducted that study. *Id.* Studies conducted by other glyphosate manufacturers over the years confirmed that glyphosate causes kidney tumors and lymphoma in animals. 12B-RT-1825:19-1836:4.

5. Monsanto Never Conducted Studies Recommended by Their Own Epidemiologist.

In 1997, Monsanto's epidemiologist, Dr. Acquavella, drafted a memo critiquing the design of the AHS study relied upon by Monsanto for its contention that Roundup does not cause cancer. 6-AA-6235. He determined that "the exposure assessment in the AHS will be inaccurate" and that "[i]naccurate exposure classification can produce spurious results." 6-AA-6238. He stated that, "the best way to position AHS is as part of a learning process" which "will need to incorporate information from ... studies of manufacturing workers, before any conclusions can be established as valid."

6-AA-6236. Monsanto never conducted an epidemiology study on its manufacturing workers and NHL. 24B-RT-4426:23-25.

Monsanto not only failed to conduct the recommended study; it failed to report cases of NHL among its workers to the EPA. AA5657.

6. A Monsanto Retained Genotoxicity Expert Raises Concern about the Genotoxicity of Roundup in 1999; His Report is Buried by Monsanto.

In the 1990's, several published studies concluded that glyphosate and Roundup are genotoxic. 5-AA-5821-5823. Monsanto retained Dr. James Parry, an expert in genotoxicity to review these independent studies. 6-AA-6386. Dr. Parry concluded that "glyphosate is capable of producing genotoxicity, both in vivo and in vitro, by a mechanism based upon the production of oxidative damage." 5-AA-5828; 5-AA-6320. He noted that one study demonstrated that Roundup was ten times more genotoxic than glyphosate alone. 5-AA-5548.

Dr. Parry recommended eight experiments to further study Roundup's genotoxicity to consider the "possibility of susceptible groups within the human population." 6-AA-6358-6360; 5-AA-5827. After reading Dr. Parry's final report, Heydens stated:

> However, let's step back and look at what we are really trying to achieve here. We want to find/develop someone who is comfortable with the genetox profile of glyphosate/Roundup and who can be influential with regulators and Scientific Outreach operations when genetox issues arise. My read is that Parry is not currently such a person, and it would take Quite some time and $$$/studies to get him there. **We simply aren't going to do the studies Parry suggests.** 6-AA-6377

Farmer concluded that Monsanto needed someone "that can dig us out of this genotox hole..." 6-AA-6400.

Portier testified that Monsanto conducted only one of the eight experiments recommended by Dr. Parry. 13A-RT-1997:19-22. Farmer admitted that Monsanto did not conduct the comet assays Dr. Parry requested, and did not seek to determine whether there were any humans being exposed to the genotoxic effect of Roundup because she disagreed with Dr. Parry's assessment. 5-AA-5563-5564. Martens confirmed that he did not receive written confirmation from Dr. Parry that he was satisfied with Monsanto's testing. 5-AA-5853-5853. Monsanto's last account of an interaction with Dr. Parry confirmed that he maintained his opinion that "genotoxic results in some studies was due to oxidative damage rather than direct genotoxicity" and want to test the relation of oxidative damage "with mutagenic events." 5-AA-5865.

Dr. Parry offered to conduct the tests himself, but Monsanto refused. 5-AA-5553-5556. Farmer confirmed that Dr. Parry never agreed with Monsanto's assessment of the genotoxicity of Roundup. 5-AA-5558-5559. Dr. Parry was under a signed secrecy agreement and could not have shared his findings with the public or with regulators. 5-AA-5849-5850. Monsanto never submitted Dr. Parry's reports to any regulatory authority, nor were they ever made publicly available before this litigation. 5-AA-5848; 10-RT-1587:16-1588:2; 5-AA-5564.

7. Monsanto Ghostwrites Articles to Influence Regulators and Mislead the Public Regarding the Safety Profile of Roundup.

When Dr. Parry was hired to evaluate the genotoxicity of Roundup, Monsanto contemporaneously developed a press release stating that "… we are confident that glyphosate herbicide products are not genotoxic." 6-AA-6386. However, rather than publish Dr. Parry's review of Roundup's

genotoxicity, Monsanto decided to ghostwrite an article claiming that Roundup posed no danger to human health.

In parallel with Dr. Parry's review, Monsanto was also working to retain another genotoxicity expert, Dr. Gary Williams, to use him on a "contingency basis." *Id*. Dr. Williams was listed as an author on a 2000 article concluding that "under present and expected conditions of use, Roundup herbicide does not pose a health risk to humans." 5-AA-5723. The article stated, contrary to Dr. Parry's conclusions, that Roundup was neither genotoxic nor carcinogenic. 12B-RT-1888:19-1889:9 Neither Dr. Williams nor any other listed author wrote that article.

Heydens admitted to ghostwriting the article stating in an email, "we ghost-write the Exposure Tox & Genetox sections…they [outside experts] would just edit & sign their names so to speak. Recall that is how we handled Williams Kroes & Munro, 2000." 6-AA-6529. However, no Monsanto employee appears as an author on the Williams (2000) article. Nowhere is it disclosed that Monsanto employees actually wrote the article. Nowhere is it disclosed that the "independent" experts only edited and signed their names to the article. Monsanto consultant, John Acquavella, had to explain the obvious to Monsanto in 2015, "We call that ghost writing and it is unethical." 6-AA-6381.

At trial, Dr. Benbrook testified that:

> ...it's very important for people reading the scientific literature to have knowledge of who conducted the research and interpreted the results and wrote the paper. That's considered very important in evaluating the quality of the research, the reliability of the research, the independence of the research, whether there was a conflict of interest of some sort. So it's truthfulness in authorship is a central feature of scientific publishing integrity.

22A-RT-3898:10-23.

The impact of the ghostwritten article, Williams (2000), on the scientific literature and regulatory evaluations cannot be understated. Monsanto itself describes Williams (2000) as an "invaluable asset for response to agencies [and] regulatory reviews" and that Williams (2000) has "served us well in the past." RA336, 341. Monsanto used Williams (2000) to try to change Dr. Parry's mind at a February 2001 meeting and Dr. Parry became "irritated by the language used in the mutagenicity section" and the article was "very dismissive of other researchers work…." 6-AA-6389. Moreover, in De Roos (2003), which shows a statistically significant doubling of the risk of NHL with glyphosate, the results were muted by citation to Williams (2000) as evidence that glyphosate is "non-carcinogenic and non-genotoxic." 12B-RT-1888:7-11. Williams (2000) is also cited and relied upon by the EPA in its evaluations of glyphosate. 7-AA-7067, 7117, 7244, 7472.

8. Monsanto Continues Ghostwriting Articles for Purposes of Regulatory Reviews, Product Defense, and Litigation Support.

By 2010, Monsanto was facing "regulatory reviews" with an increased "focus on claims in the peer-reviewed literature." RA341. Accordingly, Farmer ghostwrote sections of another "safety" review stating in an email "Attached is the first 46 pages. I added a section in genotox… …Also we cut and pasted in summaries of the POEA surfactant studies." 6-AA-6378, 5-AA-5542-5543. When confronted with this evidence Farmer did not deny ghostwriting the article but stated that "there's nothing wrong with that." 5-AA-5544.

In 2013, Monsanto ghostwrote another article that was to "be a valuable resource in future product defense against claims that glyphosate is mutagenic or genotoxic." 6-AA-6604. After the initial draft, Monsanto felt that "the manuscript turned into such a large mess of studies reporting

genotoxic effects, that the story as written stretched the limits of credibility among less sophisticated audiences." 6-AA-6610. Therefore, it was decided that a way to "help enhance credibility is to have an additional author on the papers who is a renowned specialist in the area of genotoxicity. Monsanto identified Dr. David Kirkland..." and removed the Monsanto employee's name from the manuscript. *Id.*

In 2015, due to the "severe stigma" of the IARC classification of glyphosate as a 2A carcinogen, Monsanto decided to ghostwrite a new article to "[p]rovide additional support ('air cover') for future regulatory reviews" and for "litigation support." RA344. Monsanto decided that the "majority of writing can be done by Monsanto." RA347, 349. Monsanto's legal department considered this plan "Appealing" and "best if use big names." RA352. Dr. Williams again agreed to be the lead author for the manuscript. The article claimed that "neither any Monsanto Company employees nor any attorneys reviewed any of the expert panel manuscripts prior to submission to the journal." 5-AA-5757-5758. In fact, Monsanto employees wrote portions of the manuscripts and had final say on the editing of the paper. 5-AA-5757, 5764-5765, 5712-5715. Heydens noted that "I have gone through the entire document and indicated what I think should stay, what can go, and in a couple spots did a little editing." 5-AA-5764.

9. Monsanto Was Aware of Studies Showing an Increased Risk of NHL But Failed to Warn the Public.

In 2000, Monsanto learned of the McDuffie data showing a doubling of the risk for NHL. 6-AA-6469. Dr. Acquavella was deployed to speak to Dr. McDuffie and convince her that glyphosate was not carcinogenic using the ghostwritten Williams (2000) article. 6-AA-6471-6474. Dr. McDuffie agreed to remove the reference to glyphosate from her study's abstract. 6-AA-6475; 5-AA-5629. Farmer congratulated Dr. Acquavella stating "the

fact that glyphosate is no longer mentioned in the abstract is a huge step forward – it removes it from being picked up by abstract searches!" *Id.*

When De Roos (2003) was published by the National Cancer Institute, Monsanto employees stated "[i]t looks like NHL and other lymphopoetic cancers continue to the main epidemiology issues both for glyphosate alachlor." *Id.* Rather than being concerned for consumers, Monsanto was worried the findings "may add more fuel to the fire" for NHL allegations. 6-AA-6481.

In 2008, the Eriksson study was published demonstrating a statistically significant doubling of the risk of NHL for Roundup users. Monsanto did not warn consumers about this result. Instead Farmer states "[w]e have been aware of this paper for awhile and knew it would only be a matter of time before the activists pick it up." 6-AA-6623. Farmer's primary focus was: "how do we combat?" *Id.*

10. Johnson Relied on Monsanto's Representations of the Safety of Roundup.

Johnson always reviewed the Roundup label and safety data sheet[7] before he sprayed. 18B-RT-3230:10-3232:4. Neither contained a cancer warning. Johnson was even told by a Roundup sales representative that Roundup was "safe enough to drink." 18B-RT-3229:9-3230:4. Monsanto's own expert testified that Johnson "did a good job" following the label and reducing his exposure. 28-RT-4903:3-8; 18B-RT-3236:14-3237:23; 3240:17-24.

However, Monsanto scientists were internally aware that users required more protective equipment than that worn by Johnson to adequately reduce exposure. As Sawyer explained "[w]hen they ran their own operator

[7] A document produced by Monsanto and required by OSHA to be provided to professional users of Roundup.

exposure study, they recommended waterproof jacket, pants, faceplate, et cetera. But none of that is on the warning of Roundup that was used by Johnson." 21A-RT-3661:17-22, 3672:1-16. Johnson was heavily exposed to Roundup precisely because he was not instructed to wear a faceplate and waterproof clothing. 18B-RT-3240:22-3241:10; 21A-RT-3593:21-25.

11. Johnson Contacts Monsanto After Developing a Rash in July of 2014.

On July 23, 2014, Johnson presented to Dr. Chanson for treatment of a body rash that eventually was diagnosed as NHL. 18A-RT-3080:18-24. Dr. Chanson reviewed the Roundup safety data sheet produced by Monsanto, and thereafter told Johnson that his rash was unrelated to Roundup exposure. *Id*. On November 11, 2014, Johnson called Monsanto. Johnson's call was memorialized in an email to Goldstein:

> He told me he works for a school district in CA and about 9 months ago had a hose break on a large tank sprayer. This resulted in him becoming soaked to the skin on his face, neck and head with Ranger Pro. He said he was wearing a white exposure suit and it even went inside that. A few months after this incident he noticed a rash on his knee then on his face and later on the side of his head. ... His entire body is covered in this now and doctors are saying it is skin cancer. **He is just trying to find out if it could all be related to such a large exposure to Ranger Pro** since he stated his skin was always perfect until this happened. **He is looking for answers.**

6-AA-6516. (emphasis added). Goldstein replied that he would call Johnson back, but he never did. 5-AA-5616-5617; 18B-RT-3274:5-3275:6.

Johnson continued spraying Roundup and called the Missouri Regional Poison Control[8] ("MRPC") on March 27, 2015. 6-AA-6519. The call was documented and sent to Goldstein. 5-AA-5622-5623.

[8] Monsanto has an agreement with MRPC "to provide case consultation and medical response on individuals who contact us regarding our products." 5-AA-5621.

> Caller states he has been using Ranger Pro as part of his job for 2 to 3 years. He has recently been diagnosed with cutaneous T cell lymphoma. He has concerns about continuing to use Roundup as part of his job and questions if Roundup could be a source of his cancer... **The caller's level of fear is rising over his continued use of Ranger Pro.** He states he continues to get unexplained rashes and nodules over his body. **MRPC discussed the product toxicity. The symptoms are not an expected response from the product.**

6-AA-6519. (emphasis added). This report from the MRPC was a FIFRA 6(a)(2) report required to be submitted to the EPA. 5-AA-5659-5660, 6517. A 6(a)(2) report is "information which suggests a conclusion of adverse events or substantial risk." 5-AA-5656-5657.

No one called Johnson back or told him his cancer was categorized as an adverse event. 18B-RT-3282:4-3283:5. Johnson therefore kept spraying Roundup. *Id.* Johnson would not have used Roundup if he was warned of a cancer risk. 18B-RT-3283:9-11; 3235:2-5.

Nabhan would have told Johnson to "immediately stop" spraying glyphosate if he was in Goldstein's shoes. 17A-RT-2868:19-2869:25. Nabhan testified "If they're being exposed to an agent that may be causing the cancer, you would tell them not to be exposed to this particular agent because it could make the cancer worse..." 17A-RT-2812:21-24. Ofodile concurs stating for "me and my patient's health, it's not worth the risk." 18A-RT-3156:3-4. Goldstein, on the other hand, testified that if he had returned Johnson's call, he would have told Johnson to keep spraying Roundup. 5-AA-5624.

Johnson continued to spray through at least September 2015, at which point his cancer transformed into an aggressive variant. 17B-RT-2882:21-2884:3. Ofodile, Johnson's primary treater, testified that during the summer of 2015 he had open wounds on his skin which would increase the absorption of Roundup. 18A-RT-3163:1-13. Ofodile wrote a letter to the school board,

in March 2015, asking that Johnson not be required to spray Roundup at work. 18A-RT-3154:6-16. That letter did not have the desired effect and Johnson ultimately had to refuse to continue spraying. 18B-RT-3236:4-13.

12. Monsanto Learned that IARC was going to Evaluate Glyphosate One Month Before Johnson First Called Monsanto.

Monsanto, including Goldstein himself, was aware of numerous studies demonstrating a genotoxic and carcinogenic risk of Roundup preceding Johnson's first use of Roundup. 5-AA-5626-5637. One month before Johnson first called Monsanto, Monsanto learned that IARC would be evaluating glyphosate. The IARC classification was based on decades of publically available data. On October 15, 2014, Heydens acknowledged that Monsanto had "vulnerabilities" in all the areas considered by IARC, "namely epi, exposure, genotox and mode of action." 6-AA-6432.

13. Monsanto Was Developing a Plan to Attack the Anticipated IARC Classification One Month Before Johnsons' Second Call.

In February of 2015, one month before Johnson's second call, Monsanto drafted a response plan to IARC even before the agency announced its classification. 6-AA-6426. Monsanto anticipated that IARC would classify glyphosate was a possible or probable human carcinogen. *Id.* Monsanto's plan was to "orchestrate outcry over [the] IARC decision." 6-AA-6430. The "outcry" was intended to reach both "IARC panelists" and "Regulators" through a robust media strategy defending Monsanto's Freedom to Operate. *Id*. One of Goldstein's roles was to draft op-eds attacking IARC for non-Monsanto scientists to sign. 5-AA-5642-5643. Monsanto was successfully able to "conduct[] significant outreach within the U.S. government" including briefing "key staff at EPA, USTR, USDA and the State Department as well as members of Congress." 6-AA-6587-6598.

On February 26, 2015, Monsanto decided to fund the American Council for Science and Health ("ACSH")'s attacks on IARC. 5-AA-5638-5640. ACSH is known for its past support for the tobacco industry. 5-AA-5638-5640; RT3903:4-6 (ACSH was "one of the scientific organizations that held out to the end and argued that the science really wasn't clear about tobacco causing cancer."). Goldstein emphatically wrote: "**You WILL NOT GET A BETTER VALUE FOR YOUR DOLLAR than ACSH."** 6-AA-6489. (emphasis in original).

One week before Johnson's second call, IARC classified glyphosate as a probable human carcinogen. 5-AA-5662-5664. Two days before Johnson's second call, Goldstein ignored requests by employees in Monsanto's Environmental Safety and Health division to recognize the cancer hazard with glyphosate identified by IARC. 5-AA-5644-5645. Goldstein "emphasized the need to hold firm on the 'no cancer hazard position as per the new press release." *Id.*

Monsanto followed through with its plan to "Orchestrate Outcry" over IARC, leading to the "unprecedented coordinated efforts to undermine the evaluation, the program and the organization." 16A-RT-2597:12-18. No Monsanto employee informed Johnson of IARC's classification, even though Dr. Goldstein is aware that there is "federal law requiring that we list IARC on our material safety data sheet" relied upon by Johnson. 5-AA-5646.

14. Monsanto Exercises its Influence With Government Officials in Wake of IARC Findings.

The jury could reasonably give less weight to the EPA's glyphosate evaluation due to evidence of collusive relationships between Monsanto and certain EPA employees. On April 28, 2015, before even reviewing the IARC monograph, Jess Rowland, head of the OPP's Cancer Assessment Review Committee assured Monsanto that the EPA would find that glyphosate was not carcinogenic. 6-AA-6601. Rowland stated that "We have enough to

sustain our conclusions. Don't need gene tox or epi…" *Id.* Mr. Rowland further stated that with respect to an ongoing review of glyphosate by the Agency for Toxic Substances and Disease Registry (ATSDR), "If I can kill this [review] I should get a medal." *Id.* Monsanto succeeded in stopping the immediate release of the ATSDR evaluation. 6-AA-6593-6595.

After learning that the National Toxicology Program "appear[ed] to have accepted IARC's opinion that glyphosate and its formulations display two characteristics of carcinogens: Genotoxicity and oxidative stress[,]" Farmer's colleagues noted that they would have to involve Capitol Hill to address the development. 6-AA-5601. Monsanto also got "some key Democrats on the hill to start calling jim [jones, Assistant Administrator]" which "shoots across his bow generally that he's being watched." 6-AA-6589.

III. STANDARD OF REVIEW

A. Order Denying Motion for JNOV

A defendant challenging a verdict and order denying JNOV on the basis "of insufficiency of the evidence assumes a 'daunting burden." *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1079. "[T]the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." *Id.* "If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." *Id.* "As a general rule, therefore, we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing." *Id.* citing *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.

Orders denying preemption arguments are reviewed de novo. *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371.

B. Order Denying Motion for New Trial.

An appellate court "must uphold an award of damages whenever possible." *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078. "An appellate court can reverse an award of compensatory damages as excessive only if, viewing the evidence in the light most favorable to the judgment, the court concludes that the award is so grossly disproportionate to the harm suffered that it shocks the conscience and suggests that the jury was influenced by passion or prejudice." *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 746.

Evidentiary rulings are reviewed for abuse of discretion. *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317. Even if there is error, a new trial cannot be granted "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Cal. Const., art. VI, § 13.

IV. LEGAL ARGUMENT

A. Monsanto's Arguments Based on the Sufficiency of the Evidence Should be Deemed Waived.

It is incumbent upon Monsanto in arguing the lack of substantial evidence to "fairly state all the evidence, not just the evidence favorable to the appellant." *Hartt v. Cty. of Los Angeles* (2011) 197 Cal.App.4th 1391, 1402. Although not mandated, this Court has discretion to consider Monsanto's arguments waived for failure to state all the evidence. *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 416. Here, Monsanto simply ignores large swaths of evidence. Monsanto's statement of facts do not cite any evidence presented by Johnson relevant to punitive damages. Where there are disputed facts, Monsanto presents only its version. AOB 19-32. This is a common tactic by Monsanto. *See e.g. In re Roundup* 364 F.Supp.3d at 1089. ("Monsanto cannot prevail on a motion

for summary judgment by simply ignoring large swaths of evidence."). The Court should deem Monsanto's arguments on the lack of substantial evidence waived.

B. The Court Should Disregard References to the Trial Court's Tentative Order.

Monsanto's inappropriately devotes much of its argument attempting to use the tentative order and comments by the Trial Court to impeach the final order.[9] AOB 36-38, 74, 78-83, 85-86, 88. However, [a] judge's comments in oral argument may never be used to impeach the final order... Similarly, a trial court's tentative ruling is not binding on the court... Accordingly, we disregard the trial court's tentative ruling ..." *Silverado Modjeska Recreation & Park Dist. v. Cty. of Orange* (2011)197 Cal.App.4th 282, 300; *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 638 ("We note that throughout its appellate brief, [appellant] relies on tentative comments made by the trial court, from which the trial court departed in its final ruling. [Appellant] argues the trial court had it right in its tentative opinion. The trial court's tentative opinion has no relevance on appeal."); *Diaz v. Shultz* (1947) 81 Cal.App.2d 328, 332–33 (it is "the privilege of the trial judge…upon more deliberation, to come to the conclusion that a different order should be made.").

In light of the extensive record and briefing it is not surprising that a more "mature deliberation" of the record and legal authority resulted in a different order. The Court should disregard Monsanto's repeated references to the tentative order.

[9] Monsanto also argues that the Trial Court succumbed to public pressure in issuing its final order based on letters from jurors and some newspaper articles. This Court declined to take judicial notice of these letters and newspaper articles, so Johnson will not address that argument.

C. The Carcinogenic Risk of Roundup was Known or Knowable to Monsanto Before Johnson's Use of Roundup.

Johnson was still using Roundup when his cancer progressed to an aggressive and fatal variant in September 2015. 17B-RT-2882:21-2884:3. The tumor promotion effects of Roundup would have continued until his last use; worsening his cancer. 12B-RT-1863:19-20; 2812:21-24. While Monsanto's duty to warn extends to Johnson's last use of Roundup, there is substantial evidence, particularly in alight most favorable to the verdict, for a jury to find that the risk of NHL was knowable before Johnson's ever used Roundup.

A duty to warn arises when the "*potential* risk" of cancer was "known or *knowable* in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacturer and distribution." *Valentine v. Baxter* (1999) 68 Cal.App.4th 1467, 1483-84 (emphasis added); CACI 1205. "[R]easonably scientifically knowable…refers to knowledge obtainable 'by the application of reasonable, developed human skill and foresight….[t]he actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue" *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, fn. 3 (quoting *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002, fn. 13).

Johnson's experts relied "almost entirely on scientific evidence that existed when the plaintiffs were using Roundup." *In re Roundup,* 364 F.Supp.3d at 1089. The major epidemiology studies relied on by Johnson's experts were published before 2008; the animal studies were completed by 2010; the human in vivo genotoxicity studies were published by 2009; and the IARC classification was published in March 2015, while Johnson was still using Roundup. *Supra* II(B)(2)-(3) Regarding the studies relied on by IARC, 77% were published before 2013; and 97% were published before

2015. 6-AA-6903-6916. The internal Monsanto documents in evidence show that Monsanto knew of the potential carcinogenic risk of Roundup since at least 1999.

The jury properly determined that the methodology used by IARC and Plaintiff's experts represent the "best scientific" knowledge. Dr. Mucci's own textbook acknowledges that IARC and Bradford-Hill represent the best scientific techniques for assessing causation. 24B-RT-4336:14-4337:8. One hundred twenty-five scientists published a peer-reviewed article endorsing IARC's methodology; and 95 scientists co-signed a letter endorsing IARC's findings over EFSA. 13A-RT-2016:3-2019:25, 2012:5-2014:23. The Federal Judicial Center's Reference Manual on Scientific Evidence (3rd. Ed.) ("Reference Manual") (20, 565) and California consider IARC to be an authoritative and well-respected scientific body. *California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 258.

The Reference Manual specifically endorses the methodology used by Johnson's experts and IARC:

> It appears that many of the most well-respected and prestigious scientific bodies (such as the International Agency for Research on Cancer (IARC), ...consider all the relevant available scientific evidence, taken as a whole, to determine which conclusion or hypothesis regarding a causal claim is best supported by the body of evidence...

at 20.

The jury did not view the EPA or any European regulators as using the "best scientific" knowledge as it was clear they failed to follow the guidelines reflecting the "best scientific" knowledge. *Supra* II(B)(5)(b). A jury need not agree with a regulatory agency. *Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 144 ("...it is not for this court to declare, as a matter of law, that a jury could not disagree with the FDA's conclusions.").

Monsanto did not have to wait until the IARC review to warn about the potential for Roundup to cause NHL. There is substantial evidence for a jury to conclude "that Monsanto could have reached this conclusion on its own had it investigated the issue responsibly and objectively." *In re Roundup,* 364 F.Supp.3d at 1089.

D. There Is Substantial Evidence to Support a Finding of Design Defect.

1. Johnson Did Not Abandon His Design Defect Claims.

Monsanto's belated challenge to Johnson's design defect theory is meritless. While Monsanto relies on isolated statements from counsel and expert witnesses, the record, as a whole, makes one conclusion inescapable: Johnson never abandoned his design defect claim.

Before opening statements, Johnson's counsel specifically requested that the Court pre-instruct the jury on design defect while advising that "we're going to pursue the consumer expectation test." 4-RT-438:8-439:15; 441:6-10. Nonetheless, Monsanto erroneously asserts that Johnson abandoned the design defect claim because Counsel and one expert did not suggest Roundup should be banned.[10] 9-RT-1429:11-22; 21A –RT-3601:14-21.

A plaintiff does not have to prove that a product must be removed from the market to maintain a design defect claim. Monsanto's argument is nothing more than an "impossibility preemption" argument in disguise. For the reasons detailed in Section III(H) below, federal preemption poses no bar to Johnson's design defect claims. *See Bates,* 544 U.S. at 444.

[10] Monsanto previously objected to comments made by counsel during opening statement that the surfactant within Roundup had been "banned in Europe for safety reasons." 9-RT-1398:9-1403:5.

Contrary to Monsanto's assertion, the absence of warnings regarding the safety of Roundup is relevant to whether the product performed as safely as an ordinary consumer would have expected it to perform. See *West v. Johnson & Johnson Prod., Inc.* (1985) 174 Cal.App.3d 831, 866–67; *Mariscal v. Graco, Inc.* (N.D. Cal. 2014) 52 F.Supp.3d 973, 986; *Ford Motor v. Trejo* (Nev. 2017) 402 P.3d 649, 656.

2. The Court Properly Submitted the Consumer Expectation Test to the Jury.

The consumer expectations test applies when "[t]he purposes, behaviors, and dangers of [the] products are commonly understood by those who ordinarily use them." *Saller v. Crown Cork & Seal Co.* (2010) 187 Cal.App.4th 1220, 1232.[11] The "consumer expectation test" recognizes that "implicit in a product's presence on the market is a representation that it is fit to do safely the job for which it was intended." *Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 32. "Where the product is one of 'common experience,' encountered generally in everyday life, the jury can rely on its own expectations of safety in applying the test." *Id.*

Where the use of a product is within the understanding of ordinary lay consumers, a jury instruction on the consumer expectation test is appropriate when there is evidence about: (1) plaintiff's exposure to the product; (2) the circumstances surrounding plaintiff's injury; and (3) the objective features of

[11] The California Supreme Court has consistently recognized that California law allows a design defect to be shown by the consumer expectations test. *See Webb v. Special Electric Co. Inc.* (2016) 63 Cal.4th 167, 184 fn 8. Despite Monsanto's contention to the contrary, the Supreme Court has never referred to the consumer expectations test as an "unworkable, amorphic, fleeting standard." Rather, that language is a direct quote from the defendant in *Soule* arguing for the complete abolishment of the test. The Court rejected the defendant's arguments and concluded that "the test remains a workable means of determining the existence of design defect."

the product relevant to evaluating its safety. *Saller*, 187 Cal.App.4th at 1236. The record in this case more than satisfies these minimum requirements.

Johnson mixed and sprayed Roundup approximately 30 times or more per year using a 50 gallon truck sprayer, a backpack sprayer, and directly from the Roundup container sold by Monsanto. 18B-RT-3253:11-3254:8; 3256:7-10. Each sprayer was a common and well-accepted method to apply Roundup. 23A-RT-4097:9-15; 4108:24-4109:2.

Johnson sprayed approximately 150 gallons of Roundup each day with the truck sprayer. 21A-RT-3597:11-16. While spraying Roundup, Johnson wore protective gear. 18B-RT-3244:7-3245:2; 3248:7-11; 3250:19-3251:2. Although Johnson tried to minimize his exposure to Roundup he would experience significant "spray drift" resulting in direct exposure of Roundup to his face, cheek, ears, and neck. 18B-RT-3240:17-3243:6; 3315:12-3316:2. He also had an incident of significant exposure to Roundup when the hose on his truck sprayer became detached. 18B-RT-3258:20-24; 3261:14-3262:8.

Johnson reviewed the product label every time he sprayed Roundup. 18B-RT-3230:10-3231:6. But the label never included cancer warnings. 18B-RT-3233:23-3234:19. Monsanto's own expert witnesses agree that Johnson followed the product labeling and did a "good job" trying to reduce his exposure to drift. 23A-RT-4090:3-9; 4093:3-8; 4101:19-22. Johnson understood Roundup to be safe and would not have sprayed Roundup if he knew it could harm humans. 18B-RT-3234:20-3235:5; 3283:6-11.

Johnson sprayed the same formulation of Roundup sold, over-the-counter, to ordinary consumers for use around their home. 21A-RT-3607:15-3608:8; 22A-RT-3937:7-21. There were safer, less toxic alternatives available to Monsanto during the time of Johnson's use of Roundup. 21A-RT-3626:16-3627:16.

Monsanto's argument that the jury could not form minimum safety assumptions about the safety of the product is belied by several jurors' confirming that they themselves have sprayed Roundup. For example, Juror No. 2 previously used Roundup and took "logical precautions" while spraying. 5B-RT-537:3-538:24.[12] Juror No. 11 used Roundup just weeks before jury selection. 7A-RT-912:20-22. He explained that he takes "precautions when using chemicals like that" because of potential safety concerns. 7A-RT-911:23-913:2. Clearly, using Roundup is within the understanding of lay consumers.

This straightforward conclusion is supported by the fact that the consumer expectation test has been applied to pesticides. *See Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698. In *Arnold*, the Court concluded that an ordinary consumer may "reasonably believe that pesticides are designed to eliminate pests within homes occupied by humans, without causing significant harm to the humans." *Id.* at 717.

Monsanto contends that the consumer expectation test is not appropriate because Johnson offered testimony regarding the mechanism of cancer. AOB 48. However, the alleged design defect arises from Johnson's exposure to Roundup during the routine and relatively straightforward use of the product. *See Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1002-03, ("the design failure was in [the products'] emission of high toxic respirable fibers in the normal course of [their] intended use and maintenance."). Expert testimony was necessary to explain how exposure to Roundup causes cancer; not design defect. As the court explained in *Saller*:

> The fact that expert testimony was required to establish legal causation for plaintiffs' injuries does not mean than an ordinary user of the product would be unable to form assumptions about the safety of the products. The consumer expectations test does not require

[12] The trial court denied Plaintiff's request to strike Juror No. 2 for cause. 6A-RT-700:5-702:16.

> inquiry into how exposure to a particular level of asbestos may lead to the development of cancer.

Id. at 1235.

Any user of Roundup, including Johnson, could reasonably expect that use of the product in accordance with the product labeling would not lead to cancer. *See West*, 174 Cal.App.3d at 866-867.

The cases Monsanto cites do not preclude application of the consumer expectation test. Both *Trejo*, 13 Cal.App.5th 110 and *Morson v. Superior Court* (2001) 90 Cal.App.4th 775, concern injuries involving esoteric circumstances specific to the particular plaintiff. In *Trejo*, the court noted that "allegations of allergic and/or idiosyncratic reactions" warrant special consideration because of deeply technical issues in the design of the product regarding allergies and the difficulty for a manufacturer to foresee the multitude of possible and unpredictable allergic reactions unique to certain individuals. *Id.* at 158. Likewise, *Morson* involved an idiosyncratic reaction that resulted from an underlying allergy to the natural substance of latex driven by the manufacturing procedures. 90 Cal.App.4th at 79. These cases are therefore consistent with *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 93, where the metal products alleged to be defective were generally non-harmful and only became dangerous because of the manufacturing process.

As explained in *Arnold*, injuries from pesticides do not require an overly technical review of the manufacturing process. 91 Cal.App.4th at 727.

E. There Is Substantial Evidence of Causation.

In viewing the evidence in a light most favorable to Johnson, there is more than substantial evidence to prove that Roundup was a substantial contributing factor to Johnson's NHL. In appealing the Court's JNOV order Monsanto does not and cannot challenge the admissibility of Johnson's

experts opinions that Roundup causes NHL; and was a substantial factor in causing Johnson's NHL. *Waller v. Southern Cal. Gas Co.* (1959) 170 Cal.App.2d 747, 757 ("[W]e must take the record as we find it. We cannot strike or disregard any evidence favorable to the prevailing party...").

1. Legal Standard on Causation.

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

It "is generally correct that in many (or even most) instances epidemiological studies provide the best evidence of causation." *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 491. However, it is also proper for experts to rely on "other tools to determine causation." *Id.; Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 901; *Wendell*, 858 F.3d at 1235. Where the "validity of these studies, and both their strengths and their weaknesses, are subject to considerable scientific interpretation and debate" it is not the court's role to resolve these debates. *Cooper*, 239 Cal.App.4th at 589–90; *Davis*, 245 Cal.App.4th at 484. In *Cooper*, the trial court abused its discretion in substituting "its opinion for the opinion of [the expert] and the opinions of the authors of the study." *Id.*at 575, 588.

2. Epidemiology Supports Specific Causation.

Nabhan testified that Johnson's risk of NHL was more than doubled based on the epidemiology. 17A-RT-2825:9-18, 2827:15-2830:5. In fact Johnson's exposure was "far higher" than the exposure showing a doubling of the risk in De Roos (2003), McDuffie and Eriksson. 21B-RT-3673:25-3674:16. In *Cooper*, it was proper for an expert offering a case-specific opinion to rely on the dose-duration analyses even where the ever exposure analysis did not show an increased risk. 239 Cal.App.4th at 588. In *Cooper* it was proper to rely on dose-response findings even though they did not adjust for "risk factors for bladder cancer such as arsenic, occupational exposures, race/ethnicity." *Id.* at 589. As in *Cooper,* the epidemiology relied upon by Johnson's experts shows a higher risk for NHL in the dose-response analysis compared to the ever-never analysis.

Although these studies alone can constitute substantial evidence of specific causation, Nabhan went further and reviewed the animal studies, the mechanistic studies and conducted a differential diagnosis. *See supra* II(B)(6)(a) Therefore, even if the epidemiology did not demonstrate a doubling of the risk, Nabhan's testimony constitutes substantial evidence of causation.

"There is no such requirement [for a relative risk of 2.0] in California." *Davis,* 245 Cal.App.4th at 493 ("Cooper does not mandate exclusion of these opinions for this purpose even if none of the studies shows a relative risk of greater than 2.0."). In *Cooper,* the Court determined that a study reporting an odds ratio of 2.0, in and of itself, could be used as substantial evidence of specific causation absent other evidence. *Id.* at 593. However, a relative risk of 2.0 is only necessary when one study is offered as the ***only evidence*** used for specific causation absent toxicological

evidence of carcinogenicity. *Cooper,* 239 Cal.App.4th at 593; *In re Hanford Nuclear Reservation Litig.* (9th Cir.) 292 F.3d 1124, 1136.

Other factors also make a relative risk of 2.0 unnecessary such as "evidence of a pathological mechanism may be available for the plaintiff that is relevant to the cause of the plaintiff's disease" or if the agent is a tumor-promoter [as it is here] then the "relative risk from a study will understate the probability that exposure accelerated the occurrence of the disease." Reference Manual at 614-618. A "threshold increase in risk or a doubling in incidence in a group study in order to satisfy the burden of proof of specific causation is usually inappropriate." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 28 cmt. c (4), Specific Causation.

3. Nabhan's Testimony Constitutes Substantial Evidence of Causation.

In *Cooper,* it was an abuse of discretion for the trial court to grant JNOV because Plaintiff's expert could not identify a cause of cancer in most of his patients. 239 Cal.App.4th at 593. Nabhan properly conducted a differential diagnosis. In conducting a differential diagnosis one "[a]ssumes the pertinence of all potential causes, then rules out the ones as to which there is no plausible evidence of causation, and then determines the most likely cause among those that cannot be excluded." *Wendell,* 858 F.3d at1234. *Wendell* concluded that "[w]here, as here, two doctors who stand at or near the top of their field and have extensive clinical experience with the rare disease or class of disease at issue, are prepared to give expert opinions supporting causation, we conclude that Daubert poses no bar based on their principles and methodology." *Id.*

The Plaintiff in *Wendell*, like Johnson, had a rare subtype of T-cell lymphoma. 858 F.3d 1227 at1236. *Wendell* held:

> the district court erred when it excluded Plaintiffs' experts' opinion testimony because of the high rate of idiopathic [unknown] HSTCL

> and the alleged inability of the experts to rule out an idiopathic origin or IBD itself.... It is enough that the proposed cause "be a substantial causative factor."

Id. at 1237.

The Trial Court correctly concluded that, "Nabhan's methodology in this case is similar to the differential diagnosis accepted by the Court of Appeal in *Cooper*." 6-AA-6148. Nabhan thoroughly reviewed the scientific literature, Johnson's history and applied his considerable knowledge and experience in performing his differential diagnosis. *Supra* II(B)(6)(a). Based on his thorough analysis, Nabhan testified that, more likely than not, Johnson would not have cancer today if he was not exposed to Roundup. 17A-RT-2849:6-21. Monsanto does not challenge the admissibility of that opinion.

Instead, Monsanto argues that a doctor's inability to identify a cause of cancer in some patients precludes him from identifying a cause in any patient, even if that patient is exposed to a known carcinogen. Monsanto's argument would provide legal immunity to every company that produces a product capable of causing cancer. According to Monsanto's expert, Kuzel, an expert cannot even rule out idiopathic causes of lung cancer in smokers, "because there are lung cancers which arise in nonsmokers." 27A-RT-4790:9-18. This argument has been squarely rejected in California and specifically rejected by the jury.

Idiopathic means "simply we don't know." 17A-RT-2844:9-10. As Nabhan explained,"[t]here are scenarios where you are able to identify a particular cause, and I think it's your obligation if there's a particular cause that you believe is substantially contributing to the disease to eliminate this..." 17B-RT-2998:1-5. With Johnson, Nabhan identified a substantial contributing cause: repeated high dose exposure to Roundup.

Monsanto fails to distinguish *Cooper*. *Cooper* rejected defendant's argument that a differential diagnosis was invalid where there was "no

physiological or biological markers to distinguish [plaintiff's] bladder cancer from the myriad of bladder cancer patients [the expert] treats with no known causes." 239 Cal.App.4th at 576. *Cooper* held that JNOV is only appropriate when, as a matter of law, defendant's explanation, supported by substantial evidence defeats the explanation proffered by Plaintiff. *Id.* at 578.

Here, Monsanto offers no alternative explanation. Monsanto proffered Kuzel as an expert on the cause of Johnson's cancer. His "explanation" was that "we don't know" and it's probably "bad luck." 27A-RT-4791:11-14. Kuzel explained that he would require "clear, absolute certainty" before ruling out an idiopathic causes. 27A-RT-4790:9-18. Monsanto's "explanation" thus hinges on an evisceration of the "more probable than not" standard for causation in civil cases.

Kuzel's testimony cannot defeat Johnson's explanation as a matter of law. Kuzel has no opinion as to whether glyphosate causes NHL, and he could not even rule "glyphosate out as a causative factor." 27B-RT-4851:23-4852:2. Dr. Kim, who did not testify at trial[13], only stated at deposition there are no "established" causes of Johnson's cancer. 17B-RT-2995:14-18. This is a much higher standard of proof than required at trial. *Cooper*, 239 Cal.App.4th at 578. She also had not read literature on Roundup and NHL. As Nabhan noted "unless you actually review the literature, unless you look at what is published, you probably can't comment" on the cause of Johnson's cancer. 17B-RT-2990:2-4.

Monsanto cites several cases that are inapplicable because they involve unique facts and address the admissibility of expert opinions under the procedural and substantive law of other jurisdictions. AOB58-60. Each of these cases involve the admissibility of expert opinions under *Daubert*,

[13] Her testimony was only read during the cross-examination of Nabhan, because he read all of the depositions of Johnson's treating physicians in preparing his opinion.

where an expert did not reliably "rule in" the Defendant's product as a cause of the injury. *Milward v. Rust-Oleum Corp.* (1st Cir. 2016) 820 F.3d 469, 476 ("Given that the record does not contain a scientifically reliable basis to "rule in" benzene, Dr. Butler needed some other method to "rule out" an idiopathic diagnosis."); *Tamraz v. Lincoln Elec. Co.* (6th Cir. 2010) 620 F.3d 665, 674; *Hall v. Conoco* (10th Cir. 2018) 886 F.3d 1308, 1316; *Bland v. Verizon Wireless, (VAW) L.L.C.* (8th Cir. 2008) 538 F.3d 893, 899; *Kilpatrick v. Breg, Inc.* (11th Cir. 2010) 613 F.3d 1329, 1342; *Black v. Food Lion, Inc.* (5th Cir. 1999) 171 F.3d 308, 313.

In a recent Ohio federal court case, applying *Tamraz*, the court noted that *Tamraz*, "...does not stand for the proposition that all differential diagnoses are unreliable when the cause of a disease is unknown in the majority of cases." *In re E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation* (S.D. Ohio 2016) 342 F.Supp.3d 773, 783. The Court held that an expert's differential diagnosis was admissible where there was reliable evidence to rule in Defendant's product due to a "probable link finding for testicular cancer." *Id.*

Here, likewise, although not required under California law, Nabhan specifically considered and ruled out unknown causes. The Trial Court held that Nabhan considered idiopathic causes stating that Johnson's young age was a red flag there was an environmental exposure. 6-AA-6148; 17B-RT-2843:2-2844:19; 2997:8-10 ("[n]ot in his condition. Not in somebody who has now been exposed[14] to an agent of known carcinogen causing non-

[14] Monsanto makes a baseless argument in a footnote that Nabhan did not consider Johnson's exposure. He did and described that exposure. 17A-RT-2831, 2834-2836. In any event while "precise information concerning the exposure necessary to cause specific harm [is] beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic ... and need not invariably provide the basis for an expert's opinion on

Hodgkin's lymphoma.). *See e.g. Dickson v. National Maintenance & Repair of Kentucky, Inc. (*W.D. Ky. 2011) 2011 WL 12538613, at *11 (expert properly accounted for idiopathic causes when noting "the fact that Plaintiff was young.").

4. Sawyer's Opinions Were Not Speculative and they Support Causation.

Plaintiff did not elicit a specific causation opinion from Sawyer on direct examination because Nabhan had already provided that testimony.[15] Sawyer testified as to the toxicity of surfactants; the manner in which Johnson was exposed; and that Johnson had sufficient exposure to cause his NHL. It was Monsanto, on cross-examination, who elicited Sawyer's ultimate opinion that Roundup caused Johnson's NHL and that Sawyer conducted a differential diagnosis. 21B-RT-3683:5-25; 3781:18-21. The Trial Court ruled this opinion was admissible. 4-AA-3196-3197. Sawyer's opinion constitutes substantial evidence of causation for the same reasons as Nabhan.

Monsanto does not claim that Sawyer's testimony is inadmissible. Exposure testimony without an ultimate conclusion on specific causation is admissible. *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 674. Sawyer's same exposure testimony has been deemed admissible by the Ninth Circuit. *Whitlock v. Pepsi Americas* (9th Cir. 2013) 527 Fed.Appx. 660, 661. Likewise, here, Sawyer's opinion that Roundup exposure was sufficient to cause Johnson's cancer is admissible even assuming it does not establish the burden of proof.

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causation." *Clausen v. M/V NEW CARISSA* (9th Cir. 2003) 339 F.3d 1049, 1059.

[15] Monsanto specifically objected to testimony from Plaintiff's experts as cumulative.

F. The Compensatory Damages Were Not Grossly Disproportionate to Johnson's Extreme Suffering.

"A damages award is excessive only if the record, viewed most favorably to the judgment, indicates the award was rendered as the result of passion and prejudice on the part of the jurors." *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 (quoting *Bertero v. Nat'l Gen. Corp.* (1974) 13 Cal.3d 43, 65, n. 12). As the jury was properly instructed "[n]o fixed standard exists for deciding the amount of these noneconomic damages." CACI 3905A. The jury was properly instructed to use its "judgment to decide a reasonable amount based on the evidence and your common sense." CACI 3905A.

The jury's award of $33 Million in future non-economic damages is not grossly disproportionate to Johnson's suffering. Johnson's cancer has caused immense physical and mental suffering. Johnson has open sores and lesions all over his body that makes lying down more painful than standing. *Supra* II(B)(7). He must watch his children suffer as they watch him die. *Id.*. He is deprived of the intimacy of his wife due to shame over his physical appearance and her 90 hour work week. *Id.* He is being deprived of over thirty years of experiencing and enjoying life itself. Whether he dies early or continues to live in pain for those thirty-three years, he deserves the substantial compensation awarded to him by the jury.

The jury could have credited Kuzel and awarded future non-economic damages because Johnson would live for another thirty-three years. The jury could have compensated Johnson for a shortened life span and/or for the torment Johnson may suffer as he faces death over the next several years. Plaintiff's counsel presented both scenarios to the jury during closing arguments. 29A-RT-5110:10-18.

1. California Law Permits an Award of Damages for a Shortened Life Span.

It would be permissible for the jury to award damages on the belief that Johnson will die in two years. Under California law, a "shortened life expectancy" is a compensable where a Plaintiff is still alive at the time of judgment. *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276 (verdict was excessive in part because "[t]here was no suggestion of the prospect of suffering a ... shortened life expectancy") (emphasis added); *James v. United States* (N.D. Cal. 1980) 483 F.Supp.581, 586 ("An individual may be compensated for …[a] shortening of his lifespan"); *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 549 ("a shortened life expectancy" is part of non-economic damages). The jury was instructed that it could award Johnson damages for "loss of enjoyment of life" and other "similar damages." 29A-RT-5049:15-16.

"California decisions rarely employ the 'enjoyment of life' rubric, yet achieve a result consistent with it. No California rule restricts a plaintiff's attorney from arguing this element to a jury." *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 763–764. Like California, "[a] majority of American jurisdictions recognize the compensability of loss of enjoyment of life..." *Id.* "[C]onsciousness is not required to recover loss of enjoyment of life damages." *Castro v. Melchor* (Haw. 2018) 142 Haw. 1, 14–15, 414 P.3d 53, 66–67. "Loss of enjoyment of life is just that... Alive, dead, in a coma or with bodily injuries, the individual is unable to function in a way which allows him to enjoy life." *Choctaw Maid Farms, Inc. v. Hailey* (Miss. 2002) 802 So. 2d 911, 923.

"[M]any jurisdictions have recognized decreased life expectancy as a cognizable injury in a personal injury action." *Bauer ex rel. Bauer v. Mem'l Hosp.* (Ill. 2007) 377 Ill. App. 3d 895, 919–20 (collecting cases); *see e.g. United States v. Anderson,* (Del.1995) 669 A.2d 73, 78 (allowing recovery

for shortened life expectancy because of increased risk of death from a physician's alleged failure to timely diagnose testicular cancer).

The Minnesota Supreme Court, citing *James* which applied California law, concluded:

> [Plaintiff]'s cancer has recurred and her death is very likely, but not certain. Fortunately, [Plaintiff] is still alive at the time of this appeal. Because this is not a death case at this point in time... the appropriate measure of damages is the value of the reduction of the plaintiff's life expectancy from her pre-negligence life expectancy. ... the fact-finder must determine the amount of damages necessary to compensate Jocelyn for that reduction in life expectancy.

Dickhoff ex rel. Dickhoff v. Green (Minn. 2013) 836 N.W.2d 321, 336. Importantly, the Court held that such damages…will advance, not undermine, the fundamental purposes of tort law: deterrence and compensation." *Id.*

To the extent Monsanto believes California law does not allow such damages it had an obligation to object at trial. "Raising the issue for the first time in a posttrial motion is insufficient because the trial court has no ability to correct" any claimed error. *Bigler-Engler,* 7 Cal.App.5th at 295; *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal. 2d 498, 509 (Defendant waived argument by not objecting to counsel's argument "of a mathematical formula predicated upon a per diem allowance for this item of damages.").

2. It Must be Presumed that the Jury Followed The Court's Instructions.

An appellate court "must uphold an award of damages whenever possible." *Westphal v. Wal-Mart Stores, Inc*. (1998) 68 Cal.App.4th 1071, 1078. This Court must "presume the jury follows its instructions...and that its verdict reflects the legal limitations those instructions imposed" *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803–804.

Here, another basis supports the jury's award of future noneconomic damages even if Johnson cannot recover damages for a shortened life span.

Monsanto offered testimony from Kuzel that Johnson could live for another thirty-three years. If the jury believed this testimony they would have properly awarded Mr. Johnson damages for thirty-three years of suffering. Monsanto elicited that testimony, they cannot now disown it. This Court need not speculate as to the basis for the jury's decision as, in either scenario, the verdict is not excessive.

3. An Inflamed Jury Does Not Deliberate for Three Days and Does not give Less Damages than Requested by Counsel.

The Court may properly consider the length of jury deliberations in determining whether a verdict was inflamed or a result of passion. *Jurado*, 38 Cal.4th at 134. In *Jurado*, the California Supreme Court held the "length of their deliberations rather strongly implies" that the death penalt verdict was not a result of passion. *Id.; see also In re Asbestos Litigation* (Del. Super. Ct., Jan. 31, 2019, No. CV N14C-08-164 ASB) 2019 WL 413660, at *11 (upholding a $40 million verdict because "an inflamed jury would not have taken three days to deliberate.").

Here, the verdict and the jury's deliberations indicate thoughtful rationality. During its three days of deliberation the jury was "really sifting" through the evidence and asking detailed, science-based questions. These are not the actions of an inflamed jury. The Trial Court told the jury "You were taking copious notes, and you took your time in carefully considering all of the issues in arriving at your verdict. So I'm very impressed with all of you. You were an excellent group of jurors." 32-RT-5348:3-12

That the jury awarded Johnson only two-thirds of the punitive damages requested is further evidence that the jury was not inflamed. In *Buell-Wilson,* the Court held that a 2004 jury's verdict evidenced passion because the jury awarded approximately 13 times the amount counsel requested in compensation. 141 Cal.App.4th at 553. The Court thus reduced

the non-economic damages to $18 Million, the amount requested by counsel, for a total compensatory damages award of $22.6 Million. *Id.* at 554, 571.

Here, the jury gave only what Johnson suggested was fair and reasonable compensation for his compensatory damages. Monsanto did not argue this amount was unreasonable. Monsanto deliberately chose to argue only liability and ignore damages.

4. The Size of the Award is not Evidence of an Inflamed Jury.

"The mere fact that the judgment is large does not validate an appellant's claim that the verdict is the result of passion or prejudice of the jury. Each case must be determined on its own facts." *Dirosario v. Havens* (1987) 196 Cal.App.3d 1224, 1241. "The fact that an award may set a precedent by its size does not in and of itself render it suspect." *Buell-Wilson* 141 Cal.App.4th at 548. A finding of an excessive verdict predicated on "what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 615–16 (finding that the "vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale.").

In any event, Johnson's damages are not out of line with verdicts in other cases.[16] "A [2006] review of all of these cases shows a range between $1 million and $66 million in compensatory damages awards and substantial differences in the facts of each case." *Buell-Wilson* 141 Cal.App.4th at 552 ($22 Million verdict awarded in 2004 not excessive). The highest courts of three states have approved similar non-economic damages. *Reckis v.*

[16] The plaintiffs in the cases cited by Monsanto did not have similar damages to Johnson. *See e.g. Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651 (plaintiff did not have cancer.); *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92 (evidence presented that Plaintiff was "... more likely than not ... cured of his disease.").

Johnson & Johnson (Mass. 2015) 471 Mass. 272, 301–03 ($50 Million); *Munn v. Hotchkiss Sch.* (Conn. 2017) 165 A.3d 1167, 1191 ($31.5 Million); *Meals ex rel. Meals v. Ford Motor Co.*, (Tenn. 2013) 417 S.W.3d 414, 428 ($39.5 Million).

5. Non-economic Damages are Not and Cannot be Fixed to Economic Damages.

In personal injury cases there is "no authority establishing limits upon a general damage award based upon a small amount of special damages." *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078–1079.

Monsanto cites, as support, an inapplicable case, "in the insurance bad faith setting, [where] emotional distress is not recoverable as a separate cause of action, but only as 'an aggravation of the financial damages'" *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1216. *Buell-Wilson* does not support Monsanto. The court reduced the non-economic damages to 4 times economic damages only because that is what plaintiff's counsel asked the jury to award as a reasonable amount. 141 Cal.App.4th at 553.

Here, it would violate fundamental notions of due process to create a rule tying non-economic damages to economic damages, which mostly consisted of future lost wages. Johnson's life and well-being are not less valuable than that of someone with a higher paying job.

6. Statements in Closing Arguments did Not Inflame the Jury.

Counsel's comments about "changing the world" and "champagne" were made in reference to punitive damages, and thus would not affect the compensatory damage award. Counsel's comments were appropriate. In *La Palmas*, the following statements by plaintiff were deemed appropriate:

> There is probably nothing, in my opinion that is more sickening in our society than a company that will take as much money as they've got and use it to pound away on you legally.... We can take away some of their money so they don't have that money at least anymore to grind people into the dirt.... ***You've got to send a message loud enough to***

> ***them that they won't treat people this way*** ... That they wouldn't use their money to buy lawyers to try to legally nail your knees to the floor.

Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1243. (emphasis added).

Even if Counsel's comments were inappropriate, the Trial Court mitigated any potential prejudice with an admonition and a curative instruction. 30-RT-5265:13-19. Courts "credit jurors with intelligence and common sense and presume they generally understand and follow instructions." *People v. McKinnon* (2011) 52 Cal.4th 610. The Trial Court instructed the jury to disregard the "change the world" comment and re-emphasized the purpose of punitive damages. 30-RT-5267:6-22. Monsanto approved the Court's curative instruction stating it's "quite acceptable to us." 30-RT-5265:11-12; *People v. Garvin* (2003) 110 Cal.App.4th 484, 489 ("...a defendant who believes an instruction requires clarification must request it.").

Monsanto also did not contemporaneously object to the "change the world" comment. *See Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal. 3d 285, 303 (Argument for misconduct waived where "during plaintiff's argument to the jury defense counsel did not object or request that the jury be admonished").

G. The IARC Monograph Was Admitted Without Objection From Defendant and the EPA Documents are Inadmissible Hearsay.

There was no error in admitting the IARC Monograph when Monsanto posed no objection. 12A-RT-1743:19-30. The "[f]ailure to object to the reception of a matter into evidence constitutes an admission that it is competent evidence." *People v. Close* (1957) 154 Cal.App.2d 545, 552. Two of the authors of the IARC monograph testified

at trial and were subject to cross-examination by Monsanto. 5-AA-5514, 5-AA-5875.

The Trial Court did not abuse its discretion in excluding the regulatory documents because they are hearsay within hearsay and not sufficiently trustworthy to satisfy Section 1280 requirements. 20-RT-3529:3530:18. Section 1280, the official records exception, has traditionally been employed where the public officials directly observed the acts or events made subject of the reports. *See, e.g., Burge v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 384, 388-389; *People v. Clark* (1992) 3 Cal.4th 41, 158-159. In contrast, "a public employee's writing, which is based upon information obtained from persons who are not public employees, is generally excluded because the 'sources of information' are not 'such as to indicate its trustworthiness.'" *People v. Baeske* (1976) 58 Cal.App.3d 775, 780–781; *People v. Ayers* (2005) 125 Cal.App.4th 988, 996.

The EPA only conducts reviews of reports submitted by the manufacturer. 7 U.S.C.A. § 136a; AA7386. Therefore, the EPA report is based on hearsay from "persons who are not public employees." *Baeske*, 58 Cal.App.3d at 780–781. Furthermore, the writing must be "made at or near the time of the act, condition, or event." Cal. Evid. Code, § 1280. Here, the EPA reviewed hearsay studies going back to the 1970s.

"EPA reports must survive a trustworthiness inquiry." *Junk v. Terminix Intern. Co*. (8th Cir. 2010) 628 F.3d 439, 449 (EPA assessment of pesticide not admissible); *Jenkins v. Whittaker Corp.* (9th Cir. 1986) 785 F.2d 720, 726 (Proper to exclude "opinions and conclusions in both [government] reports" because it was "concerned about the competence and trustworthiness of the reports."); *Jenkins v.* 726 *St John v. Toyota Motor Corp.* (C.D. Cal., 2013) (unpublished) 2013 WL 5775081, at *2 (flawed government report is "best explored, and cross-examined, through the experts, and not offered wholesale.").

Johnson presented evidence that the government documents were not trustworthy. Johnson noted that the European assessments were largely written by Monsanto and the lack of trust in these assessments was causing several European countries to phase out using glyphosate. 5-AA-5011-5012 (from briefing); 13A-RT-2019:17-2020:2; RT2012:5-2014:23. The SAP unanimously concluded that the EPA did not follow its guidelines in its glyphosate reports. 5-AA-5004; 14B-RT-2395:4-24. High-ranking officials in the EPA also concluded "that the assessment was not consistent with the Agency's guidelines." 5-AA-5004. As explained and conceded by Monsanto, the EPA documents are drafts, not final assessments. 5-AA-5003; 13A-RT-1998:18-1999:14; 9-RT-1300:16-1301:2.

Monsanto sought to admit these documents through judicial notice. However, "While courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.'" *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063–64. Foreign documents are not subject to judicial notice. "Judicial notice is proper only for "official acts ...of the **United States."** Cal. Evid. Code § 450.

The primary case cited by Monsanto supports Johnson. In *People v. ConAgra Grocery Products Co.*, the Court explained that it was not an abuse of discretion to admit a government report from the NIH stating:

> This monograph was introduced during the ***testimony of one of the experts who had helped write it***." …The monograph described an NIH study that had been recently completed and had been extensively peer reviewed, so the trial court could have reasonably concluded that it was a writing made "at or near" the time of the study and had been prepared using sources and methods that were trustworthy

People v. ConAgra Grocery Products Co. (2017) 17 Cal.App.5th 51, 139. Here, no EPA employee was called to testify regarding the EPA's procedures for conducting the evaluations; the EPA did not conduct the studies; the

industry studies have not been peer-reviewed; the EPA assessment did not follow guidelines; and it is based on studies dating to the 1970s.

In any event, Monsanto suffered no prejudice. *See e.g. Stephen v. Ford Motor C*o. (2005) 134 Cal.App.4th 1363, 1376 (no prejudice where "the trial court excluded the report itself" but "permitted [expert] to testify that he had based his opinion on it."). At trial, Monsanto repeatedly referenced and read the opinions of foreign agencies and the EPA during cross-examination of Johnson's experts and in examination of Monsanto's experts. 23B-RT-4147:11-19; 26A-RT-4522-4537; 4557:19-20; 26B-RT-4681:6-22. These regulatory opinions were a central part of Monsanto's closing. 29B-RT-5175:5-7.

The Trial Court's overall evidentiary rulings actually benefited Monsanto. The Trial Court excluded the government documents that Johnson sought to admit to rebut the EPA assessment. 20-RT-3529:3530:18. Johnson could not admit an EPA report showing that the approval of Roundup was based on fraudulent studies conducted by IBT laboratories. RA42, RA46-47, RA74. Johnson could not admit EPA memoranda concluding that glyphosate caused tumors in mice. RA85, 93-94. Johnson could not admit conclusions from EPA scientists in 2015 that glyphosate is likely to be carcinogenic. RA232.

A review of the entire record reveals no prejudice from the Trial Court's rulings on regulatory evidence. To the great benefit of Monsanto, the Trial Court excluded the fact that California agreed with IARC and listed glyphosate as a chemical known to cause cancer. RA236. The scientists at OEHHA both reviewed the IARC monograph and considered arguments by Monsanto in public comments. OEHHA rejected Monsanto's contentions and repeatedly stated OEHHA's agreement with IARC's findings. RA243-244, 258, 260-261, 3-RT-309:5-8; 3-RT-309:9-16.

Plaintiff's counsel appropriately commented on Monsanto's tactical decisions not to put on a sponsoring witness for an EPA document that Monsanto repeatedly asserted as key evidence in its defense. 29A-RT-5064:14- 5065:12. The California Supreme Court has blessed "comments based upon the…failure of the defense to introduce material evidence or to call anticipated witnesses." *People v. Bradford* (1997) 15 Cal.4th 1229, 1339.

Counsel was entitled to re-read and remind the jury of the limiting instruction that Monsanto requested for the EPA documents. 29A-RT-5064:23-5065:5. There was no misconduct. As requested by Monsanto, the jury was instructed that the EPA documents were "being admitted for the limited purpose of showing Monsanto's state of mind regarding the state of the science and for no other purpose." 29A-RT-5054:22-25. Monsanto did not contemporaneously object to counsel's argument. *Id.* To the extent Monsanto believed counsel inaccurately stated the law, it was Monsanto's obligation to request a curative instruction. *People v. Garvin* (2003) 110 Cal.App.4th 484, 489.

Even if Counsel's arguments were improper they were not a miscarriage of justice. *People v. Price* (1991) 1 Cal.4th 324, 451 (defendant was not prejudiced by prosecutor's direct reference to criminal defendant's failure to testify)." *Boyette*, 29 Cal.4th at 455–456. In closing argument, Monsanto's counsel told the jury they could consider the EPA evidence in deciding causation. 29B-RT-5196:16-5198:18; 5223:19-5224:5 ("Consider that the regulators, the EPA, the European regulators, all disagree" that glyphosate causes cancer.").

Monsanto was not prejudiced by these evidentiary rulings. The jury repeatedly heard Monsanto's arguments about the validity of the findings from regulators. The jury simply did not find the evidence from regulators credible.

H. Johnson's Claims Are Not Preempted.

"Pesticides are regulated by both the federal government and the State of California." *Caltec Ag Inc. v. Dep't of Pesticide Regulation* (2019) 30 Cal.App.5th 872, 881. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C.S. §136 *et seq.* (2012), establishes the federal regulatory component and establishes certain minimum requirements for pesticide labeling, 40 C.F.R. §156.10(a)(1). Under FIFRA, manufacturers seeking to sell pesticides must apply for registration with the EPA and must file certain information, including a copy of the label for the pesticide. 7 U.S.C. § 136a(a), (c)(1). The manufacturer is ultimately responsible "for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses." 53 Fed. Reg. 15952, 15956 (May 4, 1988). If the product's label "bears any statement…which is false or misleading in any particular" the product is considered "misbranded" under federal regulations. § 136(q)(1)(A).

"The States are independent sovereigns in our federal system," and courts "have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Bates*, 544 U.S. at 449, (quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485). "In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Id.*

FIFRA expressly allows states to "regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a). "States are permitted to impose their own pesticide labeling requirements as long as those requirements are not "in addition to or different from" those mandated by FIFRA. 7 U.S.C. § 136v(b)." *In re Roundup,* 364 F.Supp.3d at 1087; *Caltec Ag Inc. v. Dep't of Pesticide Regulation*, 30 Cal.App.5th at 881.

When a statute contains an express preemption clause, the court's "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63; *Quesada v. Herb Thyme Farms, Inc*. (2015) 62 Cal.4th 298, 308. The burden is on Monsanto, the party asserting preemption, to demonstrate that preemption applies. Monsanto has wholly failed to meet this burden.

1. Monsanto Waived Its Express Preemption Arguments.

Monsanto asserts, for the first time on appeal, a new theory to support express preemption: California law imposes a "more expansive warning obligation than FIFRA's requirement to warn about risks associated with 'widespread and commonly recognized' practices." AOB 67. This theory was not presented or litigated before the Trial Court. During the Trial Court proceedings, Monsanto only argued that Plaintiff's warnings-based claims were expressly preempted because a labeling requirement that "glyphosate causes cancer" would be in addition to or different from EPA findings regarding the carcinogenicity of glyphosate. 2-AA-236, 12A-RT-1751-1752. Furthermore, Monsanto did not object to the trial court's failure-to-warn instructions for failing to include the "widespread and commonly recognized" language.

"New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal." *Am. Indian Health & Servs. Corp. v. Kent* (2018) 24 Cal.App.5th 772; *quoting Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997. Monsanto's thirteenth-hour attack on express preemption grounds requires the application of limited facts to a purported warnings-standard under FIFRA never advocated to the Trial Court. *City of Scotts Valley v. Cty. Of Santa Cruz* (2011) 200

Cal.App.4th 97. Monsanto has waived its argument that Johnson's failure-to-warn claims are expressly preempted by FIFRA.

2. Johnson's Claims Are Not Preempted by the Express Preemption Doctrine.

Even if Monsanto's express preemption argument was cognizable, it fails because Johnson's failure-to-warn claims under California law do not impose requirements in addition to or different from those required under FIFRA.

FIFRA's express preemption clause provides that a State "may regulate the sale or use of any federally registered pesticide or device in the State," but it "shall not impose or continue in effect any requirements for labeling or packaging ***in addition to or different from*** those required" under FIFRA. 7 U.S.C. § 136v (a) and (b)(emphasis added). In *Bates* 544 U.S. 431, the United States Supreme Court approved a two-part test for determining whether FIFRA preempts certain state law claims, including failure-to-warn and defective design claims: "First, it must be a requirement '*for labeling or packaging* '; rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is '*in addition to or different from'* those required under this subchapter.'" *Id.* at 444. The Court explained that a state-law requirement is not preempted if it is "fully consistent" with the federal requirement even if it is not "phrased in the *identical* language as its corresponding FIFRA requirement" *Id.* at 452, 454.

FIFRA requires manufacturers to provide a warning that "may be necessary and if complied with ... is adequate to protect health." 7 U.S.C. § 136(q)(1)(G); 40 C.F.R. 156.70(b)(requiring precautionary statement when an "acute hazard may exist to humans."). "California law – which asks whether a risk is known or knowable (for strict liability) or reasonably should

have been known (for negligence) – is consistent with this requirement." *In re Roundup Prod. Liab. Litig.*, 364 F. Supp. 3d at 1087.

Monsanto disputes this conclusion, but misreads FIFRA and distorts the record. A manufacturer's warning obligation under FIFRA is not limited to risks associated with "widespread and commonly recognized" practices. *Id*. at 1087. This language is not found in the misbranding provision, § 136(q)(1)(G), but comes from the cross-referenced "Classification of pesticides" section within FIFRA's registration provision, § 136a(d). *Id*. Section 136a(d) allows the EPA to further restrict the use of a pesticide if the product may generally cause unreasonable adverse effects on the environment "when applied in accordance with its directions for use, warnings and cautions *and for the uses for which it is registered….or in accordance with a widespread and commonly recognized practice*." § 136a(d)(C)(emphasis added). The registration provision, therefore, specifically separates labeling requirements from provisions governing the use of the product. *See Reckitt Benckiser, Inc. v. Jackson* (D.D.C. 2011) 762 F. Supp. 2d 34 (distinguishing FIFRA's misbranding provision from registration provisions).[17] "Indeed, FIFRA's misbranding provision states that labels must include health warnings 'together with any requirements imposed under section 136a(d).'" *In re Roundup*, 364 F. Supp. at 1087. Johnson's failure-to-warn claims are "not preempted by the additional federal requirement that pesticide labels specify their use classification." *Id.*

Consistent with this view, every court that has considered Monsanto's preemption arguments has concluded that failure-to-warn claims are not

[17] Monsanto relies on 136a(c)(5)(D) in arguing for express preemption. The use of "widespread and commonly recognized practice" in this section is likewise limited to the registration of a pesticide. Monsanto deliberately ignores 136a(c)(5)(C) as it directly contradicts its argument that FIFRA only requires manufacturer's to warn of risks associated with "widespread and commonly recognized" practices.

preempted. *See In re Roundup,* 364 F. Supp. 3d 1085; *Beyond Pesticides v. Monsanto Co*. (D.D.C. 2018) 311 F. Supp. 3d 82, 92; *Blitz v. Monsanto Company* (W.D.Wis. 2018) 317 F.Supp.3d 1042*; Hernandez v. Monsanto* (C.D. Cal. 2016) 2016 WL 6822311; *Sheppard v. Monsanto* (D. Hawaii, 2016) 2016 WL 3629074*; Mendoza v. Monsanto* (E.D. Cal. 2016) 2016 WL 3648966*; Giglio v. Monsanto* (S.D. Cal. 2016) 2016 WL 1722859.

3. Impossibility Preemption Does Not Apply to Johnson's Claims.

Monsanto has no answer to the plain language of the express preemption clause in FIFRA preserving state law claims and accordingly retreats to implied preemption. But "when Congress has made its intent known through explicit statutory language, the court's task is an easy one." *Am. Meat Inst. v. Leeman* (2009) 180 Cal.App.4th 728, 746. The existence of an express preemption clause should inform the court's "analysis of the existence of any implied preemption." *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1092. "An express definition of the pre-emptive reach of a statute 'implies'—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters..." *Paduano v. Am. Honda Motor Co*. (2009) 169 Cal.App.4th 1453, 1478-79.

"A state may regulate the sale or use of any federally registered pesticide or device in the State…" 7 U.S.C. § 136v(a). Thus, "Monsanto's reliance on an implied preemption theory is difficult – if not impossible – to square with *Bates.*" *In re Roundup*, 364 F. Supp.3d at 1087. In *Bates*, the court found that FIFRA does not preempt strict liability claims as they do not impose labeling requirements. *Id.* at 490. It further noted that "[w]hile success on these claims may induce Defendant to change the label, this 'attenuated pressure' does not amount to a 'requirement' within the meaning of FIFRA's preemption provision." *Id.* The Supreme Court, therefore, rejected any "inducement" test holding that an "event, such as a jury verdict,

that might 'induce' a pesticide manufacturer to change its label" should not be deemed an action imposing a new labeling requirement in conflict with FIFRA. *Id.* at 445.

The implied preemption question was specifically before the court in *Bates*. *See In re Roundup Prod. Liab. Litig*., 364 F.Supp.3d at 1088; *Ansagay v. Dow Agrosciences LLC* (D. Haw. 2015) 153 F.Supp.3d 1270, 1282; *Bates*, 544 U.S. at 458 (Thomas, J., concurring in part and dissenting in part)(commending the majority for "rightly declin[ing] to address …other types of pre-emption."). In reversing the lower court and rejecting the "inducement" test, the Supreme Court necessarily dismissed the possibility of implied preemption under FIFRA. *Ansagay*, 153 F. Supp. at 1282 ("once the Court concluded that the claims were not expressly preempted, it would have been inconsistent for the Court to have concluded that FIFRA somehow impliedly preempted those same claims.").

Monsanto avoids this straightforward conclusion, but its responses are makeweights. Rather than citing authority rejecting implied preemption under FIFRA, Monsanto relies entirely on cases considering preemption under the Federal Food, Drug, and Cosmetic Act (FDCA). These arguments falter at the outset because, unlike the FDCA, FIFRA allows states to regulate or ban pesticides that have been federally approved." *In re Roundup Prod. Liab. Litig*., 364 F. Supp. 3d at 1088; 7 U.S.C. § 136v(a). California's ability to ban or restrict the use of Roundup undercuts Monsanto's contention that impossibility preemption precludes Plaintiff's claims. "If California can stop Monsanto from selling Roundup entirely, surely it can impose state-law duties that might require Monsanto to seek EPA approval before selling an altered version of Roundup in California." *Id.*

There is no implied preemption of design claims as "registration of a pesticide does not preclude. . .a claim that the product is defectively unsafe as manufactured or formulated." *Arnold v. Dow Chemical Co.* (2001) 91

Cal.App.4th 698, 728. Johnson's design defect claims do not impose labeling requirements and therefore do not conflict with FIFRA. *Mortellite v. Novartis Crop Protection, Inc*. (3d Cir. 2006) 460 F.3d 483, 490.

A finding that Johnson's labeling claims are preempted, even though they are not "in addition to or different from" those required under FIFRA, would eradicate Congress' delineation of which claims it sought to preempt, rendering §136v(b) superfluous. While success on these claims may induce Monsanto to change its label because of the verdict, it is not *required* to do so. *Mortellite v. Novartis Crop Protection, Inc*., 460 F.3d at 490.

The Supreme Court's most recent opinion on implied preemption under the FDCA, *Merck Sharp & Dohme Corp. v. Albrecht*, (2019) 587 U.S. ____ , highlights the critical deficiencies in Monsanto's implied preemption argument.

In *Albrecht*, the Court clarified the meaning of "clear evidence" for impossibility preemption under the FDCA: "evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning." *Id.* at *2. If impossibility preemption is available under the regulatory framework of FIFRA, contrary to the *Bates* holding, Monsanto fails to prove either prong of this analysis.

First, the evidence shows that Monsanto did not "fully inform" the EPA of critical information related to NHL warnings for Roundup. For example, Monsanto never submitted Dr. Parry's Report to the EPA, submitting instead the ghostwritten Williams (2000) article. Second, there is not a scintilla of evidence that Monsanto ever submitted, or otherwise requested, a cancer warning to be added to the labeling for Roundup.

The Court in *Albrecht* confirmed, once again, that, even under FDA's regulatory framework, the "possibility of impossibility is not enough." *Id*. at

*13-14. Impossibility preemption is not appropriate absent a showing that the manufacturer "attempted to give the kind of warning required by [state law] but was prohibited from doing so by the FDA." *Id*. at 12; *quoting Wyeth v. Levine*, 555 U.S. 555, 572 n.5. Even if impossibility preemption was available under FIFRA, Monsanto cannot meet its burden of showing that the EPA affirmatively decided to preserve Roundup's product labeling or prohibit Monsanto from strengthening its warnings. *Id*. It is undisputed that Monsanto never attempted to warn of the risk of NHL. "[N]either agency musings nor hypothetical future rejections constitute preemptive "Laws" under the Supremacy Clause." *Id*. at 4 (Thomas, J. concurring).

Monsanto has no answer to the judicial consensus that impossibility preemption is inapplicable to claims against pesticide manufacturers, and instead asserts there is "clear evidence" that the EPA would have rejected a cancer warning. AOB 66. That contention is meritless. Monsanto does not and cannot assert that it ever submitted a proposed label to the EPA seeking to include a cancer warning. Monsanto argues, however, that the EPA's classification of glyphosate as "not likely to be carcinogenic" amounts to "clear evidence."[18] The EPA, however, has emphasized that its classification is "based on the available evidence at the time of evaluation and should not be interpreted as a definitive conclusion that the agent will not be a carcinogen under any circumstances." 1-AA-170. Moreover, Monsanto failed to submit critical information to the EPA making any decision regarding the carcinogenicity of glyphosate questionable. As confirmed in *Bates,* federal preemption under FIFRA is not appropriate even if the Court undertakes an analysis of implied preemption as Congress expressly

[18] The EPA only considers the carcinogenicity of the active ingredient glyphosate and not the formulated product used by Johnson.

preserved state law tort claims. 544 U.S. at 435, 458 (rejecting implied preemption arguments).

I. Substantial Evidence Supports the Jury's Punitive Damage Verdict.

1. The Substantial Evidence Standard of Review Applies.

Although a judgment awarding punitive damages must be supported by clear and convincing evidence of the defendant's "oppression, fraud or malice" (Civ. Code § 3294, subd. (a)), the weight of authority establishes that the trial court's clear and convincing standard does not supplant the appellate court standard of review regarding an appeal challenging the propriety of a punitive damage award.

"The sufficiency of the evidence to establish a given fact, even where the law requires proof of the facts to be clear and convincing, is primarily a question for the trial court and the jury, and if there is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal." *Treadwell v. Nickel* (1924) 194 Cal. 243, 260-261. Courts have applied the substantial evidence standard to a jury's finding of malice or oppression. *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 601-604. *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 754 n.8. Because the normal substantial evidence standard of review applies, this Court should not substitute its judgment on conflicting evidence to override the verdict. *See Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1576.

2. There is Substantial Evidence that Monsanto Acted With Malice or Oppression.

A plaintiff is entitled to an award of punitive damages if the plaintiff proves by clear and convincing evidence "that the defendant has been guilty of oppression, fraud, or malice..." (Civ. Code § 3294, subd. (a)). "Malice" is

defined as “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civ. Code § 3294, subd. (c)(1)). “Oppression” is defined as “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.” (Civ. Code § 3294, subd. (c)(2)). “Oppression” does not require willful behavior. *Major,* 169 Cal.App.4th at 1225–26.

“Malice does not require actual intent to harm. Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences.” *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299, (*quoting Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228).

“The term ‘despicable’ is not defined in the statute, but the Supreme Court has observed that it is applicable to ‘circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.”’ *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 164, (*citing College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725). Despicable conduct is conduct that is “looked down upon and despised by most ordinary people.” *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 330.

“Marketing a product that is known to be defective and dangerous to consumers supports an inference of malice for purposes of punitive damages.” *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1230. Direct evidence is not required for a finding that a manufacturer puts its own interests ahead of the safety of consumers; circumstantial evidence is sufficient. *Grimshaw, v. Ford Motor Company* (1981) 119 Cal.App.3d 757, 813,814; *West,* 174 Cal.App.3d at 869.

Likewise, a manufacturer's failure to warn of the dangers associated with its products may be "sufficient to show malice so as to support punitive damages." *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768. "In California, it has been held that intentionally marketing a defective product knowing that it *might cause injury and death* is 'highly reprehensible.'" *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1690. Even where the risk of harm is relatively slight, and grave injury may only occur to a small fraction of the product's users, punitive damages are warranted due to the gravity of the potential harm resulting from a product used by thousands of consumers.

Here, and as the Trial Court found in denying Monsanto's JNOV, there is substantial evidence that Monsanto engaged in despicable and vile conduct. Monsanto agreed that all actions before January 2016 was the applicable time-period for punitive damage evidence. RT 3376:24-3377:4 (agreeing "[t]hat was Johnson's last use of glyphosate, according to Johnson."). For example, the jury considered:

(1) In 1999, Monsanto refused to disclose Dr. Parry's findings of genotoxicity to regulators and consumers and refused to conduct additional testing on Roundup's genotoxicity. *See supra* Section II(D)(6).

(2) Monsanto fought against the EPA's classification of glyphosate as a possible carcinogen because the "the initiation of formal regulatory action would have serious negative economic repercussions." 22A-RT-3851:20-22; 22B-RT3996:11-13.

(3) The stated goal of Monsanto's Product Safety Center was to "Secure the Base" and defend and maintain Monsanto's global glyphosate business. *See supra* Section II(D)(1).

(4) Monsanto hired outside organizations specifically to attack IARC as it was necessary to "hold firm" on their "no cancer hazard" position. 5-AA-5638; 16A-RT-2597:1218, 5-AA-5644-5646.

(5) Monsanto refused to conduct studies on Roundup and Roundup formulations despite requests from the EPA and its own consultants. *See supra* Section II(D)(4); II(D)(5).

(6) Monsanto continued to sell Roundup with POEA even though there were safer alternatives because it was concerned that discontinuing the surfactant could have global consequences. *See supra* Section II(D)(2)

(7) Monsanto engaged in ghostwriting of scientific articles to influence regulators and consumers and to support future litigation. *See supra* Section II(D)(6); II(D)(7).

(8) Monsanto's Head of Medical Toxicology began making decisions to manage punitive damage liability in 2004. 5-AA-5669-5670; 5-AA-5625.

(9) Monsanto developed a plan to "orchestrate outcry" over IARC's decisions even before IARC determined that Monsanto was a probable human carcinogen. 6-AA-6430; 5-AA-5642-5643; 6-AA-6587.

(10) Monsanto never returned Mr. Johnson's phone calls requesting information regarding whether Roundup could be associated with his cancer despite submitting his claim as an adverse event report to the EPA, and despite being long aware of several studies demonstrating that Roundup users were at an increased risk of NHL. *See supra* Section II(D)(9)-(10).

As one court concluded, this conduct amounts to "strong evidence from which a jury could conclude that Monsanto does not particularly care whether its product is in fact giving people cancer, focusing instead on manipulating public opinion and undermining anyone who raises genuine and legitimate concerns about the issue." *In re Roundup*, 364 F. Supp. 3d at 1089.

3. There is Substantial Evidence Supporting a Finding that Monsanto Was Aware of the Probable Consequences of its Actions.

Monsanto argues that the company could not have acted with malice or oppression because there is no evidence that Monsanto had "actual knowledge" that cancer was a "probable consequence" of exposure to glyphosate. This argument requires the Court to blindly accept Monsanto's version of the facts and credit preliminary regulatory findings over the findings of the jury. But EPA's comments about glyphosate do not trump the jury's findings regarding Monsanto's conduct, especially when the evidence shows that Monsanto manipulated the very science being relied upon by the EPA.

Punitive damages remain the most effective remedy for consumer protection against defectively designed mass-produced articles precisely because "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection." *Buell–Wilson*, 141 Cal.App.4th at 562. Punitive damages are available even where "there was a 'reasonable disagreement' among experts" *Id.* at 559-560. The jury is "entitled to" reject the claims of Monsanto's experts in reaching a verdict on punitive damages. *Id.* In *Arnold*, a pre-*Bates* decision, the Court held that punitive damages were permissible even where the EPA approved the safety of a pesticide. 91 Cal.App.4th at 724.

Whether a party had constructive or actual knowledge is generally a question of fact for the jury. Actual knowledge may be shown, not only by direct evidence, but also by circumstantial evidence. *Uccello v. Laudenslayer* (1975) 44 Cal. App. 3d 504, 514; *RSB Vineyards, LLC v. Orsi*, 15 Cal. App. 5th 1089, 1097-98 ("states of mind can seldom be proved by direct evidence."). Hence, Monsanto's denial of "actual knowledge" does not preclude liability.

It is of no consequence that Monsanto can identify evidence supporting an inference that it sold Roundup with the good faith belief that the product was safe as there is substantial evidence to support the jury's

finding that Monsanto acted with malice or oppression. *Pfeifer*, 220 Cal. App. 4th at1301. The jury rejected the inferences that Monsanto proposes on appeal, and the admitted evidence supports its decision to do so. *Id*.

Monsanto has a duty to "warn of the potential risks" of Roundup and not just the ones its scientists agree with. "If the sole opinion(s) of one biased actor within that complex system can govern and control the nature, timing, and dissemination of information, and warnings, the system breaks down." *In re Actos (Pioglitazone) Prod. Liab. Litig.* (W.D. La. 2014), 2014 WL 5461859, at *47 (rejecting contention that defendant's subjective believe that product does not cause cancer precludes a finding of punitive damages).

The jury could reasonably conclude from the evidence that Monsanto acted with malice and oppression. Monsanto cites to some of the above evidence, but then ignores the substantial evidence standard. Instead of drawing the reasonable inferences in favor of Johnson, it asks this Court to do the opposite – draw contrary inferences that do not support the verdict. As an example, Monsanto contends that the company ultimately conducted all but one of the mechanistic tests proposed by their consultant Dr. Parry. (AOB 80-81). But Monsanto fails to cite Plaintiff's evidence that Monsanto did not conduct these studies. The jury was tasked with weighing the evidence and the credibility of witnesses. Through its verdict, the jury did not believe Monsanto's evidence and dismissed the credibility of Monsanto's corporate witnesses.

4. Acceptance of Monsanto's Justifications for its Despicable Conduct Would Require the Court to Dismiss the Factual Findings of the Jury.

Monsanto devotes significant attention to explaining why the company chose to act in a certain manner as evidence that its conduct was not despicable. Again, the jury flatly rejected these arguments. "Jurors, not appellate justices, hear the evidence and determine the facts…It is they, with

their collective understanding of the limits of what decent citizens ought to have to tolerate." *George F. Hillenbrand, Inc. v. Ins. Co. of N. America* (2002) 104 Cal.App.4th 784, 819.

Monsanto argues that its conduct of prioritizing profits over safety, polluting the scientific literature with ghostwriting, interactions with regulators, and failure to return Johnson's phone call have "nothing to do with Plaintiff's injury." (AOB 84). This argument has no merit. Clearly, Monsanto's concerted efforts to withhold safety information from consumers generally, and Johnson specifically, are relevant to Johnson's failure-to-warn claims. Thus, Monsanto falls back to its argument that these despicable actions are not evidence of Monsanto's actual knowledge. What Monsanto is truly arguing is that this conduct does not amount to *direct* evidence of Monsanto's actual knowledge. However, taken together, Monsanto's conduct is strong circumstantial evidence of actual knowledge, despicable conduct, and malice.

Finally, Monsanto argues that it has "a constitutional right to advocate its position to regulatory bodies" and its punitive damages cannot rest on its "lawful and legitimate interactions with the EPA." (AOB 85). First, not all of Monsanto's interactions with the EPA were lawful or legitimate. Monsanto's direct interactions with EPA officials relating to the safety of glyphosate were in direct violation of federal regulations. See 40 C.F.R. 155.52(a)(meetings between EPA and company representatives to discuss matters relating to a registration review must be placed on the docket with a list of attendees, meeting minutes, and any documents exchanged). Secondly, the *Noerr-Pennington* doctrine provides qualified immunity from suit to parties attempting to encourage government action. However, no California court has ever held that the *Noerr-Pennington* doctrine bars punitive liability when a defendant takes direct steps that would prevent regulatory agencies from properly reviewing the carcinogenicity of a consumer product. *Boeken,*

127 Cal.App.4th at 1690. Neither the *Noerr-Pennington* doctrine nor the Constitution precludes evidence of Monsanto's activity that is probative to the issue of punitive damages. Monsanto "may not rely on regulatory agencies' findings as a defense and, at the same time, prevent the jury from hearing how [the company] obtained those findings." *Perrine v. E.I. du Pont de Nemours and Co.* (W. Va. 2010) 225 W.Va. 482, 551-552.

V. CONCLUSION

The jury spent four weeks carefully listening to the evidence and three days deliberating before rendering a sound and logical, and unanimous verdict. The jury properly believed the well-reasoned opinions of Johnson's highly qualified experts. The jury properly concluded that Monsanto's behavior was reprehensible. All conflicts in the evidence must be resolved in favor of Johnson. All reasonable inferences must be given to Johnson. Monsanto mounted a vigorous defense to these claims and were allowed to present that defense. The jury rejected Monsanto's defense and awarded Johnson the verdict. The Court Order Denying Monsanto's Motion for JNOV, and denying in part the Motion for New Trial, must be affirmed. As discussed in Cross-Appellant's Opening Brief, only the trial court's reduction of punitive damages should be reversed.

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In The California Court of Appeal

First Appellate District

Division One

Dewayne Lee Johnson,
Plaintiff and Respondent/Cross-Appellant,

v.

Monsanto Company

Defendant and Appellant/Cross-Respondent

CROSS-APPELLANTS' OPENING BRIEF

I. INTRODUCTION

The Trial Court erred in concluding that punitive damages could not exceed the amount of compensatory damages. This is contrary to controlling authority. *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 569 ("we do not regard the amount of compensatory damages as a fixed upper limit where damages are "substantial," as we have stated. Instead, the constitutional limit depends on the facts and circumstances of each case.") *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

Here, the jury's punitive damages award is well within the Constitutional limits set by the United States and California Supreme Courts. Monsanto stipulated to a net worth of $6.6 Billion. RT4017:13-17. The $250 Million punitive damage award is only 6.4 times the compensatory damages.

Such amount is not excessive, given the societal interest in deterring Monsanto's reprehensible conduct. The full verdict should be reinstated.

II. APPEALABILITY

Johnson timely filed a notice of appeal of the Trial Court's remittitur of punitive damages. 6-AA-6164. Because Monsanto filed a notice to appeal after Johnson accepted the remittitur, Johnson may challenge the reduction in the verdict on cross-appeal. *Miller v. Nat'l Am. Life Ins. Co.* (Ct. App. 1976) 54 Cal.App.3d 331, 345. The order is appealable under Code of Civ. Pro. § 904.1(a)(4).

III. STANDARD OF REVIEW

The constitutionality of punitive damage awards are reviewed de novo. *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172. Furthermore, "[i]f the court's decision is influenced by an erroneous understanding of applicable law…, the court has not properly exercised its discretion" and the decision must be reversed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540 ("An order that implicitly or explicitly rests on an erroneous reading of the law necessarily is an abuse of discretion."). "[A]n order lacking an adequate specification of reasons is subject to independent review" and "no deference" is given "to the trial court's ruling." *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 628**.**

If a trial court's grant of new trial on punitive damages is reversed the net result is that the "judgment [is] reinstated" and the appellate court "independently" reviews the amount of punitive damages for due process considerations. *Romo* 113 Cal.App.4th at 744, 754. The "underlying facts supporting a punitive damages award are for the jury to decide." *Id.* There is "no reason" that an appellate court cannot instruct that judgment be entered upon a constitutionally permissible amount to avoid delay. *Gober v. Ralphs*

Grocery Co. (2006) 137 Cal.App.4th 204, 215 (quoting *Simon*, 35 Cal.4th at p. 1188).

IV. LEGAL ARGUMENT

A. The Trial Court Erred in Concluding that the Jury's Punitive Damages Cannot Exceed the Compensatory Damage Award.

1. There was no Punitive Element in the Compensatory Damages.

The Trial Court must explain its reasons for reducing a verdict with sufficient specificity. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 931. Here, however, the Trial Court reduced the punitive damages to a 1:1 ratio based only on the conclusory statement that "[t]he compensatory damages award of $39,253,209 is extremely high for a single plaintiff and consists largely of non -economic damages which the due process case law recognizes has a punitive element." 6-AA-6153

There is no evidence or reason to suggest that the compensatory damages had any punitive element; particularly where the trial was not bifurcated and there was a simultaneous separate finding of punitive damages. The jury's award of $39 Million for compensatory damages is the exact amount requested by Johnson during closing argument. Monsanto never argued that $39 Million was an unreasonable amount to award Johnson. The fact that the jury awarded only two-thirds of the punitive damages requested by Counsel is further evidence that the compensatory damages did not contain a punitive element.

Even if there were a punitive element in the compensatory damages, then that amount could not have exceeded $37 Million. Therefore, a punitive element could at most justify a reduction of the punitive damages by $37 Million, and not a reduction of $210 Million.

The Court's conclusory statement that the compensatory damage award had a punitive element should be given no deference on appeal.

2. A Jury's Award of Punitive Damages Can Exceed Even High Compensatory Damage Awards.

The Trial Court erroneously concluded the "constitutionally required ratio is one to one." This is not the law. In *Bullock:*

> Philip Morris argues that there is an emerging consensus that "six-figure damage awards are more than 'substantial' enough to trigger this 1:1 upper limit." We cannot discern any emerging consensus in this regard relevant to the extremely reprehensible conduct at issue in this case

Bullock, 198 Cal.App.4th at 569. *Bullock* held that the 1:1 ratio approved in *Roby*, was not applicable to a severe injury case because *Roby* involved a "situation where the plaintiff is awarded a generous amount for emotional distress arising from economic harm with no physical injury" *Id.* at 567 (citing *Roby v. McKesson Corp.,* (2009) 47 Cal.4th 686, 693–694.)

Neither the jury's verdict not the Court are bound by the 1:1 ratio even if compensatory damages claim "contain[] a punitive element." Gober 137 Cal.App.4th at 223 (approving 6:1 ratio despite punitive element): *Yung v. Grant Thornton, LLP* (Ky. 2018) 563 S.W.3d 22, 69 (Court erred in reducing punitive damages from 4:1 ratio to 1:1 ratio even where "$20 million compensatory damage award is indisputably substantial")

There "are no rigid benchmarks that a punitive damages award may not surpass... The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm* (2003) 538 U.S. at 425. The California Supreme Court notes that the *State Farm* decision finds that only ratios "**significantly greater** than 9 or 10 to 1 are suspect." *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal. 4th 1159, 1182 (10:1 ratio is justified for purely economic injury).

The ratio of compensatory to punitive damages awarded by the jury was 6.4:1. Such a single-digit multiplier is well within the ratio limits consistently upheld. The U.S. Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between" the amount of compensatory and punitive damages. CACI 3945 Sources and Authority (quoting *State Farm*, 538 U.S. 424); *Nickerson v. Stonebridge Life Ins.* (2013) 219 Cal.App.4th 188, 194, 206-11 (10:1 ratio); *Boeken*, 127 Cal.App.4th at 1703 (10:1).

Where there is deathly harm, as here, punitive damages are not "constrained by the single-digit multiplier set forth in *State Farm." Romo* 113 Cal.App.4th at 763. Awards significantly greater than 10:1 have been upheld in cases with high reprehensibility. *Bullock,* 198 Cal.App.4th at 566 (16:1 ratio appropriate); *Williams v. Philip Morris Inc.* (2006 Or.) 127 P.3d 1165, 1182 (upholding $79.5 million punitive-damage award which represented a ratio of 152:1); *Schwarz v. Philip Morris USA, Inc*. (Or. App. 2015) 355 P.3d 931, 940-44 (148:1 ratio); *Burton v. R.J. Reynolds Tobacco Co*. (D. Kan. 2002) 205 F. Supp. 2d 1253, 1263-64 (75:1 ratio).

B. Monsanto's Decision to Hide the Cancer Risk for Profit was Highly Reprehensible and Supports a 6.4:1 Ratio of Compensatory to Punitive Damages.

In determining the constitutional limits of the punitive damage award, the Appellate Court makes "an independent assessment of the reprehensibility of the defendant's conduct." *Simon* (2005) 35 Cal.4th at 1172. "When determining a defendant's reprehensibility, courts must consider whether: (1) "the harm caused was physical as opposed to economic;" (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) "the target of the conduct had financial vulnerability;" (4) "the conduct involved repeated actions or was an isolated incident;" and (5) "the harm was the result of intentional malice,

trickery, or deceit, or mere accident." *Id.* Courts should also consider whether the wrongdoing was "hard to detect" or profit-motivated, as these circumstances may justify more severe punitive-damage awards. *Exxon*, 554 U.S. at 494. A court may consider harm to others in determining the reprehensibility of a Defendant's conduct. *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355. Applying these factors, Monsanto's egregious conduct was sufficiently reprehensible to justify the jury's punitive-damage award.

In a recent case finding that a punitive damage award of $9 billion was reasonable for a single plaintiff under the reprehensibility prong a federal court held that:

> [T]he evidence supports that from the beginning of their commercial alliance, Takeda and Lilly were aware of the possibility that Actos® posed an increased risk of bladder cancer. ...Takeda and Lilly chose to move forward and acted to avoid full disclosure of that and other relevant information to the FDA; to refuse to include adequate warnings on the label…to carefully avoid creating or acknowledging any evidence that might draw attention to the bladder cancer risk…

In re Actos (Pioglitazone) Prod. Liab. Litig. No. 6:11-MD-2299, 2014 WL 5461859, at *24 (W.D. La. Oct. 27, 2014) (the award was reduced based on the ratio prong of punitive damages to a ratio of 25:1). Monsanto's conduct justifies a ratio of 6.4:1 under the reprehensibility prong.

1. Monsanto's Tortious Conduct Evinced a Total Indifference to, and a Reckless Disregard for the Health and Safety of Individuals using Roundup.

Monsanto clearly knew of the potential risk of cancer associated with Roundup from at least 1999 when their own genotoxicity expert Dr. Parry, informed the company that its Roundup formulations were genotoxic and caused oxidative stress. *See Supra* Respondent's Brief Section II(D)(6). Dr. Parry provided Monsanto with the battery of tests that would be necessary to

further examine the genotoxicity of Roundup. *Id.* Monsanto refused to conduct these tests.

Monsanto also buried the Parry reports and instead ghostwrote an article stating that Roundup was not genotoxic. RB II(D)(7). Monsanto used this ghostwritten article as an "invaluable asset" to influence regulators to assure that glyphosate would remain on the market without a cancer warning. *Id.* Monsanto continues to ghostwrite scientific articles to the present day, proclaiming the safety of Roundup, for such purposes as "product defense" and "litigation support." RB II(D)(8).

Despite knowing that epidemiology studies in the early 2000s showed an increased risk of NHL for Roundup users, Monsanto refused to conduct carcinogenicity testing on the formulated product. Monsanto also pushed McDuffie to remove glyphosate results from the abstract of the study to assure that literature searches would not reveal Roundup's association with NHL. RB II(D)(9). Monsanto also refused to conduct a recommended epidemiology study on its workers and instead does not even report NHL cases among its employees. RB II(D)(5).

In 2008, Monsanto acknowledged that the surfactants within Roundup were "hazardous" and that there were safer alternatives. RB II(D)(2). Monsanto also knew that the surfactants played a role in the George (2010) tumor promoter study. *Id.* Monsanto continued selling the more dangerous product anyway.

Monsanto has never conducted carcinogenicity studies on surfactants nor warned of the dangers of NHL. Monsanto's own toxicologist concedes that Monsanto "cannot say that Roundup does not cause cancer...we have not done Carcinogenicity studies with 'Roundup'". RB II(D)(2). Yet, Monsanto continues to tell the world that Roundup does not cause cancer.

When scientists questioned the safety of Roundup, Monsanto formulated plans to combat the findings. RB II(D)(9). Monsanto was

developing its plan to "orchestrate outcry" against IARC even before IARC completed its review of glyphosate. RB II(D)(13). Monsanto's "unprecedented coordinated efforts to undermine the evaluation, the program and the organization" at IARC (3-AA-2597) has caused untold damage to a bastion of scientific integrity and principles created to protect public health.

Monsanto specifically refused to tell Johnson, when he called, that there were studies linking his early stage, and not yet terminal cancer, to Roundup. RB II(D)(12)-(13). Mr. Johnson explicitly told Monsanto his level of fear was increasing about using the product. *Id.* They ignored him and his cancer turned fatal. *Id.*

2. The targets of Monsanto's Tortious Conduct Were Both Financially and Physically Vulnerable.

As part of his job, Johnson was required to spray Roundup. A refusal to spray Roundup would potentially put Johnson at risk of losing his position as Integrated Pest Control Manager. Johnson wanted and needed to keep his job. It was for this reason that he requested Dr. Ofodile to ask his employer to make a reasonable accommodation to allow Johnson to stop spraying. Dr. Ofodile's letter did not work. 18B-RT-3236:1-16.

3. Monsanto's Conduct Involves Repeated Action Over Decades

The evidence demonstrates that Monsanto's conduct in obscuring the risk of cancer of Roundup dates to a least 1985 when the company first pushed back on the EPA's recommendation to put a cancer warning on the Roundup label. 22A-RT-3851:13-83. Monsanto has engaged in a concerted effort since that time to hide the risks of Roundup regardless of the cost to human health.

4. Monsanto's Conduct Involved Trickery and Deceit.

Monsanto's entire marketing campaign for Roundup was based on deception, concealment, and outright falsehoods. In 1999, Monsanto's stated

goals for employees was to work "indirectly/behind-the-scenes" to "get 'people to get up and shout Glyphosate is Non-toxic[.]' 6-AA-6556.

Monsanto engaged in repeated ghostwriting meant to influence consumers and regulators. RB II(D)(7)-(8). As one of Monsanto's own consultants pointed out when asked to take his name off a manuscript "We call that ghost writing and it is unethical." AA6380-6381. Thus, Monsanto's own employee found the company's behavior deceptive. *Id*.; *Torkie-Tork v. Wyeth*, (E.D. Va. Nov. 17, 2010) No. 1:04CV945, 2010 WL 11431846, at *2 (ghostwriting evidence is relevant to corporations disregard of human safety). Monsanto's own lawyers approved of this deception and stated it would be, "[a]ppealing; best if use big names..." *Id.* Besides ghostwriting articles, Monsanto regularly ghostwrote op-eds in newspapers attacking IARC. RB II(D)(13). Behind the scenes, Monsanto used the same tactics as tobacco companies and knowingly hired the same organization that defended Tobacco companies. RB II(D)(13).

5. Monsanto's Conduct was "Hard to Detect."

Monsanto's reprehensible conduct was deliberately hidden and withheld from the public. It took the consolidated effort of numerous law firms and enormous financial resources to bring Monsanto's conduct to light.

6. Monsanto's Conduct was Profit Motivated.

Monsanto's "Product Safety Team" was tasked with protecting and increasing sales; there was no directive to protect humans. RB II(D)(1). Monsanto has opposed a cancer warning since 1985 because of "negative economic repercussions." *Id.*

7. Monsanto's Conduct Creates Potential Harm for Millions of People.

Roundup is the most heavily used pesticide in history. 22A-RT-3933-20-22. Two hundred ninety million pounds of glyphosate is being sprayed by people in the United States every year. 22A-RT-3933:22-25. Unless the jury's full verdict is reinstated, Monsanto has no incentive to warn consumers about the risk of NHL.

V. CONCLUSION

The extreme reprehensibility of Monsanto's conduct strongly supports the jury's verdict of $250 Million in punitive damages. As the jury's award does not violate the due process clause, this Court should reinstate the full punitive damages verdict and instruct that judgment be entered without further proceedings. *See Gober*, 137 Cal.App.4th at 215. Johnson's declining health militates against further delays. "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". *Coombs v. Hibberd* (1872) 43 Cal. 452, 453.

May 24, 2019

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 27,922 words as counted by the Microsoft Word version 2013 word processing program used to generate the brief.

Dated: May 24, 2019

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Jeffrey A. Travers

Hon. Suzanne R. Bolanos
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Trial Judge
[Case No. CGC16550128]

Via U.S. Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 24, 2019, at Orange, VA.

_____

Jeffrey A. Travers