

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

EDWARD HARDEMAN,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 16-00525 VC
)	
MONSANTO COMPANY,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, March 14, 2019

TRANSCRIPT OF PROCEEDINGS

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Official Reporter

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PROCEEDINGS

1 Thursday - March 14, 1995

12:35 p.m.

2 P R O C E E D I N G S

3 ---000---

4 (Proceedings were heard out of presence of the jury:)

5 **THE CLERK:** Calling Civil Matter 16-525, Hardeman v.
6 Monsanto, et al.

7 If parties could please come forward and state their
8 appearances for the record.

9 **THE COURT:** Don't worry about it. We all know who
10 each other is at this point.

11 Okay. So let me -- let me write a list of things that we
12 need to discuss. So we have Benbrook. We have the design
13 defect issue. We have the Seralini study. I feel like I'm
14 missing one thing. No?

15 **MS. MOORE:** I don't think so, Your Honor. The only
16 other thing -- and this can probably come in with the Seralini
17 studies. We wanted to ask for some clarification on the
18 post-use corporate conduct rulings from yesterday, but I think
19 that can come up when we are talking about Seralini as well.

20 **THE COURT:** Okay. Post-use corporate conduct rulings
21 from yesterday. Oh, on the motion in limine.

22 **MS. MOORE:** Yes, Your Honor.

23 **THE COURT:** All right. So Benbrook I think is easy.
24 I don't need to hear any further argument on it.

25 The three -- the -- the first three items that -- that you

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1 propose to have Benbrook testify about, I do not think are
2 properly the subject of expert testimony. They are a factual
3 narrative. The information that you say you want to get out of
4 Benbrook, you should be able to or should have been able in
5 deposition -- been able to get that information out of fact
6 witnesses. So Benbrook will not be allowed to testify on those
7 three topics.

8 I also think it is highly unlikely that Benbrook is
9 qualified to testify on those three topics, but I don't think
10 it matters because I don't think they are the subject of expert
11 testimony.

12 The fourth topic it seems would be the proper subject of
13 expert testimony, but I don't see how Benbrook is qualified as
14 an expert on that topic. So I want to -- if you want to kind
15 of point me to something in his qualifications that I might
16 have missed, you know, feel free to do that. But that's really
17 the only thing that I would want to discuss about Benbrook.

18 **MS. WAGSTAFF:** All right. May I confer with my
19 cocounsel for just one minute?

20 **THE COURT:** Of course.

21 (A brief pause was had.)

22 **MS. WAGSTAFF:** All right. In light of Your Honor's
23 comments, and to avoid spending much more time on this,
24 Plaintiffs will withdraw Dr. Benbrook.

25 **THE COURT:** Okay. So that means that Mills is not

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1 coming either, right?

2 **MS. WAGSTAFF:** That means Welsh.

3 **THE COURT:** Sorry, Welsh.

4 **MR. KILARU:** That's right, Your Honor.

5 **THE COURT:** Okay. Now, let's go to the design defect
6 issue. I -- come on up.

7 So Monsanto filed this brief in which they say that you
8 don't really have a design defect theory -- sort of
9 anticipating that you actually do have a design defect
10 theory -- but why don't you go ahead and articulate it to me
11 now.

12 **MR. WOOL:** All right. So if you look at Monsanto's
13 letter brief, they really limit this argument to glyphosate as
14 a chemical. And I think there is already enough evidence in
15 the record for the jury to reasonably infer that it is the
16 combination of glyphosate and surfactants that creates the --

17 **THE COURT:** So your argument is going to be as it
18 relates to the design defect theory?

19 **MR. WOOL:** Yes.

20 **THE COURT:** Your argument is going to be that this
21 product as it is constituted -- this product, Roundup, as it is
22 constituted, as it is formulated, is dangerous; and Monsanto
23 could have figured out a way to formulate it so that it would
24 be less dangerous.

25 **MR. WOOL:** Well, I think that is one potential theory.

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1 I think that Monsanto's argument with respect to the
2 possibility of California banning Roundup outright is another
3 theory that Plaintiffs intend to proceed under.

4 **THE COURT:** Is that a -- if the argument is that the
5 product simply shouldn't be there, is that really a design
6 defect argument?

7 **MR. WOOL:** I think that the argument --

8 **THE COURT:** Doesn't sound like it --

9 **MR. WOOL:** So I think that the argument wouldn't
10 necessarily be that the product shouldn't be in existence at
11 all, but I think it would be that it shouldn't be in existence
12 as it pertains to residential uses, like the ones that
13 Mr. Hardeman used. That it is certainly -- you know, setting
14 aside the uses that Your Honor limited, I think in response to
15 Plaintiff's MIL Number 3, which are the agricultural uses which
16 we think aren't relevant here; that this product is completely
17 unreasonable for, you know, your ordinary consumer like
18 Mr. Hardeman.

19 **THE COURT:** Is that a design defect theory? I mean,
20 that is -- I mean, the argument is -- the argument does not
21 appear to be -- on that theory, the argument does not appear to
22 be that it was designed improperly; the argument appears to be
23 that it was marketed improperly or sold to the wrong people.

24 **MR. WOOL:** Well, I think that would still fall under
25 the ambit of design defect because this is one of the uses of

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1 the product is -- it is sort of sold and intended to be used
2 for, and that it would be used for killing poison oak in
3 Mr. Hardeman's case. And I believe that is still under the
4 ambit of a design defect.

5 **THE COURT:** So what -- so what -- do you have case law
6 for the proposition that you can pursue a design defect claim
7 based on who the product is sold to as opposed to the way the
8 product is actually designed?

9 **MR. WOOL:** Well, I think not only who it is sold to,
10 but more about -- more sort of along the lines of what the
11 product is sold for, which I guess it's not that big of a
12 distinction, but --

13 **THE COURT:** Let's assume -- let's assume for the sake
14 of discussion that you don't have any argument or evidence that
15 Roundup should have been formulated differently; and had it
16 been formulated differently, it could have been sold to people
17 like Mr. Hardeman, okay, because I don't think you are -- I
18 don't actually think you are arguing that, are you?

19 **MR. WOOL:** That it should have been -- so if I
20 understand Your Honor's hypothetical, it's that -- for the
21 purposes of this question, it is that --

22 **THE COURT:** Do you plan to argue to the jury that
23 Roundup could have been sold to people like Mr. Hardeman if it
24 had been formulated differently?

25 **MR. WOOL:** No, that's not Plaintiff's claim.

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1 **THE COURT:** Okay. So what you plan to argue is that
2 it shouldn't have -- maybe it should have been sold to farmers.
3 Maybe it should have been under a sort of a -- it should have
4 been regulated more heavily by the EPA, and maybe it could have
5 been sold to farmers. We are not here, Jury, to decide whether
6 it could have been sold to farmers or not; but it is a product
7 that is too dangerous to have been sold to ordinary consumers
8 who use it in their yard, right?

9 **MR. WOOL:** Right.

10 **THE COURT:** Regardless of the type of warning,
11 regardless of whether you are telling people to wear protective
12 equipment, it's too dangerous to be sold to ordinary consumers
13 who use it in their backyards.

14 **MR. WOOL:** Right.

15 **THE COURT:** That's what you plan to argue to the jury?

16 **MR. WOOL:** Yes.

17 **THE COURT:** On your design defect theory?

18 **MR. WOOL:** Yes.

19 **THE COURT:** Okay. And then so -- I guess the question
20 is: Do you have any case law for the proposition that that
21 is -- that that argument fits within a design defect claim?

22 **MR. WOOL:** Well, I think I could find some,
23 Your Honor. From my --

24 **THE COURT:** I understand they just filed this brief.

25 **MR. WOOL:** Right. My recollection of Bates was this

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1 was the argument that was more or less rejected by the Supreme
2 Court. In essence, any design defect claim falls back into a
3 claim that necessarily impeaches the label and turns into a
4 failure-to-warn claim, but --

5 **THE COURT:** And by the way, I mean, we should make
6 clear here that Monsanto probably should have moved for summary
7 judgment on this issue. It's -- the brief that it filed is
8 like -- the letter that it filed is like a summary judgment
9 motion basically.

10 **MR. WOOL:** Right.

11 **THE COURT:** And so there is a question of timeliness.
12 And it may be more of an issue that you can present your theory
13 to the jury and then Monsanto can make a motion for a directed
14 verdict on that question or something. But it also seems like
15 given, you know, how much time you have left on your clock, you
16 might want to be thinking proactively about whether you really
17 want to be presenting this to the jury, if, at the end of the
18 day, you don't have a legal basis for the theory, right?

19 **MR. WOOL:** Understood, Your Honor. And to be clear, I
20 do think that we have a legal basis to argue that Roundup as
21 formulated to consumers like Mr. Hardeman is unreasonably
22 dangerous and it shouldn't be on the market. And I can --
23 I believe -- I don't want to state unequivocally, but I believe
24 I can get Your Honor some case law on that topic; and we can
25 file a response to Monsanto's letter brief by whatever time

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1 Your Honor wants this evening.

2 **THE COURT:** Okay. If you -- so let's assume -- so I
3 would like you to file a brief on that question. And, you
4 know, I think it would be better for you to file it -- you need
5 to have your opening statements prepared. So I think it would
6 be better for you to file it sooner rather than later.

7 Why don't you file it by 5:00 o'clock today?

8 **MR. WOOL:** That works for Plaintiffs.

9 **THE COURT:** Get on your phone and start texting your
10 colleagues. So let's assume you get over that hurdle.

11 **MR. WOOL:** Right.

12 **THE COURT:** Let's say the theory you are articulating
13 now that you want to present to the jury is properly a design
14 defect theory. Then I guess my next question to you is: Why
15 shouldn't Monsanto be able to make its risk-benefit analysis
16 argument, subject to one very, very important limitation, okay?
17 Somewhere between 95 and 99 percent of what Monsanto put in its
18 brief about what the thing that it wants to argue, I think,
19 would not be permissible, right?

20 **MR. WOOL:** Right.

21 **THE COURT:** Because they want to say, you know,
22 Monsanto feeds the world. Monsanto has revolutionized the
23 agricultural industry. Monsanto has made things great for
24 farmers. None of that, it seems to me, is relevant to your
25 design defect theory.

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1 So I think Monsanto would be limited to arguing -- if it
2 wants to get up in front of the jury and argue it with a
3 straight face -- it can say, Look, this is so good -- this
4 product is so good at helping people kill poison oak in their
5 backyard that it doesn't matter that it gives people
6 non-Hodgkin's lymphoma, right?

7 **MR. WOOL:** Right.

8 **THE COURT:** So whether they want to argue that or not,
9 I don't know, but if they want to argue that, why -- why
10 shouldn't they be allowed to?

11 **MR. WOOL:** Well, that sort of presupposes that the
12 risk-benefit test applies rather than the consumer expectations
13 test.

14 **THE COURT:** Well, why shouldn't it?

15 **MR. WOOL:** Well, Plaintiffs have the right under
16 California law to proceed under the consumer expectations test,
17 under factors like this where, you know, Roundup's danger is
18 sort of -- kind of common to everybody who would use Roundup
19 for the purposes that Mr. Hardeman used it for, and that it
20 exceeds the consumers' expectations of what a normal kind of
21 regular --

22 **THE COURT:** Well, I think this discussion kind of
23 highlights that this is really a failure-to-warn case. It is
24 not really a design defect case, but I guess -- I don't
25 understand -- so some people are going to -- assuming the jury

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1 comes back for you, the assumption we are operating under for
2 the second phase of the trial is that some people are going to
3 get NHL for -- from their Roundup use and some people are not.

4 And why can't Monsanto argue, if it wishes, that the risk
5 of some people getting NHL from ordinary Roundup use in their
6 backyards is -- is vastly outweighed by the ability of this
7 product to eliminate the scourge of poison oak that is plaguing
8 our nation's backyards all across the country?

9 **MR. WOOL:** If Plaintiff elected to proceed only under
10 that theory, only under the risk-benefit theory, then that
11 would be Monsanto's argument. And, you know, I think we have
12 the option of proceeding under one or both theories. But as we
13 laid out in our brief, under these circumstances, the consumer
14 expectations test rather than the risk-benefit test is
15 applicable because we are not talking --

16 **THE COURT:** Your argument is that it is always the
17 Plaintiff's choice what theory --

18 **MR. WOOL:** No, we are not saying it is always the
19 Plaintiff's choice. In this case the consumer expectations
20 test is applicable.

21 **THE COURT:** Is it ever the Plaintiff's choice?

22 **MR. WOOL:** I think the Plaintiff can choose to proceed
23 under the risk-benefit test if it --

24 **THE COURT:** I mean, why? I mean, so if you have a --
25 there is a defect in a car and, you know, it's going to -- and

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1 the defect, you know, is going to -- or the alleged defect is
2 going to result in, you know, killing one person but saving ten
3 people, who would otherwise have died, are you telling me that
4 the Plaintiff in a case like that can say, We refuse to proceed
5 under the risk-benefit theory?

6 **MR. WOOL:** No, no. I think -- this is sort of the
7 hypothetical that Monsanto lays out in the beginning portion of
8 their brief on this issue with airbags, right. And I think the
9 way they laid it out is if an airbag deploys, kind of as it
10 would normally be used in a normal circumstance in a wreck,
11 and -- sorry -- strike that.

12 If it deploys under abnormal circumstances, you know,
13 going 2 miles per hour over a speed bump, that that is a
14 consumer expectations issue. If it deploys in a wreck injuring
15 somebody, and there are certain -- kind of individualized
16 circumstances involved, then that is a risk-benefit question.

17 **THE COURT:** Okay.

18 **MR. WOOL:** So I think that it sort of turns on whether
19 or not the harm is unique to the Plaintiff, which in this case
20 it is not. I think obviously there are thousands and thousands
21 of people who are alleging they developed non-Hodgkin's
22 lymphoma from Roundup.

23 **THE COURT:** Well, maybe the better way to say it is
24 the risk is not unique to the Plaintiff.

25 **MR. WOOL:** Correct.

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1 **THE COURT:** Okay. I understand your argument.

2 I guess the first question I want to ask you is: You are
3 not going to be allowed -- if you proceed under the
4 risk-benefit theory, or -- I guess the way to put that is if
5 the jury is going to be given that instruction, you are not
6 going to be permitted to make all your feed-the-world
7 arguments.

8 So what -- can you articulate to me -- and to be more
9 specific and precise in what I'm saying, you are not going to
10 be able to make any of the arguments about benefits as they
11 relate to farming. You are limited to making arguments about
12 the benefits that Roundup confers for people who are using
13 Roundup in their yards to kill weeds.

14 So what -- can you articulate for me the risk-benefit
15 argument that you will make to the jury under that instruction?

16 **MR. KILARU:** If we are in that world -- and I think as
17 Your Honor has recognized or at least questioned, we don't
18 think we should be for the reasons set out in our paper.

19 **THE COURT:** And what you mean by that is: You don't
20 believe that the failure to -- sorry. You don't believe that
21 the design defect claim should go to the jury at all?

22 **MR. KILARU:** Correct.

23 **THE COURT:** Okay.

24 **MR. KILARU:** I think saying a product should be taken
25 off the market is not a valid design defect claim and also

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1 raises pretty serious preemption --

2 **THE COURT:** Right. As you know, I disagree with you
3 on the preemption question. So putting that aside, you are
4 just saying that the law says that that is not a valid design
5 defect theory?

6 **MR. KILARU:** That's right. I do think -- not to
7 re-visit preemption, I would just say if it is a
8 ban-the-product argument, I do think that there is a preemption
9 case for that that is a little -- I think even does not fall
10 necessarily within what Your Honor has already ruled on.

11 **THE COURT:** You mean there would be a distinction
12 between a causative action where a jury reaches a verdict that
13 has the practical --

14 **MR. KILARU:** Yes.

15 **THE COURT:** -- consequence of banning the product --

16 **MR. KILARU:** Yes.

17 **THE COURT:** -- as opposed to a state regulator
18 deciding to ban the product?

19 **MR. KILARU:** Right.

20 **THE COURT:** I get that.

21 **MR. KILARU:** So on the --

22 **THE COURT:** What case is that? What case is that?

23 **MR. KILARU:** I will get it for you, Your Honor. I
24 don't have it off the top of my head.

25 **THE COURT:** Okay.

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1 **MR. KILARU:** Can we file that by 5:00?

2 **THE COURT:** Sure.

3 **MR. KILARU:** Thank you.

4 **THE COURT:** And any other case on this topic. But if
5 you have any cases now that stand for the proposition that
6 this -- that this is not -- that this theory that they have
7 articulated is not actually a design defect theory, I'm --
8 sooner than 5:00.

9 **MR. KILARU:** On that, Your Honor, I think it is the
10 cases we cited in our letter; that it is not a valid theory,
11 both with a chemical and sort of a product, you can't sort of
12 say design something differently when your argument is just
13 actually don't produce it at all. Those are the two cases we
14 have in the first paragraph.

15 **THE COURT:** Okay. And then what about -- and I
16 haven't read those cases yet. I only read the briefs so far.
17 But what about the fact that you didn't -- at least if I recall
18 correctly, you did not make this argument at summary judgment?

19 Again, I will say that as a practical matter, if you are
20 right, you know, it seems like we should decide the question
21 now so we can save everybody some time and save the Plaintiffs
22 some of their precious time. But if they, you know, if they --
23 let's say they insist on presenting this theory to the jury,
24 even if the law makes clear that I'm going to have to grant a
25 motion for a directed verdict at the end of the trial, what --

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1 what is your argument for why it would be appropriate for me to
2 take that claim away at this stage in the litigation?

3 **MR. KILARU:** I think it would be that if we ultimately
4 think the claim isn't going to go to the jury, it doesn't make
5 sense for it to go to the jury in the first instance. I don't
6 think, as Your Honor knows, it would make sense to instruct the
7 jury on a claim that isn't legally valid, and so in the jury
8 instructions context we would address it.

9 **THE COURT:** But the normal rules are that you are
10 supposed to raise these arguments on summary judgment. I think
11 in some circumstances Courts have discretion to consider these
12 kinds of issues at the sort of -- in the limine stage, but I
13 haven't gone back to refresh myself on what those circumstances
14 are. I mean, what is -- what is your argument for why I should
15 do that, other than we would be wasting the jury's time and it
16 is obvious that this is not a design defect claim; and we
17 should have raised this at summary judgment but we didn't, but
18 we are raising it now in the interest of efficiency? I mean,
19 do you have any other argument or authority for the proposition
20 I could go ahead and grant what is effectively a summary
21 judgment motion now?

22 **MR. KILARU:** I think beyond your inherent authority to
23 do so, no, Your Honor. But I do think that time savings and
24 also the fact that because of the phasing, we have this sort of
25 break in the trial, now would be an appropriate time to do it.

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1 **THE COURT:** Okay. Anything else you want to say on
2 the design defect issue?

3 **MR. WOOL:** Yes. Two issues that I was reminded of by
4 my colleagues.

5 One is with respect to the alternative design argument. I
6 think Plaintiffs would still have some evidence that if we
7 elected to could proceed under a theory that the Roundup
8 formulations in the United States -- particularly those with
9 tallow amine surfactants -- are more dangerous than, say,
10 European formulations where, you know, the regulators take a
11 more --

12 **THE COURT:** Where is that evidence?

13 **MR. WOOL:** It is in a couple of e-mails. We can file
14 that with our brief this evening.

15 Just sort of some internal back-and-forth Monsanto e-mails
16 with respect to, you know, the genotoxicity of the American
17 surfactants and -- in comparison to those that are used in
18 Europe.

19 **THE COURT:** Okay.

20 **MR. WOOL:** And I guess the second point that I just
21 wanted to raise is if Plaintiffs could file their letter brief
22 at 5:30, just to be able to incorporate and address the case
23 law that Monsanto intends to bring up, if that's -- turns out
24 to be relevant.

25 **THE COURT:** That's fine. You can even do it at 6:00.

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1 **MR. KILARU:** Can I just make a point on that?

2 **THE COURT:** Sure. On the genotox stuff?

3 **MR. KILARU:** Yeah. We had the same understanding as
4 Your Honor. I don't know if this was your understanding or you
5 were just asking a question. But we have the understanding
6 that there is no evidence of a different product formulation
7 that would be safer. We also don't believe they have any
8 expert testimony to support that argument, so I don't think
9 company e-mails alone would be the basis for allowing that
10 theory to go to a jury if there is not someone who can say as a
11 scientific matter, and Your Honor has already ruled the company
12 witnesses are not experts.

13 **THE COURT:** But as a categorical matter, I don't know
14 if that's true. If there is a company -- if there is an e-mail
15 from Donna Farmer that says, you know, the formulation that we
16 are allowed to use in Europe is far less genotoxic than the
17 formulation we are allowed to use in the United States, why
18 wouldn't that -- why couldn't they pursue their theory on that
19 e-mail?

20 **MR. KILARU:** I think this -- well, two things.

21 One, I think this sort of falls into the discussion of why
22 risk-benefit makes more sense, which is that when you are
23 talking about alternative designs, it is a somewhat complex
24 scientific inquiry; and we think they should have to have an
25 expert or someone other than a statement in an e-mail to

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1 establish to the jury why that product would be less genotoxic,
2 if that is indeed true or what the circumstances would be in
3 which it is less genotoxic and so on. I don't think this
4 theory has really been something that we have heard about
5 before now.

6 I guess, related to that, if there are these e-mails, I
7 think, we would appreciate then a chance to respond to them
8 because I think we wouldn't need to respond to the broader
9 argument, other than to cite our cases; but if there now is
10 this theory -- that I thought had been taken off the table --
11 then I think we would need an opportunity to respond without
12 knowing what those e-mails are.

13 **THE COURT:** Yeah. I mean, you know, I don't know what
14 to do because we may -- hey, we may not have opening statements
15 tomorrow. It may wait until Monday or they may not come at
16 all, who knows.

17 But -- it seems at least quite possible that there will be
18 opening statements tomorrow. And, you know, I haven't -- you
19 know, so today is Thursday. Opening statements are likely to
20 happen tomorrow.

21 I haven't been given enough to decide this question. I
22 haven't been given the evidence that the Plaintiffs would use
23 in support of this theory that you are now saying you want to
24 articulate, where previously you were saying you didn't want to
25 articulate that theory. I haven't been given any cases to

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1 support your argument that your theory that you earlier said
2 you wanted to articulate is a design defect theory. So I
3 really don't know -- I really don't know what to do at this
4 point.

5 **MR. WOOL:** Well, you know, I think with respect to
6 this being sort of a brand-new theory, I think my point was
7 that the evidence is there, that we could -- that if Your Honor
8 kind of bought Monsanto's argument hook, line and sinker, that
9 there is still some evidence --

10 **THE COURT:** Your use of the words "hook, line and
11 sinker" make it suggest -- suggest that I'm being duped by
12 Monsanto.

13 **MR. WOOL:** That's not what I meant to imply,
14 Your Honor.

15 **THE COURT:** I mean, they are the ones who gave me case
16 law. You haven't.

17 **MR. WOOL:** Well, I think that with respect to this
18 argument, this was sort of raised in the letter brief for the
19 first time, and that was -- I think at 8:00 this morning.

20 **THE COURT:** Okay. I think -- I mean I would suggest
21 that you go back and think about, what is -- let me ask you
22 this: What does proceeding on the design defect theory get you
23 that you don't get from your other claims?

24 **MR. WOOL:** Well, I think as a practical matter, there
25 is some insulation from an appellate argument as to the, you

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1 know, whether a failure-to-warn claim was preempted. And I
2 think that is sort of from the --

3 **THE COURT:** Is there a scenario where the design
4 defect claim wouldn't be preempted and the failure-to-warn
5 claim would be preempted?

6 **MR. WOOL:** Well, I don't think either claim is
7 preempted for the purposes of appellate argument. I think that
8 the argument is certainly stronger in the Bates that the design
9 defect claim is not ever going to be --

10 **THE COURT:** Under current law, yeah.

11 **MR. WOOL:** Right, under current law.

12 And in terms of what else it gets us, you know, I probably
13 would want to consult with my colleagues.

14 **THE COURT:** Is there some extra damages you get from
15 design defect?

16 **MR. WOOL:** No, no, no.

17 **THE COURT:** So I don't -- I guess I'm left a little
18 bit scratching my head at why you seem to be trying to fit this
19 square peg into this round hole.

20 But let me go back to you, Mr. Kilaru, briefly on the
21 design defect issue and the risk-benefit issue. So what -- can
22 you articulate what -- assuming the design defect claim is
23 allowed to go forward and you are -- and the jury is given the
24 risk-benefit instruction, what is the argument that -- what is
25 the risk-benefit analysis that you are going to provide to the

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1 jury?

2 **MR. KILARU:** Well, I think --

3 **THE COURT:** And who is going to provide it?

4 **MR. KILARU:** So I think we -- for example, Mr. Reeves
5 has already provided in Phase One evidence of the benefits of
6 Roundup for home users. That evidence has already been played
7 to the jury. So I think we would have the right to emphasize
8 that again, and that would go to this question.

9 We did think Dr. Weisenburger's testimony opened the door
10 to some of the agricultural benefits. I understand Your Honor
11 disagrees with that, so I think we will not go down the road.

12 But I think testimony that is similar to what Reeves
13 provided -- and other witnesses -- would also be appropriate.
14 And what he provided to the jury in the main was testimony
15 about how Roundup is absorbed by the soil, whether it leaches
16 into ground water. I don't know if we played this yet, but I
17 do think its broad applicability to a variety of weeds would be
18 appropriate. That is relevant to home users as well. I think
19 the lone toxicity --

20 **THE COURT:** I agree with that.

21 **MR. KILARU:** Those are the types of arguments that we
22 would be inclined to present in Phase One. I don't think --

23 **THE COURT:** So you will argue that -- you know, Yes,
24 you find that, yes, there is a risk of NHL with Roundup use,
25 but we are telling you that -- we are telling the jury that the

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1 risk of developing NHL from Roundup use is outweighed by the
2 benefits that Roundup confers on people who use it in their
3 backyards.

4 **MR. KILARU:** I would add something to that,
5 Your Honor, which is to the extent their arguing is that
6 Roundup shouldn't be on the market at all, we would be able --
7 I think we should be entitled -- I think we would be allowed to
8 point out that those benefits come with Roundup and maybe don't
9 come with other pesticides or herbicides, which is why we
10 believe that the benefits outweigh the risks.

11 Now, there is a separate warning piece that I think would
12 go onto the product -- the possibility of the product staying
13 on the marketplace with a warning, which I don't think we are
14 obviously contesting as a substantive matter. We are not
15 contesting the validity of that theory beyond what we already
16 raised. But as a design theory, I do think that would be
17 appropriate for us to present.

18 **THE COURT:** Okay. I think I understand that.

19 So procedurally, how -- what are we going to do in terms
20 of you-all finally providing the information that I need to
21 figure this issue out?

22 **MR. WOOL:** I think we just --

23 **THE COURT:** See, I think you need to go first because
24 you need -- the first thing you need to do is you need to -- I
25 would urge you to go back and think about whether you really

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1 want to continue pursuing this claim, and so you can think
2 about that. You can think about what your design defect theory
3 actually is. And to the extent your design defect theory is
4 that it could have been formulated differently, where is your
5 evidence for that? Show us the evidence of that. And, you
6 know, give us any case that you think is -- supports pursuing
7 either design defect theory, right.

8 I mean, the one about how it's too dangerous and so it
9 never should have been marketed and sold to home users at all,
10 and the other -- you know, the other theory that you have just
11 talked about. I mean, what is your case law to support your
12 ability to proceed on those theories under a design defect
13 claim.

14 I think you should be the one to file that first.

15 **MR. WOOL:** Right.

16 **THE COURT:** And so why don't you go ahead and file
17 that at 5:00, and then Monsanto can respond with to anything at
18 6:00.

19 **MR. KILARU:** Sure.

20 **MR. WOOL:** Okay.

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

22 Finally, the Seralini study -- let me pull up that brief.

23 So if I recall correctly, my ruling on the Seralini study
24 from the pretrial motion in limine was that it's -- it's not
25 relevant to Phase One or it should be excluded under 403 at a

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1 minimum in Phase One.

2 **MS. MOORE:** That's correct, Your Honor.

3 **THE COURT:** I think I may have also said that it
4 should be excluded under 403 in Phase Two.

5 **MS. MOORE:** You did, Your Honor.

6 **THE COURT:** And then I said in any event, its post-use
7 conduct.

8 **MS. MOORE:** That's correct, Your Honor.

9 **THE COURT:** It should be excluded for that reason as
10 well.

11 So which aspect of that ruling are you asking me to
12 reconsider, that it is 40 -- that it should be excluded under
13 403 under Phase Two, and that it has to be excluded because it
14 was post-use conduct?

15 **MS. MOORE:** Both, Your Honor.

16 **THE COURT:** Okay. And what -- and so I guess after
17 reading your brief, I wasn't -- I guess I wasn't -- in
18 particular on the post-use conduct issue, I was left scratching
19 my head. It is not to say I agree with you on the 403, but I
20 kind of understood your argument at least. I didn't really
21 understand why, given the ruling on post-use conduct, this
22 should come in.

23 **MS. MOORE:** Your Honor, to that point there are
24 internal e-mails at Monsanto going back as early as 2004. And
25 I can send that to Your Honor. It is September 8th, 2004. It

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1 is an e-mail from Donna Farmer to --

2 **THE COURT:** You included it on your brief, right?

3 **MS. MOORE:** Right -- to a series of people -- well,
4 this is actually a different one, Your Honor. And it goes
5 directly to the issue of post-use corporate conduct. And she
6 reads -- she writes: Good points and your approach makes
7 sense. Not good news that Bell and Seralini labs are in
8 contact. Similar types of research and downstream extreme
9 conclusions.

10 And she goes on from there. And she says: I am sure this
11 is not the last we have heard from these groups unfortunately.

12 This is something that Monsanto over the years -- well
13 within the time period that Mr. Hardeman was using Roundup,
14 knew that Dr. Seralini was looking into glyphosate and Roundup.
15 And so we don't believe that the post-use corporate conduct
16 even applies with respect to the Seralini study because they
17 have mounted an effort going back several years in order to
18 undermine Dr. Seralini and to discredit any science or
19 scientific conclusions that you may draw from Dr. Seralini. So
20 that is one point on that.

21 **THE COURT:** Well, but if there is evidence that they
22 are gearing up to attack the authors of a study or something
23 like that, and the study ended up not coming out until later --
24 until after Mr. Hardeman start-- stopped using Roundup, I would
25 think that that evidence of gearing up to attack somebody would

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1 be admissible in Phase Two, but I -- you know, I'm still not
2 sure why -- you know, there -- at least let me put it this way:
3 There could still be 403 issues with any such evidence, but
4 under my ruling about post-use conduct, I would think that --
5 you know, it wouldn't violate that rule, that ruling to include
6 evidence of Monsanto gearing up to attack somebody who was in
7 the process of conducting a study or something like that, as
8 was the case with the AHS e-mails or memos, right.

9 But why then would it be appropriate to include evidence
10 of Monsanto, in fact, going forward and attacking those people
11 after -- after the summer of 2012.

12 **MS. MOORE:** Well, I think there is two reasons,
13 Your Honor. First from a liability perspective, we have the
14 failure-to-test claim. And Defendant has admitted they never
15 conducted a long-term study regarding the carcinogenicity of
16 Roundup, and Seralini is a long-term carcinogenicity study on
17 Roundup.

18 **THE COURT:** Well, I thought -- you are kind of moving
19 the goal post on me, because what you just -- you just -- a
20 second ago you were making an argument about how this was
21 relevant to attacking this evidence, this -- the evidence of
22 the Seralini study post-2012 was relevant to your charge that
23 Monsanto attacks everybody who -- and now -- so I asked you a
24 question about why. And now you are changing and you are
25 saying that this is -- this is relevant to the ability of

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1 Monsanto to conduct a long-term rat study.

2 **MS. MOORE:** Your Honor, I'm --

3 **THE COURT:** Do you have any other arguments you want
4 to make about --

5 **MS. MOORE:** Yes, Your Honor. I was saying there are
6 two points. That is the first point with respect to liability
7 claim. And then the second point is punitive damages,
8 Your Honor. As the Court is well aware, on a punitive damage
9 claim, I believe your PTO 101 set forth that we had presented
10 sufficient evidence to show the jury evidence regarding
11 punitive damages. And with respect to that --

12 **THE COURT:** Yeah, you quoted that like maybe three
13 times in your five-page brief.

14 **MS. MOORE:** Well, Your Honor --

15 **THE COURT:** We are going to make a drinking game in
16 chambers about how many times you quote that sentence.

17 **MS. MOORE:** I would probably not recommend that,
18 Your Honor, especially during the day.

19 Your Honor, this goes directly to that. And not to make
20 light of it, but in your order, Your Honor, in PTO 101, I mean,
21 you write that, There is strong evidence from which a jury can
22 conclude Monsanto does not particularly care whether its
23 product was, in fact, giving people cancer, focusing instead on
24 manipulating public opinion and undermining anyone who raises
25 genuine and legitimate concerns about the issue.

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1 **THE COURT:** So do you want to hand me a beer now?

2 **MS. MOORE:** I don't have that with me, Your Honor.

3 So -- but that goes directly to the heart of the Seralini
4 study, Your Honor. That is exactly what they did here. They
5 hired the editor of the journal. Put him on contract --

6 **THE COURT:** I understand that it's relevant to the --
7 to your theory of Monsanto attacking everybody who comes out a
8 different way, but the problem is that it is post-use conduct.
9 And I just haven't got a response from you about -- I think
10 there are other problems with the Seralini study, and I think
11 there are real questions about the people on the opposite side
12 from Monsanto on the Seralini study that may make all of this
13 403 anyway. I think it is probably excludable under 403
14 anyway. But even aside from that, it is post-use conduct. So
15 I don't get it.

16 **MS. MOORE:** But the purpose of punitive damages,
17 Your Honor, is to punish the wrongdoer for the conduct of --

18 **THE COURT:** We have been through that argument. I
19 don't want a motion for reconsideration on that issue. We have
20 decided that already.

21 **MS. MOORE:** It is to show that it is still going on.
22 This pattern of conduct is still going on, so they need to stop
23 that conduct. And that is what the purpose of punitive damages
24 is. So I do think it is relevant for the jury to hear that
25 they continue to display this conduct. They displayed it

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1 during the time Mr. Hardeman used the product, and they
2 continue to do it today. And I think that is relevant for the
3 jury to hear that type of evidence.

4 **THE COURT:** Okay. I disagree with you. I have
5 already ruled on the issue. So the Seralini study is out.

6 I do think it would be fine -- I do think that if you
7 described that 2004 e-mail accurately from Farmer, and the way
8 you described it, it sounded like it was Monsanto gearing up to
9 attack somebody --

10 **MS. MOORE:** Right.

11 **THE COURT:** -- I think that probably would be
12 admissible in Phase Two.

13 **MS. MOORE:** Okay. Okay. All right. Thank you,
14 Your Honor.

15 **THE COURT:** So let's see. Is there anything else to
16 talk about?

17 **MR. KILARU:** I don't think so, Your Honor.

18 **THE COURT:** Okay. And so let's talk about scheduling.
19 I still have not started going through the depositions. So the
20 Plaintiffs are going to have to focus on live witnesses in the
21 first part of their case on Phase Two.

22 So what is -- what have you done in terms of figuring out
23 the order of witnesses?

24 **MS. WAGSTAFF:** So assuming -- it is a little difficult
25 not knowing when we are going to start. We were going to bring

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1 Benbrook first, and we have just withdrawn him. So in the last
2 five minutes we have made some executive decisions.

3 If we have to focus on live witnesses, we will see if we
4 can bring Dr. Nabhan first or Mr. Hardeman, I guess. I would
5 probably need to caucus with my co-counsel a little bit since
6 everything has changed.

7 **THE COURT:** Okay.

8 **MS. WAGSTAFF:** If we are able to -- if a verdict
9 doesn't come back until after lunch tomorrow, meaning that
10 opening would not happen until Monday, perhaps we would have
11 more time to at least narrow a few of the first depositions. I
12 think Dr. Martens would be -- well, we gave you our list.

13 We are also working on a Mills' stipulation. I don't know
14 how far we are on that. But in concept, we are sort of working
15 on that.

16 But if we can do Dr. Martens and Dr. Reeves, I think we
17 could probably get some of those done by Monday, depending on
18 when Your Honor -- we can come in tomorrow and work on those as
19 well while we wait for a verdict.

20 **THE COURT:** Well, okay. So Nabhan and Hardeman, then,
21 would be the only two -- and then Mrs. Hardeman.

22 **MS. MOORE:** Mrs. Hardeman.

23 **THE COURT:** Okay. So you have to be ready to call
24 those three witnesses at the beginning of your case. If we
25 have any of these deposition transcripts ready, then you can

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1 sub them in, but you have to -- are those the three live
2 witnesses?

3 **MS. WAGSTAFF:** Yeah, because if we do Dr. Mills by
4 stipulation, then he obviously won't be a witness and we have
5 withdrawn Benbrook. So those are our three live witnesses.

6 **THE COURT:** Okay. So there is Martens, Reeves --

7 **MS. WAGSTAFF:** Farmer.

8 **THE COURT:** Farmer.

9 **MS. WAGSTAFF:** Dr. Heydens and Koch, K-O-C-H.

10 **THE COURT:** No relation?

11 **MS. WAGSTAFF:** I'm not sure.

12 **THE COURT:** So -- and the priorities for you are
13 Martens and Reeves?

14 **MS. WAGSTAFF:** Yes.

15 **THE COURT:** In terms of my review?

16 **MS. WAGSTAFF:** Yes, Your Honor.

17 **THE COURT:** And if you're --

18 **MS. WAGSTAFF:** And then probably Heydens and Farmer
19 and Koch fifth.

20 **THE COURT:** Okay.

21 **MR. STEKLOFF:** Can I just say, Your Honor, with
22 respect to all of those, while I have not personally reviewed
23 them, I'm told that more than half involve -- more than half of
24 each of those designations probably involves post-2012 conduct.
25 So if we are -- take Reeves, for example. There are copious

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1 amounts of designations that relate to post-2012 conduct, so I
2 defer to Your Honor whether the Plaintiffs should have an
3 obligation to go through and actually cut their designations.
4 We have objected to all of that, but it has been a process.

5 **THE COURT:** I mean, I'm not going to go through -- I'm
6 not going to take hours to go through deposition testimony,
7 most of which has already been excluded pursuant to my pretrial
8 rulings --

9 **MR. STEKLOFF:** We would agree. So we would defer to
10 Your Honor how we should proceed. But that -- I mean, it is
11 clear that of the, I think, 18 hours that they have designated
12 of depositions, I would guesstimate half relates to post-2012
13 conduct, if not -- and so --

14 **MS. WAGSTAFF:** I'm --

15 **MR. STEKLOFF:** -- we have timed that they have
16 designated 18 hours. We have not timed how much of that is
17 post-2012, but it is a lot.

18 **THE COURT:** And there is, of course, an additional
19 problem with the fact that they have designated 18 hours of
20 deposition testimony, which is that they only have 7 and a half
21 hours of trial time left.

22 **MS. WAGSTAFF:** I'm well aware and I agree.

23 **THE COURT:** Okay. What --

24 **MS. WAGSTAFF:** So, Your Honor, on that note, I believe
25 Dr. Martens is almost entirely on the Parry issue, which is

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1 clearly within the scope of Phase Two. So we wanted to focus
2 on that one first. I think that is pretty --

3 **THE COURT:** Okay.

4 **MS. WAGSTAFF:** -- relevant, and then Ms. Moore
5 would --

6 **THE COURT:** Sounds like you from what -- from the way
7 Mr. Stekloff has described it, it sounds like you are going to
8 need to resubmit Reeves and do a much more careful job of
9 comporting with the pretrial rulings.

10 **MS. MOORE:** Your Honor, we will go back and look at
11 Dr. Reeves this afternoon.

12 I will just raise for the Court's attention, with respect
13 to IARC and the amount of money that Monsanto spent on trying
14 to debunk IARC, we do think that is relevant for post-use
15 corporate conduct. In Phase One they made arguments, you know,
16 we had the IARC conclusion. It has already been heard by the
17 jury. They argued EPA. There was this kind of, you know, a
18 little bit of an IARC and EPA. It wasn't a huge theme of the
19 first phase because of Your Honor's rulings, but that is
20 already out there that they disagree with the IARC conclusion
21 pretty heavily. And so we think being able to show that they
22 spent \$17 million to try to debunk IARC is relevant.

23 **THE COURT:** As I said earlier, I'm not going to
24 reconsider my ruling on post-use conduct.

25 **MS. MOORE:** Well, I had to try, Your Honor, on that

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1 one. All right. Thank you, Your Honor. We will go back and
2 look at Dr. Reeves this afternoon and let you know.

3 But that does bring up a good point. And Plaintiff -- we
4 have tried very efficiently throughout Phase One to keep our
5 time running quickly, smoothly, and efficiently. I don't think
6 we, you know, wasted the jury's time at any point. We were
7 even ahead of schedule at times.

8 And so we would respectfully request that the Court give
9 us additional hours so we can put on our case of liability and
10 damages. Right now we are at seven hours and 24 minutes. With
11 another set of opening, another closing, that is virtually
12 impossible for us to meet our burden of proof for Phase Two,
13 which would give us about four hours to put on three live
14 witnesses and do depositions. So we would ask --

15 **THE COURT:** Let me ask the Defendants. What witnesses
16 are you planning on putting on in Phase Two?

17 **MR. STEKLOFF:** We may call no witnesses, Your Honor.
18 We had reserved -- we had told Plaintiffs that we might call
19 Dr. Reeves live, but I don't know -- I wouldn't put it in the
20 likely category. And then we had also thought about calling
21 Dr. Alkhateeb, but I think based on your ruling today, how that
22 plays out that plays out, he is highly unlikely. So I think we
23 will not -- my expectation --

24 **THE COURT:** Because he's -- I can't remember. Is
25 he -- is his testimony about all the farming benefits to

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1 Roundup?

2 **MR. STEKLOFF:** He is a weed scientist. So he can talk
3 about benefits in all aspects in part. He certainly would be
4 able to talk about farming benefits. He could also talk about
5 poison oak benefits, for example.

6 **THE COURT:** Okay. So is that to say that this
7 discussion -- I mean, it seems to me that perhaps the
8 Plaintiffs need to go back and think about whether they really
9 actually have a design defect theory that they wish to pursue,
10 but it sounds like maybe Monsanto also needs to go back and
11 think about whether it wants to present a risk-benefit analysis
12 in light of the fact that I have ruled that it can't present
13 the farming stuff.

14 **MR. STEKLOFF:** Understood. I mean, I think that we
15 could get in some of the risk-benefit analysis through
16 Dr. Reeves' deposition even.

17 **THE COURT:** Yeah.

18 **MR. STEKLOFF:** So I don't know that we would have to
19 call Dr. Alkhateeb to address that topic.

20 **THE COURT:** Got it. Okay.

21 **MR. STEKLOFF:** But I agree that even if they pursue a
22 design defect claim, how heavily we push the risk-benefit
23 claim, if allowed to, is a trial strategy that we will
24 re-visit.

25 **THE COURT:** Okay. So are you saying your only

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1 possible two witnesses are going to be -- obviously you are
2 going to be designating -- you are going to be
3 counter-designating some of the witnesses that the Plaintiffs
4 are calling by video --

5 **MS. MOORE:** And they have done that, Your Honor.

6 **THE COURT:** -- but -- so Dr. Reeves and Alkhateeb are
7 your possible live witnesses?

8 **MR. STEKLOFF:** I'm just confirming, but yes, we have
9 no other possible witnesses. But I don't think, to be clear,
10 that the fact that we have been efficient and may not have a
11 long --

12 **THE COURT:** I understand.

13 **MR. STEKLOFF:** -- presentation should mean they should
14 get extra time.

15 **THE COURT:** I think that's fair. But I also want to
16 be a little practical about it, right? I mean, you have 18 and
17 a half hours left on your clock. It sounds like there is,
18 given what you just said, there is no chance that you are going
19 to come close to using those 18 and a half hours.

20 **MR. STEKLOFF:** Absolutely.

21 **THE COURT:** And I think that on its own probably, you
22 know, is not a reason to give the Plaintiffs extra time, but
23 I guess I'm thinking about -- I'm thinking about a couple other
24 things.

25 Another argument against giving the Plaintiffs extra time

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1 is I think we did waste quite a bit of time during Phase One
2 because of all the attempts that the Plaintiffs made to bring
3 Phase Two evidence into Phase One and all the sidebars and all
4 the delays that resulted from that, discussions outside the
5 presence of the jury. So that's -- that's one argument against
6 giving the Plaintiffs a little more time.

7 The argument for it, I suppose, is that -- and this is
8 something that I was thinking about during Phase One -- is
9 that -- I think the Plaintiffs probably needed more time to put
10 on their case in Phase One because having -- going first and
11 having the burden of proof, you know, they put up these experts
12 and the experts have to explain, you know, the Bradford-Hill
13 criteria and what is epidemiology and, you know, what is
14 toxicology, and what is genotoxicity and, you know, how do you
15 do -- what is the difference between a case control study and a
16 cohort study, and what are -- you know, what are the -- you
17 know, even in areas where the -- both sides agree that there
18 are certain benefits to case control studies and certain
19 benefits to cohort studies, the -- you know, it is the
20 Plaintiff's experts that had to take the time to explain that.
21 So I think that -- that could be a justification for giving the
22 Plaintiffs a little bit more time in the second phase.

23 **MS. MOORE:** And also defining, Your Honor, adjusted
24 versus unadjusted, confounding. I mean, there was a lot of
25 terms the jury would never have heard of. And so it did take

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1 time. I think we were efficient with asking the experts those
2 questions.

3 And we do have the burden of proof. And, frankly, we had
4 to make sure we put all the evidence up so we can get to
5 Phase Two. And we are still waiting to know whether we get to
6 Phase Two. So we had to put all that evidence in.

7 I would just ask the Court, respectfully, if you would
8 consider giving us additional time so then we can meet our
9 burden in Phase Two. There is no way we can meet our burden
10 with only four hours of testimony.

11 **THE COURT:** Well, I don't know if I agree with that.
12 First of all, you have seven and a half hours; you don't have
13 four hours.

14 **MS. MOORE:** But that includes opening and closing.

15 **THE COURT:** It is your choice how much to spend on
16 opening and closing.

17 **MS. MOORE:** Well, Your Honor. I mean, we have to --
18 even if we did an hour each, which I think is very reasonable
19 in a case like this of this magnitude, I mean, that puts us
20 down to five hours.

21 **MR. STEKLOFF:** Can I just weigh in a little bit on the
22 efficiency? Just as --

23 **THE COURT:** Sure.

24 **MR. STEKLOFF:** -- Your Honor considers this.

25 First, I think they gave close to a two-hour opening. I

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1 don't know if that was necessary.

2 Second, Dr. Ritz. I understand that there was some basic
3 background, but I think some of that could have been covered
4 more efficiently.

5 Third, they covered those topics, including the
6 epidemiology, the same epidemiology studies, and the
7 Bradford-Hill criteria with three different witnesses: Ritz,
8 Portier, Weisenburger.

9 **THE COURT:** They have the right to do that, though.

10 **MR. STEKLOFF:** I understand, but there is a question
11 of whether -- if the question is efficiency, there is a
12 question -- I think that that all goes to their efficiency.

13 And finally, I think it's not just that we wasted time on
14 sidebars and things outside the presence of the jury, but also
15 you had to dock time for what happened on Tuesday. And then to
16 now give them more time in sort of -- would -- I mean, I
17 understand that that was docked. But then you are sort of
18 giving them that back plus more.

19 So I just think that when you look at -- whether
20 Dr. Weisenburger is the third witness that had to deal with
21 Bradford-Hill criteria and a five-hour examination when they
22 had already heard direct examination when they already heard
23 from Ritz and Portier, I think there are questions about
24 efficiency. Whether Mr. Hardeman had to spend 30 minutes of
25 his hour showing every picture on his property to show the

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1 poison oak.

2 I just think there are a lot of things that -- whether or
3 not they had the burden, whether or not they had to explain a
4 lot of concepts, you know, they probably could have saved a few
5 hours is what I would say. So I just think that has to be part
6 of the calculus of whether they should --

7 **THE COURT:** I think all of that is fair.

8 I will give it a little bit of thought. I will let
9 you-all know tomorrow.

10 **MS. MOORE:** Okay, Your Honor. Thank you.

11 **THE COURT:** But keep your opening statements short,
12 just in case.

13 **MS. MOORE:** Your Honor, we just want the opportunity
14 to present our case. Thank you.

15 **THE CLERK:** Court is in recess.

16 (Proceedings adjourned at 1:30 p.m.)

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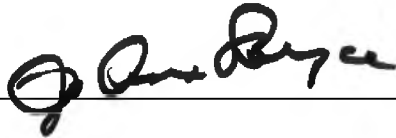
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CERTIFICATE OF REPORTERS

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, March 14, 2019



Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter



Marla F. Knox, RPR, CRR
U.S. Court Reporter