

1 Michael J. Miller (pro hac vice)  
2 Curtis Hoke (State Bar No. 282465)  
3 Jeffrey A. Travers (pro hac vice)  
4 The Miller Firm, LLC  
5 108 Railroad Ave.  
6 Orange, VA 22960  
7 (540) 672-4224 phone; (540) 672-3055 fax  
8 choke@millerfirmllc.com

9 Pedram Esfandiary (SBN: 312569)  
10 R. Brent Wisner, Esq. (SBN: 276023)  
11 pesfandiary@baumhedlundlaw.com  
12 Baum, Hedlund, Aristei & Goldman, P.C.  
13 12100 Wilshire Blvd. Suite 950  
14 Los Angeles, CA 90025  
15 Telephone: (310) 207-3233  
16 Facsimile: (310) 820-7444

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
18 **FOR THE COUNTY OF ALAMEDA**

19 **PILLIOD, et al.**  
20 **Plaintiffs,**

21 **vs.**

22 **MONSANTO COMPANY,**  
23 **Defendant.**

Case No.: RG17862702

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

Honorable Winifred Smith

Hearing Date: July 19, 2019

Time: 11:00 a.m.

Department: 21

Reservation No. R-2087954; R-2087958

Trial Date: March 18, 201

1	TABLE OF CONTENTS	
2	MEMORANDUM OF POINTS AND AUTHORITY .....	1
3	I. INTRODUCTION .....	1
4	II. LEGAL STANDARD: .....	2
5	A. Legal Standard for JNOV .....	2
6	B. Legal Standard for New Trial.....	3
7	III. ARGUMENT .....	3
8	A. The Evidence Supports a Finding of Punitive Damages.....	3
9	B. The Punitive Damages Awards are Supported by the Evidence and Are Constitutional .....	5
10	1. The Punitive Damage Awards are not Excessive .....	5
11	2. The Amount of Punitive Damages Awarded Does Not Violate Due Process .....	8
12	a. Monsanto’s Decision to Hide the Cancer Risk for Profit was Highly Reprehensible .....	9
13	b. Comparable Civil Fines are not Applicable in this Case. ....	12
14	c. The Ratio Between Compensatory and Punitive Damages is Constitutional .....	12
15	d. Monsanto Waived any Arguments about Repetitive Punitive Damages by Failing to Introduce	
16	such Evidence at Trial.....	14
17	e. In the Event the Court Finds Punitive Damages Excessive the Proper Remedy is Remittitur. .	15
18	3. The Compensatory Damages are not Excessive. ....	15
19	a. The Evidence Supports the Pilliods’ Verdicts for non-Economic Damages .....	17
20	b. There Was Sufficient Evidence Supporting the Award of Economic Damages to Mrs. Pilliod.	
21	.....	21
22	c. Non-Economic Damages do not have to be Proportionate to Economic Damages.....	22
23	C. The Evidence Supports a Finding of Causation Under Either the JNOV or New Trial Standard.	22
24	1. Drs. Weisenburger and Nabhan Properly “Ruled In” Roundup .....	23
25		
26		
27		
28		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

2. Plaintiffs’ Experts Explained Why Other Risk Factors Likely Did Not Cause Plaintiffs’ NHLs ..... 25

3. Plaintiffs’ Experts Explained Why the Cause Here is Not Idiopathic ..... 25

D. The Jury’s Finding on Plaintiffs’ Warnings Claims was Proper ..... 26

E. There were no Prejudicial Irregularities in the Trial Proceedings..... 30

    1. There was no Attorney Misconduct by Plaintiffs’ Counsel in Closing Statements..... 31

    2. There was no Attorney Misconduct Throughout Trial ..... 34

    3. Joining Plaintiffs’ Separate Claims in a Single Trial was Proper ..... 35

    4. Local Pretrial Publicity Did not Prevent Monsanto from Obtaining a Fair Trial ..... 36

    5. There was no Error or Prejudice in the Court’s Evidentiary Rulings ..... 37

        a. Plaintiffs’ Expert Testimony Was Properly Admitted ..... 37

        b. There Was No Error in the Court’s Other Evidentiary Rulings..... 38

F. There Were no Instructional Errors Prejudicial to Defendants. .... 39

G. Plaintiffs Presented Sufficient Evidence that Roundup is Defective ..... 39

IV. Conclusion: ..... 40

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Adams v. Murakami* (1991) 54 Cal.3d 105 ..... 6

4 *Am. Meat Inst. v. Leeman*, (2009) 180 Cal.App.4<sup>th</sup> 728, 746, 102 Cal.Rptr.3d 759, 772..... 29

5 *Anaya v. Superior Court*, (Ct. App. 1984)160 Cal. App. 3d 228 ..... 35

6 *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987 ..... 27

7 *Ansagay v. Dow Agrosiences LLC* (D. Haw. 2015) 153 F.Supp.3d 1270 ..... 28

8 *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698..... 4, 39

9 *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68 ..... 6

10 *Bardis v. Oates* (2004) 119 Cal.App.4th 1..... 1, 5

11 *Bates v. Dow Agrosiences, LLC*, (2005) 544 U.S. at 452 ..... 28, 30

12 *Bender v. County of Los Angeles* 217 Cal.App.4<sup>th</sup> 968, 981 (2013)..... 16

13 *Bertero v. Nat’l Gen. Corp.* 13 Cal.3d 43, 65, n. 12 (1974) ..... 16

14 *Beyond Pesticides v. Monsanto Co.* (D.D.C. 2018) 311 F. Supp. 3d 82 ..... 28

15 *Bigboy v. County of San Diego* 154 Cal.App.3d 397, 406 (1984)..... 16

16 *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276 ..... 31, 32, 34

17 *Blitz v. Monsanto Company* (W.D.Wis. 2018) 317 F.Supp.3d 1042..... 28

18 *Boeken v. Philip Morris Inc.*, 127 Cal.App.4th 1640, 1690 (2005)..... 4, 12, 13

19 *Buell–Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525 ..... 4, 16, 24

20 *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 566, (2011) ..... 13

21 *Burton v. R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253, 1263-64 (D. Kan. 2002) ..... 13

22 *Carias v. Monsanto Company* (E.D.N.Y., Sept. 30, 2016) 2016 WL 6803780 ..... 28

23 *Carlin v. Superior Court* (1996) 13 Cal.4th 1104..... 27

24 *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780..... 30, 31

25 *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922 ..... 6

26 *Chemical Specialties Mfrs. Ass’n, Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941..... 29

27 *Coombs v. Hibberd* (1872) 43 Cal. 452 ..... 40

28 *Cooper v. Takeda Pharm. Am., Inc.*, 239 Cal. App. 4th 555, 572 (2015) ..... 2, 23

1	<i>Cuevas v. Contra Costa Cty.</i> , (2017) 11 Cal. App. 5th 163.....	21
2	<i>Daniel v. Wyeth Pharm., Inc.</i> , 2011 PA Super 23, (2011).....	4
3	<i>Davis v. Honeywell Internat. Inc.</i> (2016) 245 Cal.App.4th 477, 493 .....	24
4	<i>Davis v. Kiewit Pacific Co.</i> (2013) 220 Cal.App.4th 358.....	5
5	<i>Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.</i> (1984) 155 Cal.App.3d 381 .....	6
6	<i>Dirosario v. Havens</i> (1987) 196 Cal.App.3d 1224.....	16
7	<i>Duarte v. Zachariah</i> (1994) 22 Cal.App.4th 1652.....	22
8	<i>Egan v. Mutual of Omaha Ins. Co.</i> (1979) 24 Cal.3d 809 .....	5
9	<i>Exxon Shipping Co. v. Baker</i> (2008) 554 U.S. 471.....	9
10	<i>Ferebee v. Chevron Chemical Co.</i> , (C.A.D.C.1984) 736 F.2d 1529.....	30
11	<i>Ford Motor Co. v. Home Ins. Co.</i> (Ct. App. 1981) 116 Cal. App. 3d 374 .....	4
12	<i>Gagnon v. Cont'l Cas. Co.</i> , 211 Cal. App. 3d. 1602 (1989) .....	5
13	<i>Garcia v. ConMed Corp.</i> (2012) 204 Cal.App.4th 144 .....	37
14	<i>Garcia v. Duro Dyne Corp.</i> , (2007) 156 Cal. App. 4th 92 .....	21
15	<i>Giglio v. Monsanto</i> (S.D. Cal. 2016) 2016 WL 1722859 .....	28
16	<i>Gober v. Ralphs Grocery Co.</i> (2006) 137 Cal.App.4th 204, 223 .....	13
17	<i>Gourley v. State Farm Mut. Auto. Ins. Co.</i> (1991) 53 Cal.3d 121 .....	22
18	<i>Grassilli v. Barr</i> (2006) 142 Cal.App.4th 1260.....	6
19	<i>Gutierrez v. United States</i> , (9th Cir. 2009) 323 F. App'x 493 .....	16
20	<i>Hauter v. Zogarts</i> , (1975) 14 Cal. 3d 104.....	25
21	<i>Hernandez v. Monsanto</i> (C.D. Cal. 2016) 2016 WL 6822311 .....	28
22	<i>Horn v. Atchison, Topeka and Santa Fe Railway Co.</i> (1964) 61 Cal.2d 602 .....	32
23	<i>In re Actos (Pioglitazone) Products Liability Litigation</i> (W.D. La., Oct. 27, 2014) 2014 WL 5461859	
24	..... <i>passim</i>	
25	<i>In re New Orleans Train Car Leakage Fire Litigation</i> (La. Ct. App. 2001) 795 So.2d 364.....	7
26	<i>In re Roundup Products Liability Litigation</i> (N.D. Cal. 2019) 364 F.Supp.3d 1085 .....	1, 28
27	<i>Johnson v. Ford Motor Co.</i> (2005) 35 Cal.4th 1191 .....	6, 9, 14
28	<i>Johnson v. Monsanto Co.</i> , 2018 WL 2324413.....	28

1	<i>Johnson v. U.S. Steel Corp.</i>	
2	240 Cal. App. 4th 22 (2015) .....	40
3	<i>Kelly-Zurian v. Wohl Shoe Co.</i> , 22 Cal. App. 4th 397, 414 (1994).....	3
4	<i>Knight v. Contracting Engineers Co.</i> (1961) 194 Cal.App.2d 435.....	2
5	<i>Livingston v. Kehagias</i> , No. 5:16-CV-906-BO, 2017 WL 2297004 .....	35
6	<i>Major v. Western Home Ins. Co.</i> (2009) 169 Cal.App.4th 1197 .....	22
7	<i>Mansur v. Ford Motor Co.</i>	
8	197 Cal. App. 4th 1365 (2011) .....	40
9	<i>Meals ex rel. Meals v. Ford Motor Co.</i> , (Tenn. 2013) 417 S.W.3d 414.....	16
10	<i>Mendoza v. Monsanto</i> (E.D. Cal. 2016) 2016 WL 3648966 .....	28
11	<i>Morris USA v. Williams</i> , 549 U.S. 346, 355, (2007) .....	9
12	<i>Motorola Credit Corp. v. Uzan</i> (2d Cir. 2007) 509 F.3d 74.....	2, 7
13	<i>Munn v. Hotchkiss Sch.</i> (Conn. 2017) 165 A.3d 1167.....	16
14	<i>Nat’l Ass’n of Wheat Growers v. Zeise</i> , (E.D. Cal. 2018) 309 F. Supp. 3d 842.....	38
15	<i>Nickerson v. Stonebridge life Ins.</i> 219 Cal.App.4 <sup>th</sup> 188, 194, 206-11 (2013).....	13
16	<i>Oakland Raiders v. Nat’l Football League</i> , 41 Cal. 4th 624, 633 (2007).....	3
17	<i>O’Gilvie v. International Playtex, Inc.</i> (10th Cir. 1987) 821 F.2d 1438.....	5
18	<i>Pearl v. City of Los Angeles</i> (Cal. Ct. App., June 18, 2019) 2019 WL 2511941 .....	17
19	<i>People v. Close</i> (1957) 154 Cal.App.2d 545 .....	36
20	<i>People v. Dennis</i> (1998), 17 Cal.4th 468.....	31
21	<i>People v. Dunlop</i> (1947) 79 Cal.App.2d 207.....	32
22	<i>People v. JTH Tax, Inc.</i> , 151 Cal. Rptr. 3d 728, 754–55 (2013) .....	12
23	<i>People v. Kaurish</i> (1990) 52 Cal.3d 648.....	36
24	<i>People v. Rountree</i> (2013) 56 Cal.4th 823,.....	36
25	<i>Pfeifer v. John Crane, Inc.</i> (2013) 220 Cal.App.4th 1270.....	1, 4, 6
26	<i>Philip Morris USA v. Williams</i> , 549 U.S. 346, 355, (2007).....	9
27	<i>Pooshs v. Philip Morris USA, Inc.</i>	
28	904 F. Supp. 2d 1009 (N.D. Cal. 2012) .....	40

1	<i>Quintal v. Laurel Grove Hospital</i> , (1964) 62 Cal.2d 154.....	2
2	<i>Reckis v. Johnson &amp; Johnson</i> (Mass. 2015) 471 Mass. 272.....	16
3	<i>Romo v. Ford Motor Co.</i> , 99 Cal 1115 .....	5
4	<i>Rufo v. Simpson</i> (2001) 86 Cal.App.4th 573 .....	6, 16
5	<i>Ryan v. Crown Castle NG Networks Inc.</i> , 6 Cal. App. 5th 775, 785, (2016) .....	3
6	<i>Sabella v. Southern Pac. Co.</i> (1969) 70 Cal.2d 311 .....	32
7	<i>Sargon Enterprises v. University of Southern California</i> (2012) 55 Cal.4th 747.....	23
8	<i>Seffert v. Los Angeles Transit Lines</i> (1961) 56 Cal.2d 498 .....	16
9	<i>Sheppard v. Monsanto</i> (D. Hawaii, 2016) 2016 WL 3629074 .....	28
10	<i>Simmons v. Ware</i> , (2013) 213 Cal. App. 4th 1035 .....	2
11	<i>Simon v. San Paolo U.S. Holding Co.</i> , 35 Cal. 4th 1159, 1182, (2005) .....	2, 12, 13
12	<i>Soule v. General Motors Corp.</i>	
13	8 Cal. 4th 548 (1994) .....	39
14	<i>Sparks v. Owens-Illinois, Inc.</i> , 32 Cal. App. 4th 461.....	40
15	<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> (2003) 538 U.S. 408.....	8, 13
16	<i>Stevens v. Owens-Corning Fiberglas Corp.</i> (1996) 49 Cal.App.4th 1645 .....	14
17	<i>Teitel v. First L.A. Bank</i> , (1991) 231 Cal. App. 3d 1593.....	2
18	<i>Torkie-Tork v. Wyeth</i> , No. 1:04CV945, 2010 WL 11431846.....	11
19	<i>Valerio v. Andrew Youngquist Construction</i> (2002) 103 Cal.App.4th 1264 .....	27
20	<i>Vallbona v. Springer</i> (1996) 43 Cal.App.4th 1525.....	7
21	<i>Waller v. Southern California Gas Co.</i> , (1959) 170 Cal. App. 2d 747.....	27
22	<i>Webb v. Special Electric Co., Inc</i> , (2016) 63 Cal.4th 167, 180.....	40
23	<i>Wendell v. GlaxoSmithKline LLC</i> , (9th Cir. 2017) 858 F.3d 1227 .....	23
24	<i>Westphal v. Wal-Mart Stores, Inc.</i> (1998) 68 Cal.App.4 <sup>th</sup> 1071 .....	16, 22
25	<i>White v. Ultramar, Inc.</i> (1999) 21 Cal.4th 563.....	5
26	<i>Whitlock v. Pepsi Americas</i> , (9th Cir. 2013) 527 F. App'x 660.....	37
27	<i>Williams v. Philip Morris Inc.</i> , 127 P.3d 1165, 1182 (Or. 2006) .....	13
28	<i>Yates v. Ford Motor Co.</i> (E.D.N.C. 2015) 2015 WL 2189774.....	5

1	<i>Yung v. Grant Thornton, LLP</i> (Ky. 2018) 563 S.W.3d 22.....	13
2	<b>Statutes</b>	
3	Cal. Bus. & Prof. Code § 17500 .....	12
4	Cal. Civ. Proc. Code § 657 .....	3
5	Code Civ. Proc. § 657 .....	15
6	Code Civ. Proc., § 475 .....	30
7	<b>Other Authorities</b>	
8	CACI 1203 .....	39
9	CACI 3945 .....	5
10	CACI 3945 Sources and Authority .....	13
11		
12	<b>Treatises</b>	
13	Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.56.....	2, 3
14	Rest.2d Torts, § 912, com. a .....	22
15	<b>Constitutional Provisions</b>	
16	Cal. Const. art. I, § 16 .....	2
17	Cal. Const., Art. VI, §13 .....	3
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITY**

2 **I. INTRODUCTION**

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

10 In light of the severity of the injuries suffered by the Pilliods from Monsanto’s deceit,  
11 Monsanto’s reprehensibility in this case is high. “Cancer is a disease that strikes fear into the heart of  
12 its victims, can leave the body ravaged and a shadow of its former self, and often, as with [plaintiff],  
13 necessitates painful, debilitating, medical treatment and reduction of control over and the enjoyment of  
14 one's life.” *In re Actos (Pioglitazone) Products Liability Litigation* (W.D. La., Oct. 27, 2014) 2014 WL  
15 5461859, at \*28. Mrs. Pilliod was told the cancer in her brain would kill her within 18 months; and it  
16 nearly did. Mr. Pilliod’s metastatic cancer was so severe it fractured his bones and was so painful that  
17 morphine didn’t work. Mr. Pilliod continues to suffer from chemo brain. Monsanto having inflicted  
18 the ravages of cancer on Mr. Pilliod seeks to belittle his drastically altered life by reducing to damages  
19 to an inability to go sailing. Mtn. at 22.

20 As noted by Judge Chhabria, “...there is strong evidence from which a jury could conclude that  
21 Monsanto does not particularly care whether its product is in fact giving people cancer, focusing instead  
22 on manipulating public opinion and undermining anyone who raises genuine and legitimate concerns  
23 about the issue.” *In re Roundup Products Liability Litigation* (N.D. Cal. 2019) 364 F.Supp.3d 1085,  
24 1087. Monsanto’s behavior won’t change until the juries’ verdicts are enforced and Monsanto  
25 understands that such “behavior will not be tolerated.” *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26.  
26 “The ultimately proper level of punitive damages is an amount not so low that the defendant can absorb  
27 it with little or no discomfort, nor so high that it destroys, annihilates, or cripples the defendant.” *Pfeifer*  
28 *v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1308. The award must be large enough to “sting.”

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

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

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

## 21 **II. LEGAL STANDARD:**

### 22 **A. Legal Standard for JNOV**

23 The “trial court's discretion in granting a motion for judgment notwithstanding the verdict is  
24 severely limited.” *Teitel v. First L.A. Bank*, (1991) 231 Cal. App. 3d 1593. The trial judge must not  
25 invade the province of the jury and reweigh the evidence. *Quintal v. Laurel Grove Hospital* (1964) 62  
26 Cal.2d 154, 159; *Simmons v. Ware* (2013) 213 Cal. App. 4th 1035, 1047. Neither should the trial judge  
27 disturb the jury’s determination on the credibility of witnesses. *Knight v. Contracting Engineers Co.*  
28 (1961) 194 Cal.App.2d 435; *Simmons*, 213 Cal. App. 4th at 1047.

1           **B. Legal Standard for New Trial.**

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

9           The Court in reviewing a motion for a new trial must be “guided by a presumption in favor of the  
10 correctness of the verdict and proceedings supporting it.” *Ryan v. Crown Castle NG Networks Inc.*,  
11 (2016) 6 Cal. App. 5th 775, 785. For these reasons:

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

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

17           The trial judge should therefore “decline[] to substitute its own judgment for that of the jury”  
18 where “there was sufficient credible evidence to support the verdict, and that the jury was reasonable  
19 in believing the witnesses it apparently had believed in.” *Kelly-Zurian v. Wohl Shoe Co.*, (1994) 22 Cal.  
20 App. 4th 397, 414 ; *Ryan*, 6 Cal. App. 5th at 786; *see e.g. Cty. of Riverside v. Loma Linda Univ.*, (1981)  
21 118 Cal. App. 3d 300, 323 (Appropriate for trial judge who disagreed with verdict to deny motion for  
22 new trial in part because “he thought the jury was an intelligent one and did a fine job.”).

23           **III. ARGUMENT**

24           **A. The Evidence Supports a Finding of Punitive Damages.**

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

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

7 Punitive damages remain the most effective remedy for consumer protection against defectively  
8 designed mass-produced articles precisely because “[g]overnmental safety standards and the criminal  
9 law have failed to provide adequate consumer protection.” *Buell–Wilson v. Ford Motor Co.* (2006) 141  
10 Cal.App.4th 525, 562; *Pfeifer*, 220 Cal. App. 4th at 1301 (“the existence of governmental safety  
11 regulations does not bar an award of punitive damages for egregious misconduct that they are ineffective  
12 in preventing.”). Punitive damages are available even where “there was a ‘reasonable disagreement’  
13 among experts” *Buell–Wilson*, 141 Cal.App.4th at 559-560. In a pre-*Bates* decision, California has held  
14 that punitive damages were permissible even where the EPA approved the safety of a pesticide. *Arnold*  
15 *v. Dow* (2001) 91 Cal.App.4th 698, 724; *see also Daniel v. Wyeth Pharm., Inc.* (2011) 2011 PA Super  
16 23, (‘a jury could reasonably find that Wyeth knew that additional studies were required to understand  
17 the possible association between its products and breast cancer...In this regard, we also find that the trial  
18 court's reliance on Wyeth's compliance with the FDA's testing and labeling requirements was  
19 misplaced.”). The jury is “entitled to” reject the claims of Monsanto’s experts in reaching a verdict on  
20 punitive damages. *Id.* Monsanto has a duty to “warn of the potential risks” of Roundup and not just the  
21 ones its scientists agree with. “If the sole opinion(s) of one biased actor within that complex system can  
22 govern and control the nature, timing, and dissemination of information, and warnings, the system  
23 breaks down.” *Actos*, 2014 WL 5461859, at \*47 (rejecting contention that defendant’s subjective believe  
24 that product does not cause cancer precludes a finding of punitive damages).

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

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

6 Moreover, California law broadly construes “officers, directors, or managing agents” for the  
7 purposes of inferring punitive intent. *See, e.g., Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809,  
8 822 (“[P]rior cases have not ascribed to ... the narrow interpretation proposed by Mutual[.]”).  
9 “Managing agents” are employees who “exercise[] substantial discretionary authority over decisions  
10 that ultimately determine corporate policy.” *Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358,  
11 366 (quoting *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573). “The scope of a corporate employee’s  
12 discretion and authority under our [managing agent] test is therefore a question of fact for decision on a  
13 case-by-case basis.” *Id.* at 567. “***If there exists a triable issue of fact regarding whether a corporate***  
14 ***employee is a managing agent*** under the *White* test, that factual question must be determined by the  
15 trier of fact and not the court[.]” *Davis*, 220 Cal.App.4th at 366 (emphasis added). Furthermore, a  
16 “corporate defendant cannot shield itself from liability through layers of management committees and  
17 the sheer size of the management structure.” *Romo v. Ford Motor Co.*, 99 Cal 1115, 122 Cal.2d 139  
(2002) *overruled in part on other grounds.*

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

### 19 **1. The Punitive Damage Awards are not Excessive**

20 In tort actions the Legislature has deemed that punitive damages may be assessed by a jury  
21 against a Defendant for the “sake of example and by way of punishing the defendant.” Civ. Code, §  
22 3294. “In order to serve these aims, a punitive damages award must send a message to the offender and  
23 others in similar positions that this sort of behavior will not be tolerated.” *Bardis*, 119 Cal.App.4th at  
24 26. A jury’s punitive damage award therefore must be large enough to “sting” in light of the Defendant’s  
25 net worth and the reprehensibility of its conduct. *Simon*, 35 Cal.4th at 1186 fn. 9. “The decision to  
26 award punitive damages is exclusively the function of the trier of fact. So too is the amount of any  
27 punitive damages award.” *Gagnon v. Cont’l Cas. Co.* (1989) 211 Cal. App. 3d. 1602. CACI 3945  
28 instruction correctly states: “There is no fixed formula for determining the amount of punitive damages.”

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

3 The U.S. Supreme Court allows California its “constitutional freedom to use punitive damages  
4 as a tool to protect the consuming public, not merely to punish a private wrong.” *Johnson v. Ford Motor*  
5 *Co.* (2005) 35 Cal.4th 1191, 1206. In fact “[n]othing the high court has said about due process review  
6 requires that California juries and courts ignore evidence of corporate policies and practices and evaluate  
7 the defendant's harm to the plaintiff in isolation.” *Id.* at 1207. To serve California’s interests in  
8 deterrence a jury should award damages sufficient to “deter and punish unacceptable conduct” but not  
9 so much as to result in “financial devastation.” *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1291.  
10 “The ultimately proper level of punitive damages is an amount not so low that the defendant can absorb  
11 it with little or no discomfort [citation ], nor so high that it destroys, annihilates, or cripples the  
12 defendant.” *Pfeifer*, 220 Cal.App.4th at 1308 (quoting *Rufo v. Simpson* (2001) 86 Cal.App.4th 573,  
13 621–622). Therefore, “[w]ealth is an important consideration in determining the excessiveness of a  
14 punitive damage award. Because the purposes of punitive damages are to punish the wrongdoer and to  
15 make an example of him, the wealthier the wrongdoer, the larger the award of punitive damages.”  
16 *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77–78.

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

23 Courts have found that punitive damage awards smaller than 3.2% of a Defendant’s “net worth”  
24 are only a “slap on the wrist” where conduct is even only moderately reprehensible. *Century Surety Co.*  
25 *v. Polisso* (2006) 139 Cal.App.4th 922, 967. Therefore, based upon Monsanto’s stipulated net worth of  
26 \$7.8 billion, a punitive damage verdict of 3.2% or \$249 million for either plaintiff would be a mere slap  
27 on the wrist and thus impermissible by law. Courts have held that a punitive damage award amounting  
28 to 23% of net worth strikes an appropriate balance of deterrence and financial devastation because it

1 leaves a Defendant with 77% of their net worth intact. *Vallbona v. Springer* (1996) 43 Cal.App.4th  
2 1525, 1540. 23% of Monsanto's stipulated percent of net worth is \$1,794,000,000.00 and therefore that  
3 is the due process limit for a one plaintiff verdict. A higher net worth also supports a Defendant's ability  
4 to pay a higher proportion of that net worth. In approving a punitive damages award of \$1 billion that  
5 amounted to 20% of a Defendant's net worth the U.S. Court of Appeals for the Second Circuit noted:

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

12 *Motorola Credit Corp. v. Uzan* (2d Cir. 2007) 509 F.3d 74, 84. A Louisiana appellate court upheld an  
13 \$850 million dollar punitive damages award stating:

14 The question is, in effect, how much will *this defendant* be punished or deterred by an \$850  
15 million punitive damages award? The record reflects that CSX has a net worth of about  
16 \$4.8 billion. The \$850 million punitive damages award is about 18% of CSX's net worth. We do  
17 not find that percentage to be an abuse of discretion in this case because we cannot say that 18%  
18 is indisputably more than necessary to effectuate the *Billiot* purposes of punishment and  
19 deterrence.

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

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

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

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

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

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

23 Under federal and state due process analyses the size of the punitive damage award is viewed in  
24 light of “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the  
25 actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference  
26 between the punitive damages awarded by the jury and the civil penalties authorized or imposed in  
27 comparable cases” *Simon*, 35 Cal.4th 1159 at 1172 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*  
28 (2003) 538 U.S. 408, 418). The “scale and profitability” of a defendant’s wrongful conduct “remain

1 relevant to reprehensibility and hence to the size of award warranted, under the guideposts, to meet the  
2 state's interest in deterrence.” *Johnson*, 35 Cal.4<sup>th</sup> at 1207.

3 **a. Monsanto’s Decision to Hide the Cancer Risk for Profit was Highly Reprehensible**

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

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

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

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

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

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

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

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

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

1 protective gear.<sup>1</sup> Tr. at 3729:9-3731:14.

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

7 **Monsanto’s conduct was the result of intentional malice, trickery, and deceit.** Rather than  
8 publish Dr. Parry’s findings that Roundup was genotoxic Monsanto instead ghostwrote an article in  
9 2000 that stated that Roundup was not genotoxic. P-Exh. 41. Monsanto employee, Michael Koch  
10 acknowledged that this ghostwriting practice was unethical. Koch Dep. at 207:11-14 *Torkie-Tork v.*  
11 *Wyeth*, No. 1:04CV945, 2010 WL 11431846, at \*2 (E.D. Va. Nov. 17, 2010) (ghostwriting evidence is  
12 relevant to corporations disregard of human safety).

13 Monsanto scientists were instructed to “discomfort our opposition” in relation to public  
14 perception of Roundup’s safety. P-Exh. 621. One month before IARC even came to a decision on  
15 glyphosate Monsanto initiated a campaign to “orchestrate outcry over IARC decision” knowing that the  
16 evidence supported that glyphosate was a possible or probable carcinogen. P-Exh. 522; P-Exh. 8.  
17 Monsanto’s attacks were meant to “invalidate the relevance of IARC” and provide “litigation support.”  
18 Ex. 621. In 2015, prior to commencement of litigation, Monsanto scientists advised its legal department  
19 that Monsanto would draft a paper to be “authored” by third-party scientists to provide regulatory “air  
20 cover” and “litigation support” in light of IARC. Monsanto’s legal department advised, “Appealing;  
21 best if use big names...” P-Exh. 74. In addition to ghostwriting scientific papers, Monsanto regularly  
22 ghostwrote op-eds in newspapers to attack IARC. Goldstein Dep. at 136:13-137:2. Behind the scenes,  
23 Monsanto hired the same organization that defended tobacco companies to attack IARC. *Id.* at 124:18.

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

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

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

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

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

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

#### 14 **b. Comparable Civil Fines are not Applicable in this Case.**

15 The comparative civil fine<sup>2</sup> guidepost requires only a comparison to civil fines imposed by state  
16 government (not to other verdicts). However, “The third guidepost is less useful in a case like this one,  
17 where plaintiff prevailed only on a cause of action involving common law tort duties that do not lend  
18 themselves to a comparison with statutory penalties” *Simon*, 35 Cal. 4th at 1183–84. *Boeken*, 127 Cal.  
19 App. 4th at 1700 ( “finding analogous penalty provisions sanctioning frauds leading to wrongful death  
20 is a difficult, if not impossible, undertaking.”).

#### 21 **c. The Ratio Between Compensatory and Punitive Damages is Constitutional**

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

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

12 Plaintiffs acknowledge that the Court does need to examine the reprehensibility of Monsanto’s  
13 conduct if it approves a multiplier above 10:1. The California Supreme Court notes that the *State Farm*  
14 decision finds only ratios “**significantly greater** than 9 or 10 to 1 are suspect.” *Simon* 35 Cal. 4<sup>th</sup> at 1182,  
15 (10:1 ratio justified for purely economic injury) (emphasis added); *Nickerson v. Stonebridge life Ins.*  
16 (2013) 219 Cal.App.4<sup>th</sup> 188, 194, 206-11 (10:1 ratio) *Boeken* 127 Cal. App. 4th at 1703, (9:1 ratio).

17 The 1:1 ratio advocated by Monsanto has been rejected in California. As stated in *Bullock*:  
18 Philip Morris argues that there is an emerging consensus that “six-figure damage awards are  
19 more than ‘substantial’ enough to trigger this 1:1 upper limit.” We cannot discern any emerging  
20 consensus in this regard relevant to the extremely reprehensible conduct at issue in this case.  
21 Moreover, we do not regard the amount of compensatory damages as a fixed upper limit where  
22 damages are “substantial,” as we have stated. Instead, the constitutional limit depends on the  
23 facts and circumstances of each case  
24 (2011) 98 Cal. App. 4th at 569; *Id.* at 567. “...nothing in *State Farm* suggests that the high court, while  
25 declining to impose a bright-line limit in other cases, imposed the amount of compensatory damages as  
26 a bright-line limit in cases where the compensatory damages are ‘substantial.’” *Id.* “Furthermore,  
27 whether the compensatory damages are ‘small’ or ‘substantial’ within the meaning of *State Farm*, [538  
28 U.S. at 425], depends, in substantial part, on the defendant’s financial condition.” *Id.* at fn. 11.

29 Monsanto’s reprehensibility is also far worse than the defendant’s in *Roby v. McKesson Corp.*  
30 (2010) 47 Cal. 4th 686, 717 which was determined to fall at the “low end of the range of wrongdoing  
31 that can support an award of punitive damages” and involve only emotional distress arising from

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

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

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

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

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

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

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

1 recovery does not call for mitigation.

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

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

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

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

23 **3. The Compensatory Damages are not Excessive.**

24 There is a presumption that the amount of damages awarded by the jury is proper. **"A new trial**  
25 **shall not be granted upon the ground of ... excessive...damages, unless after weighing the evidence**  
26

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

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

9 The amount of compensatory damages is a fact question that is decided by the jury. *Westphal v.*  
10 *Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4<sup>th</sup> 1071, 1078-80. The primary focus on determining whether  
11 a verdict is excessive is whether or not the verdict is so “out of line with reason that it shocks the  
12 conscience.” *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508 “The mere fact that the  
13 judgment is large does not validate an appellant’s claim that the verdict is the result of passion or  
14 prejudice of the jury. Each case must be determined on its own facts.” *Dirosario v. Havens* (1987) 196  
15 Cal.App.3d 1224, 1241. “The fact that an award may set a precedent by its size does not in and of itself  
16 render it suspect.” *Buell-Wilson* 141 Cal.App.4<sup>th</sup> at 548. A finding of an excessive verdict predicated  
17 on “what other juries awarded to other plaintiffs for other injuries in other cases based upon different  
18 evidence would constitute a serious invasion into the realm of factfinding.” *Rufo*, 86 Cal.App.4<sup>th</sup> at 615–  
19 16 ( the “vast variety of and disparity between awards in other cases demonstrate that injuries can seldom  
20 be measured on the same scale.”). The 9th Circuit, in approving a \$31 million verdict for a spinal cord  
21 injury has held “California courts emphasize that each case must ultimately be resolved on its own  
22 unique facts.” *Gutierrez ex rel. Gutierrez v. United States*, (9th Cir. 2009) 323 F. App’x 493, 494.

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

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

4 The jury in this case awarded no more compensatory damages than what Plaintiffs' counsel  
5 suggested was a reasonable amount. Monsanto's counsel strategically abdicated its responsibility to  
6 argue to the jury in closing argument that the compensatory damages suggested by Plaintiffs was  
7 unreasonable. It cannot now complain that the jury found the damages suggested by Plaintiffs were  
8 reasonable. "One of the most difficult tasks imposed on a factfinder is to determine the amount of money  
9 the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective  
10 and not easily amenable to concrete measurement." *Pearl v. City of Los Angeles* (Cal. Ct. App., June 18,  
11 2019) 2019 WL 2511941, at \*10 (affirming \$10 million dollar non-economic damage award in  
12 workplace harassment suit.)

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

14 **Alva Pilliod:** Mr. Pilliod has suffered and will continue to suffer severe physical and emotional  
15 suffering as well as a severe loss of his enjoyment of life. Before cancer, Mr. Pilliod had a sharp mind,  
16 and an incredibly rich, active life. Tr. at 3673:17-25. He earned three college degrees while working  
17 full-time. 3765:1-17. He had a long career with Goodyear working in sales and as a financial analyst.  
18 3767:6-17. Mr. Pilliod was an adventurer. He went skydiving, bungee jumping, scuba diving, and at  
19 one point was a pilot. 3691:9-15.

20 In the six months leading up to his cancer diagnosis in 2011, Mr. Pilliod was experiencing "Lots  
21 of pain. Back pain, upper leg pain, hip was really bad, the right hip." 3772:15-23 His doctors couldn't  
22 figure out what was wrong and pain killers weren't working. *Id.* Even so, Mr. Pilliod stayed active, and  
23 at the age of 69, was chain-sawing a fallen tree to assist his neighbor, when his hip bone fractured.  
24 3773:4-16. It turned out that the hip fracture was caused by an aggressive Stage IV metastatic cancer  
25 growing throughout his bones. 3774:1-6; Hoke Decl. Ex. I, Raj Dep. at 139:12-16. Dr. Nabhan showed

---

26  
27 <sup>4</sup> Exhibit H to Hoke Decl. (\$45 million for a sexual abuse victim, at 1; \$50 million for a couple where one spouse  
28 is in a vegetative state, at 6; \$36 million for child hit by a bus, at 11; \$42.5 million for adult hit by truck; \$45  
million for shooting victim, at 16; \$31 million for couple hit by truck; \$25 million for sexual abuse victim at 27;  
\$30 million for relatives in wrongful death case, at 31; \$15 million for loss of right leg beneath the knee, at 41;  
\$23.5 million for wrongful death, at 53. \$20 million in non-economic damages for wrongful death, at 57.

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

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

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

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

21 Chemotherapy impacts the mind and causes neurological problems often called chemo-brain.  
22 5289:5-11. As Dr. Levine explained chemotherapy can “affect neurological function” where people go  
23 goofy, don’t think properly, and have a sense that they are not the same. *Id.* This brain damage doesn’t  
24 show up on scans. As Dr. Raj explained Mr. Pilliod “would be able to tell us more about his symptoms  
25 than anybody else. A lot of times when you talk about neurologic disorders, there's more subjective,  
26 like, symptoms than what we can elicit in, like, scans and whatnot. So, yes, usually patients tell us more.”  
27 Raj Dep. at 216:12-217:3. As Mr. Pilliod explained:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 For the rest of her life, Mrs. Pilliod will be required to take the prescription medication Revlimid  
13 to treat her NHL. Hoked Decl. Ex. J, Rubenstein Dep. at 29:7-13; 30:11-31:5. This evidence is  
14 undisputed. And yet Monsanto argues that Mrs. Pilliod cannot recover damages for the cost of Revlimid  
15 because she cannot prove, with certainty, the exact cost that she will pay in the future. The requirement  
16 of certainty is not required under California law. Mrs. Pilliod introduced sufficient evidence for the  
17 factfinder to determine “the reasonable cost of reasonably necessary medical care that she is reasonably  
18 certain to need in the future.” CACI 3903A; Tr. at 5489:10-13. Dr. Nabhan testified that the cost of a  
19 21-day supply of Revlimid is \$14,000 to \$16,000 per month. Tr. at 3981:9-3982:2. Plaintiffs’ expert  
20 economist calculated the future cost of Revlimid for Mrs. Pilliod over the rest of her lifetime at a value  
21 of \$2,957,710. Tr. at 4198:6-4200:1. Monsanto did not bring in any witness, expert or otherwise to  
22 challenge these future medical needs or their costs.

23 “The fact that the amount of future damages may be difficult to measure or subject to various  
24 possible contingencies does not bar recovery.” *Garcia v. Duro Dyne Corp.*, (2007) 156 Cal. App. 4th  
25 92, 98. The “requirement of certainty ... cannot be strictly applied where prospective damages are  
26 sought, because probabilities are really the basis for the award.” *Cuevas v. Contra Costa Cty.*, (2017) 11  
27 Cal. App. 5th 163, 182; quoting *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 533. Indeed, the  
28 appellate courts have upheld future economic damage awards even when the medical experts could not

1 state that the plaintiff’s cancer would recur, no less give a precise figure as to amount of future damages.

2 *Garcia*, 156 Cal. App. 4<sup>th</sup> at 99. As one court recently advised:

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

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

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

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

20 Monsanto cites as authority for its fabricated standard a bad faith insurance coverage case.  
21 However, “in the insurance bad faith setting, emotional distress is not recoverable as a separate cause of  
22 action, but only as ‘an aggravation of the financial damages’ ” *Major v. Western Home Ins. Co.* (2009)  
23 169 Cal.App.4th 1197, 1216. It has no application to the present matter involving personal injury claims.  
24 *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 127 (“... the nature of an insurance  
25 bad faith action is one seeking recovery of a property right, not personal injury.”) In *Buell-Wilson*, the  
26 Court reduced the non-economic damages to 4 times economic damages only because that is what  
27 Plaintiff’s counsel asked the jury to award as a reasonable amount, not because there is some fixed ratio.  
28 141 Cal.App.4<sup>th</sup> at 553. (“...counsel was requesting the jury award noneconomic damages to Mrs.  
Wilson in an amount three to four times the amount they awarded in economic damages”).

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

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

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

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

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

## 28 **1. Drs. Weisenburger and Nabhan Properly "Ruled In" Roundup**

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

8 Here, Plaintiffs experts relied on epidemiological, toxicological and genotoxicological data for  
9 their opinions, and accounted for dose-response. *See* Tr. at 2694:25-13, 2729:13-24 (Dr. Weisenburger  
10 explaining reliance on all three pillars of science, and that the dose-response data in the epi studies  
11 demonstrates a doubling of the risk); Tr. at 3921:2-21 (“what this shows is that if you are exposed to  
12 glyphosate more than two days per year, you...double the risk of developing non-Hodgkin’s lymphoma.  
13 And that’s what you see, the odds ratio of 2.12... It applies to [the Pilliods] and others.”); Hoke Decl.  
14 Exh. 4, Pilliod Sargon Order at 10 (“The McDuffie and Erickson studies suggests a relative risk of 2.0.”).  
15 Indeed, as Dr. Weisenburger explained, the NAPP study demonstrates a statistically significant risk ratio  
16 of 2.42 for DLBCL following more than 2 days/year of exposure and after adjusting for exposure to  
17 other pesticides. Tr. at 2985:24-2986:9.<sup>5</sup> And, with respect to the unadjusted 2.1 risk ratio in McDuffie  
18 (2002), and 2.36 for more than 10 days of use in Eriksson (2008), Monsanto did not present any evidence  
19 that these results were in fact confounded, and Dr. Ritz testified that it is improper to adjust for variables  
20 which are not actual confounders as this dilutes true risk estimates. *See* Tr. at 2485:10-25 (“In order for  
21 a variable to have to adjust for...it has to be a risk factor for the outcome. If this factor is not a risk factor  
22 for the outcome, it should not bias my results. Only things that actually cause the disease can be  
23 confounders.”). That said, De Roos (2003) controlled for exposure to over 40 different pesticides and

---

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

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

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

3 **Mrs. Pilliod:** Monsanto claims that Plaintiffs' experts ignored Mrs. Pilliods' negative t(14;18)  
4 translocation. Mtn at 4. However, Dr. Weisenburger explained he "would not make big decisions based  
5 on this data because it's what I would consider preliminary data based on small numbers...that has not  
6 been confirmed" and the jury agreed. Tr. at 3020:18-3121:5; 3016: 25-14, 3019:8-3021:14.<sup>6</sup> Moreover,  
7 Plaintiffs' experts provided exhaustive explanations for why they considered and/or ruled out Mrs.  
8 Pilliods other risk factors, such as Hashimoto's disease,<sup>7</sup> bladder cancer,<sup>8</sup> and obesity. Tr. at 3965:13-  
9 3967:12, 2778:8-15, 2777:11-2778:7, 3943:17-21. The jury resolved these scientific controversies.

10 **Mr. Pilliod:** Mr. Pilliods' treating physician, Dr. Raj, does not believe ulcerative colitis ("UC")  
11 or skin cancer are by themselves associated with Mr. Pilliods' NHL. See Raj Dep. at 210:19-22, 208:21-  
12 209:8. Such evidence supports Dr. Nabhan's opinion that it is "not always the ulcerative colitis that is  
13 associated with the higher risk of non-Hodgkin's lymphoma; it's the medications that you give somebody  
14 to treat the ulcerative colitis." Tr. at 3950:11-15. Consistent with Dr. Raj's testimony, Dr. Weisenburger  
15 also testified that it is not biologically plausible for skin cancer to transition to NHL in the bones: "if  
16 having multiple skin cancers actually was an important risk factor for non-Hodgkin's lymphoma, you  
17 should not just see it in the first few years, but you should see it out many more years." 3010:12-15,  
18 4157:8-12 ("Basal skin cancer and squamous cell cancer, in my opinion, are not a risk factor for  
19 developing non-Hodgkin's lymphoma. They occur with sun exposure. If you're in the sun enough,  
20 you're going to get these cancers."). Monsanto falsely states that neither expert discussed Mr. Pilliods'  
21 recurrent genital warts, ignoring Dr. Nabhan's testimony that "HPV by itself does not cause non-  
22 Hodgkin's lymphoma." 3946:4-11. Monsanto's counsel failed to cross-examine Nabhan on the issue.

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

24 Dr. Nabhan aptly summarized the basic logical flaw with Monsanto's argument regarding the  
25 potential idiopathy of Plaintiffs' cancers: "So you rule out idiopathy by the fact that you have actual risk  
26

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

<sup>7</sup> Mrs. Pilliod's treating physician, Dr. Raj, also saw no evidence of Hashimoto's. See Raj Dep. 96:20-23

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

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

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

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

1 *Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003 (“the user of the product must be given the option either to  
2 refrain from using the product at all or to use it in such a way as to minimize the degree of danger.”).<sup>9</sup>

3 Monsanto argues that it’s express knowledge regarding glyphosate dating back to 1983—based  
4 on animal studies which Plaintiffs’ experts testified are adequate for assessing causation —cannot be  
5 deemed “generally recognized” because Monsanto refused to make the results publically available. *See*  
6 *Mtn.* at 8. Monsanto is attempting to shield itself against liability because it hid the critical facts of  
7 cancer risk which the jury found to constitute wrongful conduct. This does not make sense as a matter  
8 of law or policy, given that “reasonably scientifically knowable...refers to knowledge obtainable ‘by  
9 the application of reasonable, developed human skill and foresight....the manufacturer is...presumed to  
10 know the results of all such advances.’” *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, fn. 3  
11 (quoting *Anderson*, 53 Cal.3d at 1002, fn. 13). And, here, Monsanto did know what the results of the  
12 early rodent studies showed, but refused to warn anyone, much less Plaintiffs’ regarding the risk, even  
13 when the EPA classified glyphosate as oncogenic based on the same bioassays. *See Tr.* at 1668:10-19,  
14 1669:3-4; at 3536:19-23. Monsanto’s novel argument would permit corporations to harm the public,  
15 conceal the risk, and escape liability precisely because they successfully obfuscated the dangers of a  
16 product. This pretzel logic has no authority in modern law.

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

---

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

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

### 3 **E. The Pilliods’ Claims Are Not Preempted By Federal Law**

4 In arguing that Plaintiffs’ claims are pre-empted, Monsanto presents the same arguments that  
5 this Court (and every court that has reviewed the issue) has rejected at the summary judgment stage. *See*  
6 *In re Roundup*, 364 F. Supp. 3d 1085; *Beyond Pesticides v. Monsanto Co.* (D.D.C. 2018) 311 F. Supp.  
7 3d 82, 92; *Blitz v. Monsanto Company* (W.D.Wis. 2018) 317 F.Supp.3d 1042; *Hernandez v. Monsanto*  
8 (C.D. Cal. 2016) 2016 WL 6822311; *Sheppard v. Monsanto* (D. Hawaii, 2016) 2016 WL 3629074;  
9 *Mendoza v. Monsanto* (E.D. Cal. 2016) 2016 WL 3648966; *Giglio v. Monsanto* (S.D. Cal. 2016) 2016  
10 WL 1722859; *Carias v. Monsanto Company* (E.D.N.Y., Sept. 30, 2016) 2016 WL 6803780, at \*2;  
11 *Johnson v. Monsanto Co.*, 2018 WL 2324413, at \*21 (Cal.Super.) (“*Wyeth* and its progeny do not  
12 apply.”) There is no basis for the Court to reverse its prior ruling.

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

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

1 Congress has made its intent known through explicit statutory language, the court’s task is an easy one.”  
2 *Am. Meat Inst. v. Leeman* (2009) 180 Cal.App.4<sup>th</sup> 728, 746. Monsanto’s impossibility preemption  
3 arguments are impossible to square with *Bates* and simply do not apply to this case. *In re Roundup*, 364  
4 F. Supp. at 1087. The MDL court correctly recognized that impossibility preemption is inapplicable  
5 because FIFRA expressly permits states to ban the sale of federally approved pesticides. If “California  
6 can stop Monsanto from selling Roundup entirely, surely it can impose state-law duties that might  
7 require Monsanto to seek EPA approval before selling an altered version of Roundup in California. By  
8 contrast, nothing in the FDCA allows a state to ban a drug.” *Id.* at 1088. Furthermore, Monsanto does  
9 not need EPA approval to warn the public about the risk of NHL through means other than the label;  
10 such as through its website, social media, the media, or through retailers. Tr. at 3636:4-6; Murphy  
11 83:19-90:20; Hoke Decl. Ex. M., Guard 675:16-676:2; *see also Chemical Specialties Mfrs. Ass’n, Inc.*  
12 *v. Allenby* (9th Cir. 1992) 958 F.2d 941, 947 (cancer warning on Point-of-sale signs required under Prop  
13 65 are not preempted because FIFRA only regulates the label affixed to the product.)

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

18 First, Monsanto cannot establish the “demanding” clear evidence defense because it cannot show  
19 that it “**fully informed** the [EPA] of the justifications for the warning required by state law and that the  
20 [EPA], in turn informed [Monsanto] that the [EPA] would not approve a change in [Roundup]’s label  
21 to include that warning.” *Merck Sharp & Dohme Corp. v. Albrecht* (May 20, 2019) 139 S. Ct. 1668,  
22 1672 (emphasis added). There is nothing in the record to suggest that Monsanto fully informed EPA of  
23 the justifications for a more stringent warning on Roundup. Rather, the uncontroverted evidence  
24 suggests the opposite—that Monsanto **withheld** information from EPA.

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

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

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

### 8 **E. There were no Prejudicial Irregularities in the Trial Proceedings**

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

17 Here, there is absolutely no indication that the jury failed to follow the Court’s instructions.  
18 Monsanto claimed that there was juror misconduct in its notice of intention to move for a new trial but  
19 lacked any evidence to raise that issue in its in memorandum. In fact, there is every indication that the  
20 jury followed the Court’s instructions. During deliberations, the jury even asked for clarification as to  
21 whether certain testimony by Dr. Benbrook was stricken indicating their intention to heed the Court’s  
22 instructions. Hoke Decl., Ex. N. The jury’s other questions during deliberation demonstrated a focus  
23 on the science and a careful consideration of the evidence highlighted by Monsanto. They asked for  
24 testimony regarding the AHS study from both Dr. Bello and Dr. Ritz. They also asked to review Exhibit  
25 1629, the 2005 AHS study; Exhibit 1676, a paper by Dr. Aaron Blair on methodological issues in  
26 occupational epidemiology studies. *Id.* The Court told the jurors after the verdict, “I’m sure I also speak  
27 on behalf of the lawyers in terms of your being the jury that I think anybody would want which is to  
28 promise to be fair and impartial, and I think you've delivered on that promise.” Tr. at 5767:13-17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 9 **2. There was no Attorney Misconduct Throughout Trial**

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

20 Wearing gloves when handling a bottle of Roundup is not a scare tactic. Monsanto's own  
21 internal documents recommends wearing gloves. *Id.* at 3237:13-23. The Court issued the curative  
22 instruction after Question No. 12, stating that there was only water in the first bottle of Roundup, and  
23 instructed the jury to disregard completely the second bottle of Roundup. *Id.* at 3806:11-16. This  
24 conduct wasn't prejudicial. In fact, Monsanto viewed the conduct as favorable to their case reminding  
25

---

26 <sup>10</sup> Counsel's statement was not false or unsupported by the evidence. Counsel reminded the jury that he asked Dr. Phalen  
27 in cross-examination "When you use Monsanto's own model, the POEM model, when you actually use it, it was like 8 to  
28 12 milligrams." 5711:2-4. The questions was based on data from Dr. Sawyer's report which Dr. Phalen reviewed prior to  
trial and was shown at trial during cross. 4682:12-4685:3 Dr. Phalen acknowledged that he did review the data. 4685:1-3.  
Monsanto asked Dr. Phalen about Sawyer's report in direct. 4624:16-18. The fact that Counsel reminded the jury in  
closing about a question he asked in cross is not prejudicial misconduct, the jury was instructed that questions from counsel  
are not evidence. 5476:1-2. The jury can certainly consider the credibility of Dr. Phalen in how he answered the question.

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 4 **5. There was no Error or Prejudice in the Court’s Evidentiary Rulings**

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

##### 7 **a. Plaintiffs’ Expert Testimony Was Properly Admitted**

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

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

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

1 **b. There Was No Error in the Court’s Other Evidentiary Rulings**

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

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

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

27 \_\_\_\_\_  
28 <sup>11</sup> Monsanto never requested to introduce the irrelevant *Nat’l Ass’n of Wheat Growers v. Zeise*, (E.D. Cal. 2018) 309 F.  
Supp. 3d 842, 853 decision.

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

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

12           **F. There Were no Instructional Errors Prejudicial to Defendants.**

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

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

28           **G. Plaintiffs Presented Sufficient Evidence that Roundup is Defective**

1 Under the consumer expectation test “[a] product design may be found defective if (1) “the  
2 product failed to perform as safely as an ordinary consumer would expect when used in an intended or  
3 reasonably foreseeable manner” *Webb v. Special Electric Co., Inc.*, (2016) 63 Cal.4th 167, 180. Plaintiffs  
4 are not required to “prove that there was a safer alternative design.” *Sparks v. Owens-Illinois, Inc.*, 32  
5 Cal. App. 4th 461 (1995). A defense that a product is unavoidably unsafe is limited to claims against  
6 manufacturers of pharmaceuticals and medical devices. *Hardeman v. Monsanto Company* (N.D. Cal.  
7 2016) 216 F.Supp.3d 1037, 1040 (holding that *Brown v. Superior Court*, (1988) 44 Cal.3d 1049 does not  
8 apply to Roundup). Glyphosate is not a raw ingredient, it is manufactured. 3129:2-4.

9 Monsanto is liable for design defect because Roundup causes NHL. *See Johnson v. U.S. Steel*  
10 *Corp.*, 240 Cal. App. 4th 22, 33 (2015) (“the seller of a completed product is strictly liable for any defect  
11 in the completed product”)<sup>12</sup>. Dr. Sawyer testified that studies showed Roundup is more genotoxic than  
12 glyphosate alone. Tr. at 3161:5-12, 3164:22-23, 3178:7-25, 3243:17-44:6. Dr. Sawyer further testified  
13 that the surfactant in Roundup and the equipment supplied by Monsanto increased internal exposure to  
14 glyphosate thereby increasing the Pilliods’ risk of developing cancer; and that there were alternative  
15 surfactants and equipment available to reduce this risk. *Id.* at 3137:20-3138:24, 3147:12-14, 3250:21-  
16 3251:19, 3234:6-3236:12, 3240:12-19. The epidemiology relied on by all of Plaintiffs experts examined  
17 Roundup as a formulated product and not isolated glyphosate. Tr. at 2565:5-10; 3257:25-3258:4.

#### 18 **IV. Conclusion:**

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

23  
24 \_\_\_\_\_  
25 <sup>12</sup> *Poosh v. Philip Morris USA, Inc.*, is not applicable here. 904 F. Supp. 2d 1009 (N.D. Cal. 2012). In *Poosh*  
26 , the court’s decision turned upon that fact that the act of smoking itself, as opposed to a defect in a particular  
27 brand of cigarettes, caused the plaintiff’s injury. *Id.*, at 1025. But here, there is no evidence that *spraying* is  
28 inherently dangerous, or itself caused Plaintiff’s NHL. Rather, the evidence presented at trial demonstrated that  
exposure to Roundup caused Plaintiff’s cancer. *Poosh* also utilized the risk-benefit test, as opposed to the  
consumer expectations test. Here, unlike *Poosh*, where expert testimony was required, “it is well settled that  
expert testimony is not relevant in a consumer expectations theory of liability.” *Mansur v. Ford Motor Co.*, 197  
Cal. App. 4th 1365, 1380 (2011).

1 Dated: July 1, 2019

Respectfully submitted,

2  
3 /s/ Michael J. Miller

4 Michael J. Miller (pro hac vice)  
5 Curtis Hoke (State Bar No. 22465)  
6 The Miller Firm LLC  
7 108 Railroad Avenue  
8 Orange, VA 22960  
9 (540) 672-4224 phone; (540) 672-3055 fax  
10 mmiller@millerfirmllc.com  
11 choke@millerfirmllc.com  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28