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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
BEFORE THE HONORABLE WINIFRED Y. SMITH, JUDGE PRESIDING
DEPARTMENT NUMBER 21

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COORDINATION PROCEEDING	)	
SPECIAL TITLE (RULE 3.550)	)	
	)	
ROUNDUP PRODUCTS CASE	)	JCCP No. 4953
	)	
	)	
THIS TRANSCRIPT RELATES TO:	)	
	)	
Pilliod, et al.	)	Case No. RG17862702
vs.	)	
Monsanto Company, et al.	)	Pages 5313 - 5454
	)	Volume 31

Reporter's Transcript of Proceedings

Tuesday, May 7, 2019

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



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I N D E X

Tuesday, May 7, 2019

E X H I B I T S

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

1 Tuesday, May 7, 2019

10:12 a.m.

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

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

5 All right. Where do we begin?

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

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

10 **THE COURT:** Yes. Delaying the inevitable.

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

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

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

1 instructions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 **THE COURT:** Sure.

25 Counsel, would you like to respond?

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

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

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

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

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

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

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

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

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

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

25 Is that a typo?

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

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

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

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

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

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

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

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

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

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

3 Does anyone want to be heard on that?

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

8 **THE COURT:** I did.

9 1222. It was modified by Monsanto.

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

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

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

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

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

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

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

5 Do you have any --

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

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

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

16 **MR. EVANS:** Correct.

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

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

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

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

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

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

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

25 Let's see. So definition of Roundup.

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

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

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

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

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

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

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

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

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

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

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

9 I don't know about --

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

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

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

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

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

23 So --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 **MR. EVANS:** Correct.

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

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

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

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

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

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

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

6 **THE COURT:** Okay.

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

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

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

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

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

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

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

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

1 we argue that to the jury.

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

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

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

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

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

1 manufactured at the time.

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

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

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

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

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

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

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

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

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

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

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

4 **THE COURT:** Right.

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

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

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

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

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

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

20 Did I misunderstand you?

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

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

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

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

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

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

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

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

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

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

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

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

22 Okay. So...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 using it. Was it 2015? '17?

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

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

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

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

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

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

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

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

5 **MR. EVANS:** Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Now, I understand the promotion period --

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

1 is.

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

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

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

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

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

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

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

12 And the relevant analysis --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I don't want to focus on punitive damages

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

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

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

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

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

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

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

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

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

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

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

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

8 And when you instruct them --

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

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

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

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

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

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

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

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

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

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

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

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

22 So our sentence was --

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

25 **MR. DICKENS:** Okay.

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

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

6 **THE COURT:** Yes.

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

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

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

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

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

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

23 **MR. EVANS:** Yeah.

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

25 **MR. WISNER:** Okay.

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

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

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

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

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

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

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

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

23 And 4 --

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

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

1 1, 2, and 3 are denied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 **MR. EVANS:** Okay.

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

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

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

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

1 could actually go right after the first paragraph.

2 **THE COURT:** All right.

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

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

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

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

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

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

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

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

1 the basis for the proposal for Special Instruction 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 So they can make any arguments they want.

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

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

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

25 And I think that completes our review of the

1 jury instructions.

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

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

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

12 **THE COURT:** No.

13 **MR. WISNER:** Okay.

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

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

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

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

1 thinking it precedes federal law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 **THE COURT:** Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Moreover, Your Honor, we have a time

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 there's a problem.

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

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

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

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

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

14 **THE COURT:** Absolutely not.

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

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

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

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

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

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

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

15 So you had some issues?

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

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

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

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

25 Exhibit 4900 is the 1991 cancer peer review

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

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

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

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

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

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

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

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

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

4 "A. It is."

5 Question on page 825:

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

12 "A. I did.

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

15 "A. It was."

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

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

1 do. It's nothing but hearsay.

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

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

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

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

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

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

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

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

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

17 "Yes, it did."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 **THE COURT:** So --

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

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

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

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

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

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

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

15 **THE COURT:** Uh-huh.

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

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

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

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

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

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

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

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

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

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

1 have referred to several times in their questioning.

2 **THE COURT:** Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 **THE COURT:** Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 "A. Correct.

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

18 "A. Correct."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 NTP, where Jameson and Portier worked, never

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 (Trial Exhibit 6795 received in evidence.)

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

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

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

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

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

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

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

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

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

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

15 Are you looking at that order?

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

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

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

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

25 Exhibit 3106 should have been moved into

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

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

7 (Trial Exhibit 3106 received in evidence.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 include, which --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 **MR. EVANS:** 5194.

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

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

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

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

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

22 **MR. ISMAIL:** 5194.

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

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

1 page 79.

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

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

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

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

11 **THE COURT:** Sure.

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

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

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

17 **MR. WISNER:** Sure.

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

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

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

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

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

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

9 You want to address this?

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

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

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

1 then I'd want to --

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

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

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

9 **THE COURT:** Okay.

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

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

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

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

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

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

1 how they tried the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 for each plaintiff separate, correct?

2 **MR. MILLER:** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 ought to be stopped.

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

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

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

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

16 **MR. MILLER:** Sure.

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

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

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

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

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

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

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

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

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

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

20 **MR. WISNER:** Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 And in this context --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 **MR. WISNER:** Can I get a hard rule one way or
6 the other on the boardroom just so I know, just so I get
7 a sense of it?

8 **THE COURT:** Oh, I'm not crazy about that one.

9 **MR. WISNER:** Okay.

10 **THE COURT:** That's not my favorite. I think
11 because it invokes that they're happy, you know, sort of
12 that -- I understand you think that they've acted
13 maliciously. And you're going to tell the jury about
14 that.

15 But the suggestion that they're going to do
16 attaboys around someone's pain and suffering. That's --
17 you know, you don't need to go there to make your point
18 about what you perceive as bad corporate behavior.

19 **MR. WISNER:** That's helpful, Your Honor.
20 Thank you.

21 **MR. EVANS:** Your Honor, the rest of the motion
22 addresses additional issues. And I think Your Honor can
23 read that. I think your direction is helpful to -- with
24 respect to drawing lines.

25 Clearly, referencing or making up facts that

1 are not in evidence is improper. Everyone knows that.
2 So, with that, I appreciate the Court's direction. And,
3 hopefully, we won't have to have objections tomorrow.

4 **THE COURT:** Okay.

5 **MR. WISNER:** Your Honor, one issue in here
6 that I think I need clarification on. One of the
7 central themes --

8 **THE COURT:** I do want to say this: So let's
9 talk about this case and not reference historical,
10 impactful, because this is about the Pilliods. The
11 jurors already know that there are other cases out
12 there. So to sort of enlist them in some sort of
13 movement is not what I want you to focus on or do.

14 That is prejudicial, particularly because
15 there's been a lot of back-and-forth about mentioning
16 other cases, other litigation, other proceedings.
17 They're already aware of that. And I think it would be
18 particularly problematic to then start talking about how
19 important their actions in this case are to a bigger
20 issue or a bigger movement or whatever.

21 **MR. WISNER:** Fair enough.

22 **THE COURT:** So just stay away from that.

23 **MR. WISNER:** But the line that I would walk is
24 I will say that what they're doing is important for
25 deterring future misconduct.

1 **THE COURT:** And that's fine with respect to
2 punitive damages. That's fair.

3 **MR. WISNER:** Okay.

4 One of the arguments that I'm going to be
5 making tomorrow is calling out the fact that Monsanto
6 has not disputed significant amounts of evidence that
7 we've presented in our case in chief. And that's
8 obviously fair argument.

9 However, if you read this motion, it suggests
10 that I'm not really able to do that. Because they say,
11 you know -- for example, I plan to point out that they
12 didn't call a single witness to talk about any of those
13 EPA documents, not a single person to explain it in any
14 context or explain the methods or processes of which
15 they used.

16 But we did. And it's undisputed that the
17 criticisms that Dr. Portier levied against EPA, for
18 example, that has not been refuted by a single witness.
19 And when they're considering the weight to give the EPA
20 assessment, they should realize that the only evidence
21 in the record is that they didn't file their own --
22 whatever. I'll make my arguments.

23 But I'm worried that the way this is written
24 can somehow preclude or I'm doing something wrong and
25 that they put me on notice about that ahead of time. I

1 want to be clear that that's what I intend to do, and I
2 don't think that's improper.

3 **THE COURT:** You can comment on the evidence or
4 lack thereof. I don't think there's an issue, unless
5 it's with time, but --

6 **MR. WISNER:** Okay.

7 **THE COURT:** I guess they're talking about
8 personal attacks on Monsanto witnesses. I'm sure that
9 your adjectives will be appropriate.

10 **MR. WISNER:** I'm just curious. If I tell the
11 jury that this witness didn't tell the truth, is that a
12 personal attack or attacking the credibility? It's sort
13 of a vague line.

14 **THE COURT:** I don't think that was what this
15 motion was addressing.

16 **MR. WISNER:** Well, so --

17 **THE COURT:** "Completely bonkers," discussing
18 has no dignity, that kind of thing. It's a little
19 outside the line.

20 **MR. WISNER:** It was a pretty outrageous thing
21 the guy had said. It was a specific cause expert who
22 told the jury that Mr. Johnson was not going to be sick
23 anymore and he would live, and the evidence was clear
24 that he was dying. So that was pretty disgusting, and
25 that's what I told the jury. And so I don't think we

1 have that here, for what it's worth.

2 **THE COURT:** I haven't heard anything
3 reprehensible, "completely bonkers," or -- so far. So I
4 think that, certainly, you can describe or characterize
5 the evidence. I just would be careful about how you
6 describe people and witnesses. You know what I mean?

7 And if you're talking about a particular
8 witness, you can talk about their testimony. You can
9 talk about the evidence they offered. But in describing
10 them, be careful, because it's not appropriate to
11 describe a person as disgusting or whatever.

12 Maybe what they said was completely wrong,
13 completely lacks evidentiary basis. There are a lot of
14 things that you could say with passion that I think
15 convey that. But as you're describing people, nothing
16 that gets on the outside of insulting or -- I think you
17 understand.

18 **MR. WISNER:** Absolutely, Your Honor. For what
19 it's worth, these quotes that they've cited were I was
20 referring to statements that were made by them. "That
21 testimony was disgusting." I didn't say the person was
22 disgusting or didn't look good or something. It wasn't
23 a personal attack; it was about the evidence.

24 **THE COURT:** You can articulate that in a way
25 that sends the message that you need to send without

1 borderline insulting whatever they said or the person
2 that said it.

3 **MR. WISNER:** All right, Your Honor.

4 **THE COURT:** Now that I know that we've had
5 some celebrities present, I'll -- and I'm not laughing.
6 I don't want this to turn into some, you know, event,
7 because it's not.

8 And I certainly don't want the jury to be
9 influenced at all by anything that happens outside this
10 courtroom or outside the jury room.

11 So if anything else comes up you think I need
12 to know about, tell me about it, and we'll try to
13 strategize how to prevent any undue influence or even
14 putting the jurors in a position where, you know, they
15 are in contact with something they shouldn't be that's
16 unrelated to the case that might be prejudicial to
17 either plaintiffs or defendants.

18 So I think that's probably all I need to say.
19 Hopefully, everything will go smoothly tomorrow.

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

21 **MR. MARSHALL:** Your Honor, I did spot a couple
22 of extra things on the plaintiffs' verdict form that I
23 wanted to raise to the Court's attention.

24 On the punitive damages instruction, they're
25 missing what shows up in the CACI verdict form 3902

1 dealing with officers, directors, or managing agents,
2 which is a required finding for the jury.

3 And so the question is "Was the conduct
4 constituting malice, oppression, or fraud committed by
5 one or more officers, directors, or managing agents of
6 Monsanto acting on behalf of Monsanto?"

7 That question does not show up in their
8 special verdict form, and we think that's a straight
9 CACI requirement.

10 **MR. WISNER:** No objection.

11 **MR. MARSHALL:** And, just for the record, I
12 wanted to register an objection on due process grounds
13 to the possibility of the jury awarding multiple
14 punitive damages awards for each plaintiff based on what
15 is essentially the same conduct by Monsanto.

16 And then, finally, on their special verdict
17 form, they've entered an amount of damages for past
18 economic losses. And while we had stipulated to that
19 amount, we do not believe it should be included on the
20 special verdict form because that implies that that's
21 something that the jury is already basically -- that the
22 Court is already asking the jury to award.

23 Of course, there are all sorts of predicate
24 findings before the jury gets there, so we believe that
25 should be left blank.

1 **THE COURT:** I've already told them that the
2 stipulation is a fact of the case.

3 **MR. MARSHALL:** It is a fact of the case, but
4 they still must award it by going through all of the
5 other predicate findings. So we believe it should be
6 left blank in --

7 **THE COURT:** That invites all kinds of trouble
8 because, if they get to that point and they find
9 liability, then that's the amount they're going to have
10 to award. And if they come up with some other number
11 than has already been stipulated to, that's a problem.
12 So they're not going to deliberate on the amount that
13 everyone has agreed to is a fact in the case.

14 I understand what you're saying.

15 **MR. MARSHALL:** I think it could be modified
16 post verdict if that was necessary, your Honor. But the
17 point is we do not want to give the jury the impression
18 that, somehow, there have already been findings made
19 that the Pilliods are entitled to be awarded these
20 amounts. And I think that's what this verdict form
21 does.

22 **MR. BROWN:** Yes, Your Honor. By putting that
23 in, you're already saying they're liable.

24 **THE COURT:** I understand that's a potential
25 problem. My concern has also been what do I do.

1 Because, if they find liability, should I instruct them
2 that, if they find liability, then that is the amount of
3 past damages they must award?

4 **MR. BROWN:** Or, as Mr. Marshall says, Your
5 Honor, we know what that amount should be. So if they
6 put in an amount that is incorrect, we can modify that
7 by agreement with counsel at the end, by modifying the
8 verdict. And that's done all the time.

9 Because we've already agreed to that number.

10 **MR. WISNER:** Your Honor, just quickly.

11 This is routinely done, where you put in the
12 stipulated amount of damages in the thing. They will
13 not get to that question unless they have found
14 liability on everything -- they don't even get to
15 Question 15 until they've answered yes on everything
16 else.

17 So the verdict form is designed to avoid any
18 potential problem. This is what we did in Johnson.
19 It's what they did in Hardeman. This is routinely done,
20 where you put in the stipulated economic damages.

21 Leaving it open would potentially confuse the
22 jury. "I thought this was stipulated to. Why are we
23 even having to put a number in here? What's going on?"

24 Maybe we put in parentheses "stipulated" --
25 that's probably not necessary. I think the way it's

1 done here is exactly what we always do.

2 **THE COURT:** I'm trying to remember. I had an
3 asbestos case where it was stipulated to as to past
4 economic damages. I don't remember if we put it in the
5 verdict form or not.

6 **MR. BROWN:** Your Honor, I would doubt it
7 seriously. I think, because we've stipulated to it, we
8 know what that amount is. It doesn't matter what the
9 jury puts in there because we've already agreed on it.

10 But by putting it in, what we're saying is
11 "they're liable." And that's not what's happened here.
12 They've got to establish liability before they can
13 establish anything in terms of damages.

14 **MR. WISNER:** Can't we just tell the jury --
15 I'm going to tell them in my closing, when I go through
16 the damages portion, that the past economic damages are
17 already stipulated to. And we obviously don't get here
18 until you find liability. It's all going to be in my
19 argument. I don't understand what the issue is here.
20 It's already written there, but you'll only get to the
21 damages, obviously, if you find liability. And I'm
22 pretty sure that's going to be the heart and soul of
23 their argument.

24 I don't think there's any potential confusion
25 here. The only thing that they're doing is inviting the

1 jury coming back with a different number and then giving
2 Monsanto an argument afterwards to say, well, the jury
3 clearly wasn't weighing the facts because they didn't
4 even get the stipulated damages right.

5 I mean, it just creates unnecessary potential
6 error. There's no error putting it on here. It's done
7 in every single Roundup trial so far. I don't
8 understand why we could depart from that.

9 **THE COURT:** Okay. Here's what I'm going to
10 do. My recollection is that I may have allowed the
11 notation that, if liability is found, the stipulated
12 amount is not filling in the blank, just putting an
13 asterisk there, indicating that if they are to find
14 liability, then this is the amount and not filling in
15 the blank. Something like that. We came to some
16 agreement, which I think was okay. I don't really want
17 to leave it blank, but I do understand that filling it
18 in for the jurors may suggest to them that this is an
19 amount they need to award no matter what.

20 But what if they were to -- I don't know if we
21 put an asterisk right before or right below the
22 tabulation of damages, which is liability for if I find
23 this stipulated amount of past economic damages for
24 Albert and Alberta is the following, and then they get
25 to figure that out or not. They are going to be

1 instructed to go through, in order, the questions,
2 answer the questions in order to go through the verdict
3 form. So hopefully they'll be skipping ahead.

4 **MR. WISNER:** Can we keep a number there, drop
5 a footnote to it, and just say this is the amount of
6 damages if liability is found?

7 **THE COURT:** Just put the amount in a footnote
8 and with the statement "If liability is found, the
9 amount stipulated to by the parties are for past
10 economic damages is the following," in a footnote. And
11 no line. And they can put it in themselves, but at
12 least there's a footnote saying what's stipulated to.

13 I am concerned about, if they do find
14 liability, I don't want a lot of crazy numbers and we
15 have to change the verdict. So I think this is a good
16 way to avoid that problem.

17 **MR. MARSHALL:** And, Your Honor, we did file a
18 directed verdict motion. And I don't intend to go over
19 old ground at this point, but there is an issue in that
20 motion which we do believe the Court needs to rule on.
21 And that has to do with the impossibility of preemption
22 argument.

23 As you will recall in the summary judgment
24 motion, you denied our summary judgment motion and held
25 that there was a question of fact for the jury to decide

1 on whether or not there was clear evidence that the
2 regulator would have denied a request to change the
3 design or label.

4 And we are obviously not submitting that
5 question to the jury. So we're in the uncomfortable
6 position of not having a decision on that issue in the
7 case.

8 So we raise that issue in the directed verdict
9 motion, and we think that our argument on the Wyeth v.
10 Levine clear evidence issue has gotten even stronger now
11 with the EPA's interim decision in April of this year,
12 just a few days ago.

13 And I --

14 **THE COURT:** Which they didn't admit, as you
15 know.

16 **MR. MARSHALL:** No. But we've now decided that
17 this is a question of law for the Court on the
18 possibility of preemption.

19 **THE COURT:** I really resolved that. I
20 resolved that issue. I thought we talked about that in
21 the discussion of the jury instructions in addition
22 to -- my sense that that really got resolved at summary
23 judgment, but holding that open until I look at the
24 language in the order, I thought we had that discussion
25 during the course of jury instructions. And I don't

1 think it's an open question. I do not.

2 So to the extent that the motion for directed
3 verdict is premised on that, it would be denied.

4 **MR. MARSHALL:** Well, Your Honor, in the
5 summary judgment order, you said that the trier of fact
6 would be required to infer. You cited the Fosamax case
7 which said the impossibility of preemption is a fact
8 issue for the trier of fact. And you denied the summary
9 judgment motion.

10 But you did not -- at least in this order, you
11 did not hold, in fact, that there was no impossibility
12 of preemption defense for Monsanto. And so we don't
13 have a ruling on that. We don't have it submitted to
14 the jury.

15 And, as I said, the argument has gotten
16 stronger as a result of the EPA's decision. One of the
17 issues that you pointed to is the EPA studies were for
18 glyphosate, not for Roundup. And so there was an issue
19 of, well, would they have really changed the label for
20 the formulation based on the decision about glyphosate?

21 But if you look at the EPA's decision, the
22 April 2019 decision, they specifically said that there
23 were no human health risks from exposure to any use of
24 glyphosate. They were clearly looking at this in the
25 context of the formulations because they were

1 determining label changes that would be appropriate for
2 glyphosate-containing formulations.

3 They responded to questions about the
4 formulations. They said that a multitude of studies,
5 including on multiple formulations containing
6 glyphosate, they weren't looking at those studies on the
7 formulations. And they said that EPA thoroughly
8 assessed risks to humans from exposure to glyphosate
9 from all uses and all routes of exposure and did not
10 identify any risks of concern.

11 They then went on to assess the label, and
12 they decided that they were going to update all of the
13 glyphosate labels to modern standards.

14 And, of course, in doing that, they did not
15 suggest that there should be a risk on the label based
16 on the alleged risk that they did not believe existed.

17 So, as I mentioned, I think our argument on
18 impossibility of preemption has gotten stronger. I
19 think there is clear evidence here for you to decide
20 that, in fact, the state law claims put Monsanto in an
21 impossible position here, where they're being asked to
22 warn of a risk that the EPA would not allow them to warn
23 of, based on the decisions the EPA is coming out with.

24 And so we're simply asking for a ruling on
25 this, Your Honor.

1 **THE COURT:** Do you want to respond?

2 **MR. WISNER:** Sure, Your Honor.

3 Just for the record, the impossibility of
4 preemption argument that is being put forward by defense
5 counsel has been roundly rejected by every court to
6 consider it, including this Court, Your Honor.

7 Specifically, they have an affirmative
8 obligation to prove to the Court by clear evidence that,
9 had they taken any action whatsoever to inform consumers
10 of the risk that Roundup could cause cancer, that the
11 EPA would have deemed Roundup to be misbranded and would
12 have taken it off the market.

13 We aren't even close to the realm of clear
14 evidence. Whether it's the Court deciding or the jury
15 deciding, doesn't make a difference.

16 Fundamentally, Your Honor, we heard testimony
17 from Mr. Guard, Monsanto's 30(b)(6) witness specifically
18 on labeling issues, and their ability to disclose
19 information to consumers, specifically as it relates to
20 lawn and garden. And he said that they have the
21 opportunity to disclose risks outside of the labeling
22 context, of signage next to the brand. He actually went
23 out of his way to explain all the different ways they
24 communicate information to consumers. The EPA does not
25 in any way regulate that communication.

1 So impossibility requires that they prove that
2 there is no humanly possible way for Monsanto to have
3 ever disclosed a cancer risk to consumers. And that's
4 just not supported by the record, whether it be as a
5 matter of law or factual issue.

6 The Court has held that it is a matter of law,
7 and you did conclude that in the context of jury
8 instructions. And I believe that they haven't met their
9 burden of showing clear evidence that, in fact, they
10 were prohibited by the EPA from complying with
11 California state law. The seminal case on this issue is
12 the Bates case, which has soundly rejected this.

13 **THE COURT:** Well, what I haven't done is read
14 the motion. So I'm not going to rule on it without
15 reading it. So I will take that into consideration. I
16 probably will have to email something later on in the
17 day, but it is not likely.

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

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

20 **THE COURT:** So one last thing.

21 **MR. WISNER:** Oh, that last issue in the jury
22 instructions.

23 **THE COURT:** Yes, the one last thing. And then
24 after I rule on this, when do you think I can get a
25 final set of the jury instructions with all the

1 modifications?

2 **MR. DICKENS:** We've been working together. I
3 think that can be relatively quick, within 30 minutes
4 once that decision is made.

5 **THE COURT:** Okay. Because then what we can do
6 is have everybody look at it. If you have any
7 questions -- I don't know whether everyone should hang
8 around just to go through it and take one last look at
9 that and the verdict forms to make sure we don't have
10 any problems. I don't want to start tomorrow morning
11 with a problem. That needs to be fixed.

12 **MR. MILLER:** We can be back here in a moment's
13 notice if the Court needs us. But we're going to work
14 together and get it done and should be to you within 30
15 minutes.

16 **THE COURT:** Okay. That's fine.

17 **MR. WISNER:** There's one last legal dispute,
18 right?

19 **MR. DICKENS:** On the failure to warn case, the
20 widespread and recognized.

21 **THE COURT:** Right. That's what I'm saying.
22 It's the last thing that I haven't really addressed and
23 that needs to be addressed before these can be finished.
24 And I am going to go with my original tentative. And
25 that's it. Okay.

1 So draft the -- send me a draft of the
2 instructions. We'll review them. If I need you back
3 here -- I actually have to leave a little early today.
4 So whatever it is, I'm going to try to wrap it up by
5 4:15 or 4:30. I have a meeting in the city, so I need
6 to get going.

7 **MR. EVANS:** Mr. Griffis had one issue he
8 needed to raise, Your Honor.

9 **THE COURT:** It's been a while.

10 Let me just say this. A number of things have
11 occurred in this trial that will inform JCCP going
12 forward. This is probably not the last of a whole lot
13 of issues.

14 **MR. GRIFFIS:** You have a hearing set for
15 Friday on confidentiality issues, and that has shrunk
16 from about half a dozen distinct issues to a pretty
17 narrow dispute about EU redaction. We handed up a joint
18 brief on that yesterday.

19 **THE COURT:** You did.

20 **MR. GRIFFIS:** And so the sole issue remaining
21 for Friday is about the EU redactions, and that falls
22 into two camps: The trial documents, about which you've
23 already issued a ruling, but we do need a final ruling
24 on that, and the joint brief says that; and the other
25 issue is nontrial documents; i.e., the documents that

1 were teed up for resolution that were not actually used
2 at trial. And we briefed that.

3 And if you don't need to hear from us on
4 Friday repeating what we said in the brief, then we
5 don't need to have that hearing.

6 **THE COURT:** Yeah, I don't really think so.
7 That's my first impression -- I haven't had a chance to
8 get back to it. Strictly necessary -- thinking strictly
9 necessary. My recollection is the ask was that the
10 documents should, according to the EU rules, where I've
11 already decided strictly necessary in the trial context
12 meant that the names needed to be displayed so that the
13 jury could keep track of all of the witnesses and make
14 sure that they could follow the documents.

15 **MR. GRIFFIS:** Yes, Your Honor.

16 **THE COURT:** But, actually, outside the context
17 of trial, it wouldn't be strictly necessary. Strictly
18 necessary means strictly necessary.

19 **MR. GRIFFIS:** That was our argument.

20 **MR. BAUM:** So that's been my dialogue with
21 them. I just ask you to read the briefing and the
22 supplemental briefing that came in day before yesterday,
23 I guess. Our point is that that's an EU standard. It
24 doesn't apply to California courts. And you don't need
25 to have that standard to just issue an order saying that

1 it's okay. Because it's confusing --

2 **THE COURT:** Can you speak up a little bit.

3 **MR. BAUM:** That standard that you were
4 referring to as necessity is the EU standard; it doesn't
5 apply to California courts.

6 So you can issue an order saying that the
7 documents are more clear with those names in there and
8 that it would be beneficial for academics and
9 legislators and regulators for understanding what these
10 documents said, and that it's a California standard you
11 should be applying, not the EU standard.

12 So I'd just ask you to read those before you
13 make your decision.

14 **THE COURT:** Okay. I will. Thank you. And I
15 don't think I need any more argument on this. So don't
16 worry about Friday. I'll figure it out between now and
17 then.

18 **MR. BAUM:** Seating. There's going to be a lot
19 of people here that want to come in tomorrow. We want
20 to know if it's okay to bring in some chairs and how
21 many can we bring in.

22 **THE COURT:** What did we do last time? I think
23 we found chairs. What did we do? Bring chairs in?

24 **MR. BAUM:** Yeah, last time we brought in a
25 whole bunch of chairs in from --

1 **THE COURT:** First, nobody go into any other
2 courtroom and touch anything.

3 **MR. BAUM:** They let us.

4 **THE COURT:** Well, that's okay. Don't do it
5 anyway. I will let my staff figure that out. So don't
6 go into any other courtrooms and ask if you can bring in
7 chairs. Let my staff figure out how many chairs that we
8 will get probably from those courtrooms, but let me
9 figure that out and let my staff work it out. And we'll
10 bring as many as we can bring in. Probably about the
11 same number that we had last time.

12 I guess somebody from the press was asking to
13 reserve a few seats for the press. I'm fine with
14 reserving a few seats for the press.

15 This isn't a big courtroom. The only large
16 courtroom is Department 1, and it has no seating for
17 jury. And, otherwise, the courtrooms are -- and then
18 there's the criminal courtrooms, all of which are
19 occupied. So there's really no other larger space. So
20 we'll just have to work with the number of chairs that
21 we can put in here.

22 Part of the problem is a lot of times, when I
23 put different chairs, there's not as much equipment.
24 There's a lot of spaces taken up with the equipment.

25 So it's probably not going to be more than

1 another 10, 15 chairs or 20 chairs that we were able to
2 get in here last time. That's all I can do. And then
3 beyond that, I don't know. Just tell people, I guess,
4 if they want to sit down, they're going to have to come
5 in early and take a seat. But the doors will probably
6 open a little before 9:00. And then that will be it.

7 So if you think there's anything we need to
8 talk about, let me know. We can open a little bit
9 earlier, at 8:45, if there's something else we need to
10 talk about, anything last-minute we need to clean up.

11 **MR. EVANS:** So the Martens exhibit that we
12 thought was in on the plaintiffs' exhibit number was
13 not. So we'll give it 4798 from the Martens deposition.
14 We move for admission. I think there's no objection.

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

16 **THE COURT:** Granted.

17 (Trial Exhibit 4798 received in evidence.)

18 (Proceedings adjourned at 1:54 p.m.)
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24
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1 State of California)
2 County of Alameda)

3

4 I, Lori Stokes, Court Reporter at the Superior
5 Court of California, County of Alameda, do hereby
6 certify:

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

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

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

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

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

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

21 Dated: May 7, 2019

22

23

24

25


Lori Stokes, CSR No. 12732