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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MONSANTO COMPANY'S MOTION FOR NEW TRIAL

Hon. Judge Suzanne R. Bolanos

Hearing Date:	October 10, 2018
Time:	2:00 p.m.
Department:	504
Trial Date:	June 18, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES

STATE RULES AND REGULATIONS

INTRODUCTION

In ruling on a new trial motion, this Court acts as a "thirteenth juror." The Court, which is in "the unique position of assessing demeanor, tone, and credibility firsthand,"[1] "*must* independently weigh the evidence and assess whether it sufficiently supports the jury's verdict."[2] The Court's scrutiny of the verdict is particularly warranted here because the jury found that Roundup caused Plaintiff's cancer even though:

(1) Numerous agencies around the world, including the U.S. EPA, repeatedly concluded that the use of glyphosate in herbicides (the "Formulation") such as Roundup is safe;

(2) Those conclusions are supported by the largest and most statistically-powerful epidemiological study—the 2018 National Cancer Institute study ("NCI Study")—which found *no* causal relationship between the Formulation and Non-Hodgkin Lymphoma ("NHL"); and

(3) Plaintiff himself conceded that the epidemiology was insufficient to establish causation.

The need for this Court's scrutiny is only confirmed by the jury's $250 million punitive damages award—an award nearly *five times* the largest punitive award ever upheld on appeal in California. The jury imposed this massive award despite the absence of any evidence that anyone at Monsanto believed the Formulation caused cancer or had any secret scientific information that would have changed the repeated conclusions of regulatory agencies that glyphosate-based herbicides are safe. The Court noted during trial that Plaintiff's evidence supporting punitive damages is "thin" and "I'll have to reconsider, depending on what the jury does with that." 7/30/18 Tr. at 4026:13-4027:8, 8/6/18 Tr. 4909:21-22.[3] Given the jury's unjustified award, the time to do so has arrived, and this verdict must be vacated and a new trial granted for at least three independent reasons:

First, the verdict is against the weight of the evidence. An independent assessment of the

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[1] *People v. DePriest*, 42 Cal. 4th 1, 21 (2007).

[2] *People v. Capps*, 159 Cal. App. 3d 546, 552 (1984) (emphasis added).

[3] All trial transcripts, deposition transcripts, exhibits, and orders cited herein are attached for the Court's convenience to the Declaration of Sandra A. Edwards in Support of Defendant Monsanto Company's Motion for New Trial and Motion for Judgment Notwithstanding the Verdict.

evidence leads to the unmistakable conclusion that the verdict for both liability and punitive damages must be set aside in its entirety.

Second, both the compensatory and punitive awards are excessive. Awarding $1 million per year for future noneconomic losses for 33 years, as Plaintiff's counsel requested and the jury awarded, is irreconcilable with Plaintiff's own evidence that his life expectancy is between six months and two years. The $250 million punitive damage award shocks the conscience and far exceeds awards California courts routinely vacate or reduce. If the verdict is not thrown out in its entirety, both awards must be substantially reduced.

Third, the trial included significant prejudicial misconduct by Plaintiff's counsel, evidentiary errors, and instructional error that necessitate a new trial. Plaintiff counsel's misconduct improperly inflamed the jury, as this unsupportable verdict demonstrates. Dr. Nabhan's specific causation testimony (among others) lacked even a thin veneer of reliability and should not have been allowed. Finally, instructional error, including on design defect and punitive damages, requires a new trial.

This Court can and should order a new trial.

ARGUMENT

I. THE VERDICT IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Trial courts have a substantial, mandatory, and indispensable role in guaranteeing justice by evaluating whether the evidence at trial is sufficient to sustain a jury's verdict. Cal. Civ. Proc. Code § 657(6). This role is so important that "it has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on a motion for a new trial." *People v. Robarge*, 41 Cal. 2d 628, 634 (1953). In this regard, the trial judge "functions as a thirteenth juror." *In re Elliot's Estate*, 114 Cal. App. 2d 747, 748 (1952); *accord Johnson & Johnson Talcum Powder Cases*, Case No. BC628228, 2017 WL 4780572, at *17-19 (Cal. Super. Oct. 20, 2017) (Orders Regarding Motion for New Trial and JNOV, hereinafter "*Talcum* Order").[4]

The Court's power—and responsibility—as the thirteenth juror has three salient features.

[4] California Rules of Court 8.1115 does not bar citation to unpublished trial court opinions, such as this one, of persuasive value.

First, the power is broad. "Insufficiency of the evidence is one of the most frequent grounds for new trial motions. It is also one as to which the judge has the broadest power." Civil Trials & Evidence at 18:170. A trial judge "is not bound by conflicts in the evidence." *Robarge,* 41 Cal. 2d. at 633. After finding its own facts and re-weighing the evidence, the court "may grant a new trial even though there [is] sufficient evidence to sustain the jury's verdict on appeal, so long as the court determines the weight of the evidence is against the verdict." *Candido v. Huitt*, 151 Cal. App. 3d 918, 923 (1984).

Second, the power is mandatory. The court "must independently weigh the evidence." *Capps*, 159 Cal. App. 3d at 552. If it believes the verdict is not warranted, it may *not* "deny the motion and let the [reviewing] court pass on these questions" in the first instance. *In re Bainbridge's Estate*, 169 Cal. 166, 169 (1915); *see Robarge*, 41 Cal. 2d at 634-35 (reversing trial judge who denied new trial despite belief that evidence was against prevailing party).

Third, the power is committed to the trial court. A "trial court is in the unique position of assessing demeanor, tone, and credibility firsthand." *DePriest,* 42 Cal. 4th at 21. An appellate court is powerless to grant the same relief as the trial court. *People v. Serrato,* 9 Cal. 3d 753, 761 (1973) ("In ruling upon a motion for a new trial, the trial court is required to independently weigh the evidence, but an appellate court will not modify or set aside the verdict if there is any substantial evidence to support it."). And in recognition of this singular power, an appellate court may not disturb the trial court's grant of relief absent a clear abuse of discretion. *Tice v. Kaiser Co.*, 102 Cal. App. 2d 44, 46 (1951).

A. <u>The Weight of the Evidence Does Not Support Causation.</u>

Plaintiff was required to show to a reasonable medical probability that the Formulation caused his mycosis fungoides ("MF"). *Jones v. Ortho. Pharm. Corp,* 163 Cal. App. 3d 396, 403 (1985). As set forth in Monsanto's JNOV Motion, none of the scientific evidence—epidemiology, animal toxicology, mechanistic data, or the differential diagnosis of Dr. Nabhan—support either that the Formulation is capable of causing MF generally or that it was a substantial factor in the cause of Plaintiff's MF specifically. At a minimum, when the totality of the evidence is weighed, the verdict on causation was against the overwhelming weight of the evidence.

1. The Epidemiology Does Not Support Causation.

Plaintiff conceded at trial—including in counsel's closing argument—that the epidemiology does not support causation here. Tr. 5072:16-20 ("Nobody is saying [the epidemiology] gets you there. Nobody."). This telling admission counsels strongly in favor of a new trial. Epidemiological studies are the single most powerful evidence of causation because only they can show whether a product is associated with cancer in humans at dose levels relevant to human health. *E.g., In re Roundup Prod. Liab. Lit.*, 2018 WL 3368534, at *7 (N.D. Cal. July 10, 2018) (stating "epidemiology is central to the general causation inquiry, and where such evidence exists, it must be addressed by the experts"). Plaintiff's experts, however, retreated from the epidemiological evidence, admitting over and over that it did *not* demonstrate a relative risk ratio above 2.0 and did not demonstrate causation. Neugut Tr. at 2614:16-21; 2635:23-2636:1: 2645:17-21. Dr. Portier, Dr. Neugut, and Plaintiff's counsel all conceded that the epidemiology was insufficient to show causation. JNOV Motion at 3-4; Portier Tr. at 1964:13-1965:7; Neugut Tr. 2645:16-20; Closing Tr. 5072:16-20. These stark admissions echoed one of Plaintiff's key pieces of evidence, a monograph published by the International Agency for Research on Cancer ("IARC Monograph") in 2015 that purported to associate glyphosate and cancer but that nonetheless called the epidemiological evidence "limited," meaning that bias, chance, and confounding could not be ruled out. Neugut Tr. at 2676:25-2677:10; 2678:16-19.

Plaintiff's admissions were not surprising in light of the 2018 study by the prestigious NCI—an independent, long-term, prospective cohort study following over 50,000 pesticide applicators. The NCI Study is the largest and most statistically-powerful epidemiological study and unequivocally found "no association between glyphosate use and NHL overall or any of its subtypes." Neugut Tr. at 2745:7-13; Portier Tr. at 2357:19-23. Indeed, the Formulation was found to be slightly inversely correlated with NHL (.87 relative risk ratio).

Plaintiff's attempts to dismiss the NCI Study in lieu of the older, underpowered studies relied upon by their experts demonstrate how little weight Plaintiff's causation case had. Plaintiff's experts offered the mantra that there is "no perfect epidemiology study," as if a non-statistically significant result confounded by other pesticides and powered by a sample size that

can be counted on two hands (Hardell) could somehow be placed on the same level as the NCI Study. Plaintiff also argued (as articulated by Drs. Portier and Neugut) that the smaller risk ratio was so "modest" that it could have been missed due to supposed design limitations in the far larger NCI Study.[5] Plaintiff has it precisely backwards—a larger study is more likely to detect smaller risk ratios. Dr. Mucci also explained there were multiple different validation studies, all published in peer reviewed journals, by many of the same NCI Study authors, addressing the very criticisms Plaintiff's experts purported to offer. Tr. at 4429:19-25; 4439:20-4440:14. Dr. Neugut ultimately conceded that he (not the 2018 NCI Study authors) may be the person "who has it wrong here." Tr. at 2742:4-6.

The size of the NCI Study alone—compared to the case-control studies on which Plaintiff's experts relied—speaks volumes about the strength of the epidemiology evidence favoring Monsanto. Epidemiology studies are powered by the number of "exposed cases"—people exposed to a substance of interest who become sick.[6] Of the case-control studies Dr. Neugut presented to the jury, Hardell had 8 exposed cases, Orsi had 12, Eriksson had 29, De Roos (2003) had 36, and McDuffie had 51.[7] By contrast, the NCI Study had 440 exposed cases. Mucci Tr. at 4285:21-4286:9. It is thus *8.6 times* larger than McDuffie (Plaintiff's largest case-control study), and *55 times* larger than Hardell (Plaintiff's smallest). It is more than three times larger than all of the case-control studies *put together*. Dr. Neugut, excluded from testifying in federal court for his unreliability (*Roundup*, 2018 WL 3368534, at *30), appeared to be oblivious

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[5] Neugut Tr. at 2636:10-13 ("the exposure misclassification is basically going to make it impossible to see a relative risk of 1.5 in the first place.") *Id.* (Plaintiff's counsel: "We know that it has about a 2.0 -- maybe **1.5 to 2.0 risk**. You're not going to see it in the AHS. And they never did; right?"); Portier Tr. at 1912:15-19 ("if the true relative risk was **roughly 1.5**, then the degree of – of nondifferential exposure and misclassification can bring that down to 1.01, 1.05.").

[6] Neugut Tr. at 2686:21-25 ("Q. Okay. Doctor, the key number for power is the number of individuals who are both exposed and had the outcome of interest; correct? A. That's probably the most important single number, yes.").

[7] Neugut Tr. at 2690:21-23; 2692:4, 2695:8-2698:7; *see also* Mucci Tr. at 4238:12-18 (describing number of exposed cases in Hardell as "quite low"); 4248: 9-17 (Eriksson had "only 29 exposed cases"); 4247: 7-14 (Orsi had "very small number of exposed cases, only 12"); 4246:20-22 (De Roos 2003 "by pooling together these three studies, they had 36 exposed cases, so, again, not a really large study"); 4242:3-8 (McDuffie was "larger than Hardell, [but] still a fairly small number of exposed cases.").

to the size difference in these studies, thereby demonstrating the unreliability of his epidemiology opinions. Tr. at 2697:17-18 (Q. "Isn't Hardell eight exposed cases? A. I would not know."); 2698:3-7 ("Q. And McDuffie was 51, does that sound about right? A. Again, I have no way of knowing. Q. Orsi, 12, does that sound about right? A. I don't know.").

Moreover, the handful of small (even tiny) case-control studies relied upon by Plaintiff's experts suffered from serious limitations.[8] Reflecting their small size and lack of power, all of the case-control studies Plaintiff relied on presented enormous confidence intervals, and in the analyses adjusted for other pesticides that Dr. Neugut presented to the jury in his forest plot, none yielded statistically significant results. Tr. at 2702:25-2703:3; 2682:10-15 (Hardell: 1.85 (.55 to 6.2); Orsi: 1.0 (.5 to 2.2); Eriksson: 1.51 (.77 to 2.94); De Roos (2003) 1.6 (.9 to 2.8); McDuffie 1.2 (0.83 to 1.74)).[9] Because Dr. Neugut admitted that a statistically significant increased risk was essential to determine whether there is a causal association (Tr. at 2685:4-8), the lack of statistical significance effectively ended Plaintiff's epidemiology argument. *See, e.g., McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, No. CIV.A. 10-143, 2013 WL 3487560, at *15 (W.D. Pa. July 12, 2013) ("Step one looks to whether there is a statistically significant association between a substance and a specific disease.... If no association between the exposure and the disease is supported by the scientific literature, there is no basis to find a causal relationship exists and the

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[8] Epidemiologists try to avoid "bias, confounding and chance" in studies. Mucci Tr. at 4211:12-17. Most of the case control studies relied on by Plaintiff used proxy respondents, which causes an epidemiologist to "be very concerned about the quality or reliability of the data." *Id*. at 4222:10-21. Moreover, many of the studies did not adjust for other pesticides, or had incomplete adjustment which "give[s] the epidemiologist reason for concern" (*Id*. at 4219:2-6) because confounding "may either overestimate or underestimate our relative risk." *Id*. at 4212:12-17. For studies which adjusted for other pesticides, "all of the relative risks [were] attenuated towards the null value," suggesting "no association." *Id*. at 4442:9-19. These studies also had a low number of exposed cases, which makes it more "likely that chance is going to have led to a specific finding." *Id*. at 4223:9-18.

[9] Dr. Portier agreed: Tr. at 1878:12-15 (McDuffie 2001: "It's clearly not a statistically significant result."); 1885:17-22 (Hardell 2002: "The second [line] is adjusted for pesticides, other pesticide use. . . . And there you see it's clearly not statistically significant . . . ."); 1887:3-6 (DeRoos 2003: "The second method of analysis of the same data but a different method of analysis, using what's called Bayesian statistics, shows a positive finding but not statistically significant."); 1895:13-20 (Eriksson 2008: "A. If I remember correctly, I think they did two different types of analyses, but, yes, they adjusted for other pesticides. Q. And what happens to the risk ratio when they did that? A. It dropped. It drops to 1.5, and it's no longer statistically significant."); 1898:19-21 (Orsi 2009: "Q. And it has a ratio of .5 and 2.2, so it's not statistically significant? A. Correct.").

analysis should end there."); *In re Lipitor Mktg.*, 174 F. Supp. 3d 911, 924-925 (D.S.C. 2016) (collecting cases).

Regardless, Plaintiff's experts' focus on the alleged "modest" risk ratio allegedly established in the small case-control studies only underscores the extent to which they failed to present epidemiological evidence supporting Plaintiff's causation burden. In arguing that the epidemiologic studies demonstrated a risk ratio of 1.3 to 1.5, Plaintiff's experts acknowledged that they could not meet Plaintiff's threshold requirement of an above 2.0 risk ratio to establish specific causation. See JNOV Motion at 4-5; Neugut Tr. at 2614:16-21; 2635:23-2636:1; 2645:17-21. This concession renders the epidemiology evidence and these experts' opinions inadequate as a matter of California law. JNOV Motion at 3-7; *Simmons v. W. Covina Med. Clinic*, 212 Cal. App. 3d 696, 702-703 (1989) ("A less than 50-50 possibility that defendant's omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause."); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995) ("A relative risk of less than two . . . actually tends to disprove legal causation. . . .").

Plaintiff's experts also failed to consider all the data. Dr. Neugut declined to review the results of the North American Pooled Project (NAPP), which pooled the results of the North American case-control studies,[10] to make the overall data set more robust. Tr. at 2698:17-2699:5; 2699:17-18. When properly adjusted for other pesticides, NAPP found that the data from the earlier studies upon which Dr. Neugut relied did not show any association whatsoever between the Formulation and NHL, with risk ratio confidence intervals that surrounded the null finding of 1.0 (1.13 RR including proxy respondents, 0.95 RR without). Portier Tr. at 2451:3-5, 2338:24-2339:7. Although Dr. Neugut never showed the data this way to the jury, whenever large studies, pooling, or proper adjustment for other pesticides was conducted, the results clearly and repeatedly showed no effect.[11]

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[10] NAPP included the data sets from the studies pooled together in De Roos 2003 and McDuffie 2001. Mucci Tr. at 4262:5-10.

[11] *See also* Mucci Tr. at 4442:9-13 ("Q. Every single time they have a study where there's no pesticide adjustment and a pesticide adjustment, what happens when you adjust for pesticides? A.

Dr. Mucci was the only expert on either side who considered all of the data. She calculated a global relative risk ratio for the Formulation and NHL from both the case-control and cohort studies (with the exception of Hardell, which was tiny and flawed, but would make no difference either way). Tr. at 4306:8-16. The result of that analysis—performed in the same manner that IARC performed its own meta-analysis (excluding Hardell and including the 2015 NAPP and 2018 NCI studies that IARC did not consider)—was that the Formulation demonstrated slightly **less than a 1.0 (null) relative risk ratio**. Tr. at 4306:19-4307:12. Thus, combining all of the epidemiology studies conducted on the Formulation and NHL, appropriately weighted for their sizes, Dr. Mucci observed that the totality of the evidence showed no association whatsoever. Tr. at 4307:23-25. Her testimony was unrebutted.

In short, the epidemiology evidence did not simply fail to show a causal connection between glyphosate and NHL and its subtypes (as Plaintiff through his counsel and experts admitted); when considered as a whole, it strongly refutes any possible causal connection (general or specific) at doses relevant to human health.

2. The Animal and Mechanistic Studies Do Not Overcome the Insufficiency of the Epidemiology Evidence.

The two other types of studies presented to the jury—animal and mechanistic studies—cannot overcome the failure of epidemiology to establish causation for three reasons.

First, the animal and mechanistic studies did not show that the Formulation is capable of causing human cancer for general causation purposes. Although the toxicology database is exceedingly robust and the doses given to most of the animals were substantially higher than what any human would be exposed to in real life, there were no compound-related tumors in any of the studies and thus, glyphosate does not even cause tumors in animals. Foster Tr. at 4496:13-18; 4497:2-10; 4563:14-17, 4528:11-15, 4549:17-4550:6; Martens Dep. at 198:4-19. That is why every reviewing regulatory and risk assessment agency looking at this vast data set has concluded

All of the relative risks are attenuated towards the null value." Q. What do you mean by 'attenuated towards the null value'? A. Right. They become closer to the relative risk of 1, which shows there is no association."); 4222:20-21 (Hardell), 4252:22-4253:1, 4443:8-11 (Eriksson), 4269:18-22 (NAPP).

that glyphosate is not carcinogenic. Foster Tr. at 4522:12-4423:20, 4557:19-25; Portier Tr. 2105:9-18, 2234:22-2235-1, 2237:15-2238:1. Several agencies have examined, and rejected, the very opinions Dr. Portier offered in this litigation. Portier Tr. at 2091:14-17; 2094:7-2098:5; 2107:7-2111:1. Dr. Portier is the voice in the wilderness for very good reasons. As Dr. Foster explained, the putative "compound related" tumors Dr. Portier has imagined are not replicable across the studies, and Dr. Portier's *post hoc* statistical reanalysis improperly adopts statistical criteria that were not part of the prospective study design. Foster Tr. at 4514:16-4515:15; 4518:6-14.

Second, animal and mechanistic studies provide no data by which one can conclude that Plaintiff's cancer—or anyone else's—was more likely than not actually caused by the Formulation for specific causation purposes. As a result, this evidence cannot satisfy the requirement that plaintiff must prove exposure was the probable cause of injury. *Jones,* 163 Cal. App. 3d at 403.

There was no evidence linking animal or genotoxicity studies to human cancer outcomes. "[E]xtrapolations of animal studies to human beings are generally not considered reliable in the absence of a scientific explanation of why such extrapolation is warranted." *Redfoot v. B.F. Ascher & Co.*, 2007 WL 1593239, at *11, n.18 (N.D. Cal. June 1, 2007); *General Electric Co. v. Joiner*, 522 U.S. 136, 144 (1997) (rejecting specific causation based on animal studies allegedly showing that PCBs caused cancer in animals because the doses, routes of exposure, and types of cancer all differed from humans); *Lockheed Litig. Cases*, 23 Cal. Rptr. 3d 762, 779 (rejecting animal studies for specific causation absent explanation of "differences between human beings and the animals studied (species extrapolation)" and "how to extrapolate from the high doses given to animals to the lower doses to which human beings may be subjected (dosage extrapolation)"), *rev. dismissed*, 83 Cal. Rptr. 3d 478; *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1410–11 (D. Or. 1996) ("Plaintiffs offer no explanation of why extrapolations from the rodent studies their experts rely upon to humans are warranted here.").

Third, as to specific causation, the animal and mechanism studies are simply not useful. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp. 2d 879, 912 (C.D. Cal. 2004) ("The animal studies . . . do not support any conclusion about specific causation."). That is

why even Plaintiff did not attempt to use them for that purpose. Neither of Plaintiff's specific causation witnesses presented animal or genotoxicity studies to the jury to support their opinions that the Formulation caused Plaintiff's MF. Indeed, Dr. Sawyer was excluded at the *Sargon* stage from presenting evidence about his "slope factor" analysis derived from animal studies. *Sargon* Order at 27-28. Dr. Nabhan stated only that he reviewed animal and genotoxicity studies, but he offered no testimony about them and did not state they supported his opinions about Plaintiff.[12]

3. Dr. Nabhan's Unreliable Testimony Does Not Support Causation.

Dr. Nabhan's differential diagnosis was legally insufficient to establish causation and is yet another reason Monsanto is entitled to a new trial. *See* JNOV Motion at 10-16.

First, Dr. Nabhan had no basis to "rule in" the Formulation as a probable cause of Plaintiff's MF because he was not qualified to give such an opinion. *Id*. at 10-11. Besides, regardless of his qualifications, none of the evidence Dr. Nabhan reviewed supports finding that the Formulation is a probable cause of either NHL or MF. *Id*. at 10-16.

Second, Dr. Nabhan never ruled out idiopathic causes for Plaintiff's MF even though he conceded that *most* NHL cases are idiopathic. Tr. at 2990:6-14; 2997:17-23, 2998:16-21;[13] JNOV Motion at 14-15. Simply put, Dr. Nabhan's opinion that Plaintiff's MF was caused by the Formulation cannot be squared with the unified opinion of the world's experts in MF, including Plaintiff's treating physicians, that it has no known cause. Indeed, none of Plaintiff's physicians expressed the opinion that his cancer could have been caused by the Formulation. Nabhan Tr. at

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[12] The one witness who testified about these studies, Dr. Portier, did so only in the limited context of arguing that they supported the biological plausibility of general causation. Dr. Portier did not offer an opinion about Plaintiff (or account for the differences in dosages between Plaintiff and laboratory animals), the difference in routes of administration, and the difference in the diseases allegedly seen in laboratory animals compared to MF. *See Joiner*, 522 U.S. at 144. Likewise, no expert purported to link alleged oxidative stress or other cellular mechanisms to MF, the cause of which is unknown. To the contrary, Dr. Kuzel explained that "the fact that we don't have a single gene mutation or disturbance suggests that it may be that DNA mutations or alterations may actually not be involved in the process that leads to mycosis fungoides at all." Tr. at 4736:6-20.

[13] This is particularly true in light of Dr. Kuzel's opinion that the causes and risk factors for each subset of NHL are different, and that there are known causes for some subtypes that are not causes for others. Tr. at 4731:19-4734:20. Dr. Kuzel explained, "[e]very case of mycosis fungoides is of unknown etiology," and that "you can't rule out idiopathic unless you can, with absolute certainty, pin things down. . . . Unless there's a clear, absolute certainty such as the viral etiologies, without scientific facts, there's no way to see what caused any patient's cancer." Tr. at 4789:20-4790:18.

2989:13-17; 2991:9-2995:24. For example, Plaintiff's physician at Stanford, Dr. Kim, testified that it is a "scientific fact" that there is no known cause of MF and anything else would be a "guess." Tr. at 2994:21-2996:1. Dr. Nabhan, who admitted that Dr. Kim is an internationally recognized expert on MF (Tr. at 2961:6-18), conceded that he never specialized in MF and never believed the Formulation causes MF until after he was retained to be an expert in this case. Tr. at 2897:10-2898:8. And unlike Dr. Nabhan, Monsanto's expert Dr. Kuzel *is* an expert in MF and was clear that "every case of [MF] is of unknown etiology." Tr. at 4790:3-4.

Third, Dr. Nabhan also failed to appropriately assess latency—whether the time period between exposure and the onset of Plaintiff's MF was consistent with causation. Dr. Nabhan admitted he had no real data on latency and no opinion about it. Tr. at 3010:22-3011:1; JNOV Motion at 15-16. And he did not consider Plaintiff's degree of exposure or whether it was sufficient to plausibly cause MF.[14] It was undisputed that the amount of exposure is relevant to causation, and Dr. Nabhan's total failure to consider it makes his opinion unreliable. His analysis was essentially that the exposure was sufficient to cause MF because Plaintiff developed MF—obviously circular logic. Tr. at 2835:3-18.

Finally, in an attempt to demonstrate a "doubling" of the risk, as is required to prove causation, Dr. Nabhan cherry-picked three data points from various studies. But Dr. Nabhan ignored all contrary data, including the contrary conclusions of Plaintiff's other experts. He also did not factor in the NCI Study or *any* other study that would undermine his ultimate conclusion. *See Talcum* Order at *19 (evidence of specific causation insufficient where expert "did not consider all available epidemiology and apply it to the facts relative to [plaintiff] except where it favored [plaintiff]."); *see also In re Zoloft Prods. Liab. Litig.*, 26 F. Supp. 3d 449, 460-62 (E.D.

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[14] Just like the flawed approach rejected in *Talcum*, Dr. Nabhan also did not rely on the testimony of any of Plaintiff's other experts. *Talcum* Order at *13. In any event, Dr. Sawyer's opinion that Plaintiff's exposure was theoretically sufficient to cause NHL was insufficient and unreliable. He never testified that Plaintiff's cancer was caused by the Formulation—nor could he, since he was not proffered as an expert in NHL or oncology. Instead, he simply testified about the amount of Formulation to which Plaintiff was theoretically exposed—albeit without testifying about any actual amount—and opined that the amount was sufficient to cause a carcinogenic response based on epidemiology studies that Plaintiff's epidemiologists agreed were "not causal." Sawyer Tr. at 3596:15-3597:4; 3674:25-3675:3; Portier Tr. at 1964:13-1965:7.

Pa. 2014). Dr. Nabhan's head-in-the-sand approach to science that does not line up with his conclusion is yet another reason his testimony cannot support causation.

As in the *Talcum* case, given the lack of anything other than a hypothesis about causation and the nature of the epidemiological evidence, the Court—in its role as the thirteenth juror—should order a new trial. *Talcum* Order at *25.

4. Plaintiff Likely Developed MF Before Exposure to the Formulation.

Plaintiff had the burden of proving that his exposure to the Formulation predated his MF diagnosis by enough time that he *could have developed the disease* during that period. Plaintiff not only failed to carry this burden, but given the latency of MF, the timing of his exposure makes it extraordinarily *improbable* that his cancer was caused by the Formulation.

Latency undermines Plaintiff's entire case for causation for a simple reason: Plaintiff relied on two incidents of acute exposure but those incidents occurred *after* Plaintiff began showing symptoms of MF. Plaintiff's purported exposure occurred during his job as a full-time integrated pest manager, which he began in June 2012. Nabhan Tr. at 2833:14-20. Plaintiff's medical records reveal symptoms of MF about a year later in the fall of 2013. *Id.* at 2953:2-20, 2956:19-2957:22. Yet it was not until April 2014 that he experienced his first acute exposure incident. *Id*. at 2970:13-17. A mere three months later, in July 2014, Plaintiff had a biopsy, the results of which were consistent with MF. *Id*. at 2963:8-13. Plaintiff's second acute exposure was not until January 29, 2015, after he was already being treated for MF. *Id*. at 2977:16-24. These incidents cannot be temporally linked to the onset of his NHL.

The great weight of evidence also established that it is highly unlikely that Formulation exposure starting in June 2012, when Plaintiff's job started, could cause diagnosable MF less than 18 months later. Plaintiff's designated expert Dr. Weisenberger (whom Plaintiff elected not to call) told the EPA that the average latency period for glyphosate was "**20 or more years from initial exposure**." Portier Tr. at 2380:21-2381:18, 2383:7-2384:4. Dr. Portier admitted that latency of 11 years was probably on the short side. *Id.* at 2373:19-25. And both Drs. Sawyer and Portier agreed that the median follow-up time in the NCI Study of 6.7 years was unlikely to be long enough to account for cancer latency. Sawyer Tr. at 3768:11-20; Portier Tr. at 2367:10-16.

None of Plaintiff's experts addressed these standard latency periods and they all testified that it *was more likely than not* that Plaintiff's cancer developed in a little over a one-year period. Faced with this unfavorable timing, Plaintiff instead inverted the inquiry by trying to establish that it was *not theoretically impossible* for his cancer to have developed in such a short time. For example, Dr. Sawyer, who is not an expert in NHL or MF, explained latency as a bell curve to try to explain that there is individual variation from the average latency period. Tr. at 3678:7-10. That Plaintiff's case is a possible extreme outlier on a bell curve, far from the median latencies measurable in many years, affirmatively shows that his cancer was *probably not* caused by glyphosate exposure. Unlike Plaintiff's experts, Dr. Kuzel, who is an expert in MF, explained that it usually takes years for any cancer to develop from the first cell to when it becomes clinically detectable. Tr. at 4748:5-14. He further testified that with respect to MF, it would take a minimum of *thirty months* to get a *one-centimeter tumor* that could reliably be biopsied. Tr. at 4748:5-4749:23.[15] The weight of the evidence thus established it was not even possible, let alone probable, that Plaintiff's MF resulted from the Formulation.

There was also no evidence that exposure made Plaintiff's MF worse or changed his prognosis. Dr. Kuzel testified that he has "never seen any evidence" that MF progresses due to exposure to the Formulation. Tr. at 4777:16-22. Dr. Nabhan agreed that "I don't think we know. You know, I mean, it's hard to tell" if continued exposure to the Formulation bore any relation to the progression of his disease. Tr. at 2865:1-5. Plaintiff's counsel asked the jury to rely on the so-called "tumor promotion" study in rodents ("George study"); however, there was no witness who testified that the George study could be linked to any human outcomes, MF, or, more significantly, Plaintiff's MF. In fact, Dr. Portier conceded that the George study did not even show "cancer" promotion—it observed benign growths—and that every regulatory body, including IARC deemed the study to be of poor quality. Portier Tr. at 1863:21-25 ("[IARC] reviewed it. I don't believe they used it."), 2229:13-2230:6, 2207:14-19; PX784, IARC Monograph p. 32 ("The Working

[15] This was a *conservative* estimate from Dr. Kuzel based on a one month doubling time of MF cancer cells (although many cancer cells take three to six months to double in number) and that it would take approximately 30 doublings of MF cells to reach approximately one billion cells—the approximate number of cells in a one centimeter tumor.

Group concluded this was an inadequate study for the evaluation of glyphosate."). The verdict on causation was contrary to the vast weight of the evidence.

B. <u>There Is Insufficient Evidence on Failure to Warn.</u>

A new trial on the failure-to-warn claims is also independently warranted because Plaintiff's evidence did not establish that Monsanto had a duty to warn. "Typically, under California law, we hold manufacturers strictly liable for injuries caused by their failure to warn of dangers that were known to the scientific community *at the time* they manufactured and distributed their product." *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 64 (2008). A duty to warn arises when "a particular risk . . . was known or knowable in light of the *generally recognized* and *prevailing best scientific and medical knowledge available* at the time of manufacture and distribution." *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1112, 1116 (1996) (emphasis added). But it is well established there is no duty to warn of risks that are "merely speculative or conjectural, or so remote and insignificant as to be negligible." *Id*. at 116.

The "generally recognized and prevailing best scientific and medical knowledge" at the time of manufacture and distribution of the Formulation (and up to the present day) is that it does not cause cancer. At the time Plaintiff's exposure began in June 2012, and at his MF diagnosis in 2014, there was effectively a global consensus that glyphosate was not likely to cause cancer in humans. By 2012, glyphosate had developed one of the largest bodies of scientific data of any substance in the world. Portier Tr. at 2051:1-3; Martens Dep. at 194:9-14. Worldwide regulatory and scientific bodies, including EPA, European Chemicals Agency ("ECHA"), and European Food Safety Authority ("EFSA"), had re-reviewed the safety of glyphosate every 10 to 15 years since 1974. Portier Tr. at 2072:14-23. EPA also approved the surfactants used in the Formulation. Farmer Dep. at 420:3-23. Regardless of Plaintiff's reliance on pre-2012 data, no regulatory or scientific body to have reviewed the entire body of the data concluded that glyphosate was likely to cause NHL in humans or required glyphosate to be accompanied with a cancer warning. Portier Tr. at 2010:4-25, 2098:21-23, 2106:12-15, 2110-2112, 2121-2122. Even during Plaintiff's use of the Formulation, glyphosate was undergoing the latest round of regulatory review. Benbrook Tr. at 3965:1-6. The resulting report, completed after EPA's re-registration

review of glyphosate in September 2016, concluded that glyphosate is not likely to be carcinogenic to humans. Farmer Dep. at 403:14-19, 405:2-406:9, 407:12-408:22.

Multiple scientific and regulatory agencies, including the EPA, continued to find that glyphosate is not carcinogenic to humans even after the March 2015 announcement of the IARC Monograph. The EFSA considered the IARC Monograph and reached the same conclusion as EPA—glyphosate is not carcinogenic for humans. Farmer Dep. at 395:7-15, 400:16-24; Portier Tr. at 2014:6-14. The German BfR did as well. *See* Portier Tr. at 2110:23-2111:1. So too did ECHA. *Id.* Same with the Joint Meeting of Pesticide Residues ("JMPR"), a World Health Organization program that looks at toxicology, and which evaluated the carcinogenic potential of glyphosate in 2016 and concluded it was not carcinogenic to humans. Farmer Dep. at 395:19-396:20; Portier Tr. at 2102:6-20.

The weight of the evidence does not support a finding that the risk of developing NHL from exposure to the Formulation is "generally accepted in the scientific community" now, let alone that this risk was "generally accepted" prior to the IARC Monograph when most of Plaintiff's exposure occurred and his MF developed.

C. <u>There Is Insufficient Evidence the Formulation Was Defectively Designed.</u>

With respect to the design defect claim, the weight of the evidence was that the Formulation was not defectively designed. Plaintiff rejected the risk-benefit test and chose to submit his design-defect claim under the consumer-expectation test. The evidence was insufficient to establish that the product was one about which an ordinary consumer could form minimum safety expectations. JNOV Motion at 19-20. Indeed, Plaintiff's certification as a qualified applicator is irreconcilable with a finding that he was an ordinary consumer. Johnson Tr. at 3223:24-3224:17; 3303:22-3304:19. The lack of evidence on this essential element of the consumer-expectation test strongly supports a new trial, if not JNOV, on Plaintiff's design defect claim.

D. <u>There Is Insufficient Evidence to Support Punitive Damages.</u>

The Court should also vacate the punitive damages award. JNOV Motion at 23-34. There was no evidence, let alone clear and convincing evidence, that could justify punitive damages

under California's exacting legal standards. If, however, the Court denies the JNOV Motion, the evidence of punitive damages was so "thin" the Court said it would "reconsider, depending on what the jury does." 7/30/18 Tr. at 4026:13-4027:8, 8/6/18 Tr. at 4909:21-22. On reconsideration, this Court should grant a new trial because the verdict is against the weight of the evidence under Cal Civ. Proc. Code § 657(6) for the following reasons.

First, there was no evidence that Monsanto believed the Formulation causes cancer, and all testimony was to the contrary. Monsanto could not possibly have willingly and knowingly disregarded a risk or intended harm that it did not believe existed. The honestly-held belief by Monsanto's scientists about the safety of the Formulation cannot be squared with the requirement that Plaintiff prove by clear and convincing evidence that Monsanto engaged in malice or acted despicably.

Second, Monsanto's scientific conclusions are confirmed by all the regulatory bodies tasked with protecting the public health in the United States and around the world. The unanimity of opinion in this group—which includes U.S. EPA, Canadian EPA, ECHA, EFSA, German BfR, the WHO's JMPR, and the Australian, New Zealand and Japanese regulatory authorities[16]—overwhelmingly supports the conclusion that Monsanto's scientists' professed beliefs were truly held, scientifically valid, and reasonable. These agencies all considered the same scientific evidence as Monsanto's scientists and reached the same conclusion: glyphosate does not cause cancer. Finding Monsanto liable for "willful and knowing disregard" of consumers' health would similarly indict these regulators for willfully and knowingly disregarding public health.

Third, the IARC Monograph merely reflects a scientific dispute, but that is not a basis for punitive damages. This is especially so considering that what scientific dispute exists tilts overwhelming in favor of the conclusion reached by Monsanto that glyphosate is not a human carcinogen. In less than a few days, IARC's Working Group discussed glyphosate, reviewing a small subset of what the EPA reviewed in its *years* of ongoing review. Blair Dep. at 115:12-16. From that review, they reached what is a solitary dissenting opinion against the tide of every other

[16] Goldstein Dep. at 340:7-341.3; Farmer Dep. at 395:7-15, 395:19- 396:20, 400:16-24; Portier Tr. at 2014:6-14, 2110:23-2111:1, 2102:6-20.

scientific and regulatory review. Punishing Monsanto for not immediately agreeing with IARC's conclusion would be unconstitutional and improper in light of the existing state of the science and its subsequent rejection by world regulators, not to mention subsequent studies like the NCI Study that confirmed the regulators' view.

Fourth, the IARC classification of glyphosate was first announced publicly in March 2015 and not published as a Monograph until months later. That was *after* Plaintiff was diagnosed with MF. To find the IARC classification had any logical nexus to Plaintiff's injury would require the jury to have concluded that a "failure to warn" caused Plaintiff's existing cancer to *worsen*. But the only putative evidence for "tumor promotion" consisted of the George study, which involved rodents and was never tied to MF or human outcomes. *See supra* at 14. Nor was it tied to Plaintiff's MF. Even Dr. Nabhan, who had little hesitation in expressing scientifically unsound opinions on Plaintiff's behalf, would not testify that the Formulation promotes or worsens existing tumors. Tr. at 2865:1-5.

Fifth, the documentary record Plaintiff presented to the jury—consisting of misleadingly-quoted excerpts from a few documents from a production of millions of pages—fails to meet the standard for punitive damages. For example, Dr. Farmer's putative "you-cannot-say-Roundup-doesn't cause cancer" email actually reflects Dr. Farmer's approval of the statement that Roundup (the Formulation) is safe and does *not* cause cancer at dosages far exceeding human exposures. Farmer Dep. at 50:2-20; 52:3-7; 53:15-18. Monsanto's 2002 internal memorandum, PX 282 (not admitted into evidence), supposedly reflecting Monsanto's malicious "knowledge" of epidemiology studies, begins with a statement that glyphosate is "*not* carcinogenic." Dr. Goldstein's internal email about Plaintiff's 2014 call indicates that it did not make sense to him and he intended to call Plaintiff back. Goldstein Dep. at 37:13-17, 56:18-57:12. In each case, the documents do not say what Plaintiff claims and fail to establish any conduct for which punitive damages would be warranted.

Sixth, although the Court allowed punitive damages to be considered by the jury, the two emails by Farmer and Heydens the Court tentatively identified as a justification for presenting the case to the jury are not evidence of malice or oppression. *See* JNOV Motion at 27-28. The

Farmer email simply shows disagreement with the McDuffie study and is so innocuous that Plaintiff's counsel did not mention it in his closing argument. PX 313. The Heydens email involves a statement about "ghostwriting" that did not occur, and could not logically or chronologically have affected Plaintiff in any way. PX 362. And even if the jury could find something nefarious in these emails (which they reasonably could not), they are just two emails out of millions of produced documents and would not be enough to warrant an award of punitive damages because they are overwhelmingly outweighed by the evidence of Monsanto's good-faith scientific conclusion, the affirmative testimony of the company witnesses, and the consistent views of regulatory agencies agreeing with Monsanto. JNOV Motion at 25-27.

II. THE DAMAGES AWARDS ARE EXCESSIVE AND UNCONSTITUTIONAL.

The Court should also vacate the award of both compensatory and punitive damages pursuant to Cal. Civ. Proc. Code § 657(5).[17] "[A] trial court reviews a motion challenging the excessiveness of . . . damages similar to other motions for new trial, as a 'thirteenth juror.'" *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640, 1689 (2005); *see also* Cal. Civ. Proc. Code § 657. A trial court, acting as the thirteenth juror, is to reweigh the evidence on damages and, "[i]f [s]he believes the damages awarded by the jury to be excessive," it "becomes [her] duty to reduce them." *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 507 (1961).

A. The Award for Noneconomic Loss Is Excessive and Unsupported.

The $37 million award for past and future noneconomic losses is excessive. An award out of line with similar verdicts may "giv[e] rise to the presumption that it was the result of passion or prejudice on the part of the jurors." *Seffert*, 56 Cal. 2d at 509. The $37 million in noneconomic compensatory damages here is grossly disproportionate to the noneconomic damages juries have awarded patients with terminal mesothelioma, an excruciatingly painful and terminal disease.[18]

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[17] If the Court nonetheless believes that some compensatory or punitive award is justified, it should enter a conditional order pursuant to Cal. Civ. Proc. Code § 662.5(a)(2).

[18] *See Garcia v. Duro Dyne Corp.*, 156 Cal. App. 4th 92, 95 (2007) ($750,000); *Cadlo v. Metalclad Insul. Corp.*, 151 Cal. App. 4th 1311, 1317 (2007) ($4,000,000); *Taylor v. John Crane, Inc.*, 113 Cal. App. 4th 1063, 1066 (2003) ($1,790,000); *Hackett v. John Crane, Inc.*, 98 Cal. App. 4th 1233, 1238–39 (2002) ($2,000,000); *Wilson v. John Crane, Inc.*, 81 Cal. App. 4th 847, 851

Even courts reviewing those awards have remitted noneconomic damages verdicts of $14 million and $14.1 million. *Bakkie v. Union Carbide Corp.*, 2007 WL 4206739, at *26 (Cal. App. Nov. 29, 2007); *Kelemen v. John Crane, Inc.*, 2011 WL 3913115, at *11 (Cal. App. Sept. 7, 2011).[19] In comparison, the $37 million awarded for non-economic damages is particularly excessive.

The $33 million award for future noneconomic damages is also unsupported by the evidence. A plaintiff may only recover for future suffering if he is "reasonably certain" to actually suffer such future harm. *See* Cal. Civ. Code § 3283; *Matthews v. Atchison, T & S.F. Ry. Co.*, 54 Cal. App. 2d 549, 560 (1942); *Oliveira v. Warren*, 24 Cal. App. 2d 712, 714 (1938); *Mendoza v. Rudolf*, 140 Cal. App. 2d 633, 636–637 (1956). Thus, future damages are limited by a plaintiff's projected remaining lifespan. *See, e.g.*, *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 305-06 (2016) (reducing damages to level based on plaintiff's life expectancy at trial).

Plaintiff's counsel directly contradicted this fundamental damages rule in arguing that Plaintiff should receive $1 million per year for his entire lifespan (as projected for a healthy person his age by actuary) "because he deserves that money…it doesn't matter if he dies in two years or dies in 20." Closing Tr. at 5110:13-18. The jury, heeding this improper argument, awarded precisely the amount counsel requested for future noneconomic damages: $33 million. Damages for future pain and suffering may be based *only* on the time which the Plaintiff himself is actually expected to live into the future. Here, the undisputed evidence at trial was that Plaintiff's post-trial life expectancy was between six months and two years. Nabhan Tr. at 2884:1-15; 2886:20-2887:12, Thus, the compensatory damages must be reduced (at a minimum) from $33 million to $2 million. *See, e.g.*, *Kelemen*, 2011 WL 3913115 at *11 ("The record suggests that the jury's $14 million award represented $1 million for each of the 14 years he was statistically likely to have lived without mesothelioma and was thus based on a misunderstanding of the law and the evidence presented."); 2 Stein on Personal Injury Damages Treatise § 8.25 (3d. ed.) ("[D]amages for future pain and suffering are based upon [a] plaintiff's probable life expectancy *in his or her*

(2000) ($3,000,000); *Overly v. Ingalls Shipbuilding*, 74 Cal. App. 4th 164, 169–70 (1999). ($400,000); *Buttram v. Owens-Corning Fiberglass Corp.*, 16 Cal. 4th 520, 524 (1997) ($450,000).

[19] The Court may take judicial notice of the verdicts in these unpublished opinions. *See People v. Hill*, 17 Cal. 4th 800, 848 & n.9 (1998) (taking judicial notice of facts in unpublished opinion).

injured condition.") (emphasis added); *see also Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 764 (1998) ("The jury must impartially determine pain and suffering damages based upon evidence specific to the plaintiff, as opposed to statistical data concerning the public at large.").

B. The $250 Million Punitive Damages Award Is Excessive and Unconstitutional.

1. The Punitive Damage Award Is Unconstitutional.

Because punitive damages "serve the same purposes as criminal penalties" but are awarded by juries without "the protections applicable in a criminal proceeding," S*tate Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), due process "imposes certain limits, in respect . . . to amounts forbidden as 'grossly excessive'" as a safeguard against excessive penalties. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). The court must consider three "guideposts" to determine whether a punitive damages award comports with due process: (1) the degree of reprehensibility of the defendant's actions; (2) the ratio between the compensatory damages and the punitive damages award; and (3) a comparison between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418; *accord Roby v. McKesson Corp.*, 47 Cal. 4th 686, 712 (2009).

Reprehensibility: The reprehensibility guidepost reflects the view that some conduct—such as "intentional malice," "trickery," and "threats of violence"—is "more blameworthy." *BMW of N. Am. v. Gore*, 517 U.S. 559, 575-76 (1996). "It should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.

The Court's polite comment that the punitive evidence is "thin" understates the lack of evidence. 8/6/18 Tr. at 4909:21-22. Plaintiff did not introduce a single piece of evidence showing that any Monsanto employee actually believes the Formulation causes NHL, let alone that an employee—much less a managing agent—disregarded a known risk. There is no evidence that Monsanto through deception or deceit inhibited the development of science concerning associations between exposure to the Formulation and NHL. Rather, the evidence shows that no regulatory or scientific body has ever concluded glyphosate is likely to cause NHL; that until the

IARC Monograph in 2015 no regulatory or scientific body had ever found the Formulation to be even potentially carcinogenic to humans; and that since the IARC Monograph in 2015 several regulatory and scientific bodies have expressly disagreed with IARC's findings.

Ratio: The second "guidepost" focuses on the ratio between the compensatory and punitive damage awards. *Gore*, 517 U.S. at 580-81; *State Farm*, 538 U.S. at 425. Ratios that "exceed 9 or 10 to 1" are presumptively unconstitutional.

Due process permits higher ratios—perhaps closer to the 9 to 1 ratio—"between punitive damages and a small compensatory award for purely economic damages." *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1182 (2005). Because noneconomic damages "may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent," due process requires smaller ratios—perhaps no greater than 1 to 1—between "punitive damages and a substantial compensatory award for [noneconomic damages]." *Id.*; *see also State Farm*, 538 U.S. at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."). In *Roby v. McKesson Corp.*, the California Supreme Court held that, "[b]ased on the relatively low degree of reprehensibility and the substantial award of noneconomic damages" that "thus includ[ed] a punitive component," a 1 to 1 ratio was "the maximum punitive damages . . . in light of the constraints imposed by the federal constitution." 47 Cal. 4th at 719 ($1,905.000 compensatory award consisting of $1.3 in noneconomic damages).

Here, the jury awarded approximately $39 million in compensatory damages, of which $31 million was improper as a matter of law, and $250 million punitive damages. This amounts to a 6.4 to 1 ratio of punitive to compensatory damages even before any correction for the legal error in the future noneconomic damages award, and a 31.3 to 1 ratio after such a correction. Both greatly exceed the 1 to 1 ratio *Roby* held was the constitutional "maximum" where, like here, reprehensibility was, at best, low and the compensatory damage award contained substantial noneconomic damages reflecting a "punitive component." *Id.*; *see also Simon*, 35 Cal. 4th at 1182 ("Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.'"). Of the $39

million in compensatory damages awarded to Plaintiff, the jury awarded $37 million in non-economic compensatory damages, amounting to an extreme 94% of the total compensatory award that dwarfs Plaintiff's economic damages. By contrast the compensatory award in *Roby*—which the California Supreme Court found contained a "punitive component" requiring a 1 to 1 ratio—consisted of only 68% noneconomic damages. *Roby*, 47 Cal. 4th at 719. Even after the jury's improper award of $33 million for non-economic future loss is reduced to $2 million, the remaining noneconomic damages is still nearly double Plaintiff's economic damages. No punitive award greater than a 1 to 1 ratio may comport with due process here—whether the compensatory damages are $39 million or reduced to $8 million.

Comparable Cases: Allowing the jury's $250 million punitive damage award to survive judicial scrutiny would be unprecedented in California. The two largest punitive damages awards to have survived judicial scrutiny in California that Monsanto is aware of are $55 and $50 million under facts far more egregious than Plaintiff proved here. *See Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277 (2008) (depublished opinion reducing punitive damage award to $55 million amounting to a 2 to 1 ratio to compensatory damages for deficient design resulting from deliberate decisions of management); *Boeken*, 127 Cal. App. 4th at 1691-1692 (remitting the jury's punitive damage award to $50 million resulting in an approximately 9 to 1 ratio for knowingly selling cancer-causing cigarettes and fraud).[20]

Because Monsanto did not engage in reprehensible conduct and the jury awarded substantial compensatory damages that contain a punitive element and far exceed civil penalties for similar conduct, any ratio greater than 1 to 1 of the remitted compensatory award would be excessive under the Due Process Clause.

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[20] The $250 million punitive award is also astronomical compared to civil penalties available for similar conduct. U.S. EPA may fine Monsanto $19,446 for selling the Formulation with a label that "does not contain a warning or caution statement . . . adequate to protect public health." 7 U.S.C. § 136j(a)(1)(E); 40 C.F.R. § 19.4 (adjusting civil penalty for inflation). The State of California can levy up to a $2,500 penalty per day for misbranded herbicide labels. Cal. Health & Safety Code § 25249.7. The jury's punitive damage award equals approximately 274 years of such fines set at the maximum amount. As the IARC Monograph was published in March 2015 and Plaintiff testified his exposure to the Formulation stopped in early 2016, even a full year's worth of the maximum daily fine is approximately $912,000.

2. The Punitive Damage Award Is Excessive Under State Law.

California courts have also developed independent state grounds for judicial review of punitive damage awards. *See Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928 (1978). The three state law factors are: (1) the reprehensibility of the acts of the defendant in light of the record as a whole; (2) the amount of compensatory damages awarded; and (3) the wealth of the particular defendant. *Adams v. Murakami*, 54 Cal. 3d 105, 110-11 (1991). For the same reasons discussed above, the first and second factors demonstrate the punitive award is excessive.

As to wealth, Monsanto is a large company with substantial cash reserves and net worth. But the punitive award here amounts to more than 8% of Monsanto's cash holdings and approximately 4% of its net worth. 7/27/18 Tr. at 4017:13-17. Although punitive damages "generally are not allowed to exceed 10 percent of the net worth of the defendant" even in the most reprehensible cases, "significantly lower percentages are indeed the norm." *See Bigler-Engler*, 7 Cal. App. 5th at 308. The damages even in this single case far exceed the "norm" for a case that clearly is not "among the most reprehensible" (particularly given the weaknesses the Court identified in reluctantly submitting punitive damages to the jury). And in this large serial litigation, the risk that Monsanto could be punished many times over for the same conduct concerning the sale of the Formulation makes the jury's punitive award excessive under the final wealth prong. *See Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1209 (2005) (rejecting punitive award based on profit made from sale of product due to multiple punishment problem); *Delos v. Farmers Grp., Inc.*, 93 Cal. App. 3d 642, 666 (1979) (affirming remittance of punitive damage award based upon recognition of similar actions pending and a likelihood of multiple judgments involving the same conduct).

III. IRREGULARITIES IN THE PROCEEDING REQUIRE A NEW TRIAL.

A. Plaintiff's Counsel Engaged in Prejudicial Misconduct.

The Court should grant a new trial under Cal. Civ. Proc. Code § 657(1) because Plaintiff's counsel engaged in repeated and flagrant misconduct in front of the jury. His closing argument was littered with the type of misconduct California law flatly prohibits; he also routinely ignored the Court's rulings excluding evidence on motions *in limine*. Any of this misconduct on its own

could be grounds for a new trial. Combined, a new trial is required.

Improper Message to Punish on Behalf of Society. An attorney may not ask jurors to send a message to a party in litigation to punish them *independent* of any damages actually suffered by an opposing litigant. *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 694 (2008) (reversing punitive verdict where counsel in closing emphasized "the numbers of smokers in California who have died as a result of smoking cigarettes" and argued those citizens were "lied to year after year" like plaintiff). Punitive damages are designed only to punish the conduct of a defendant vis-a-vis the plaintiff, *not* to punish the defendant on behalf of society at large. Here, Plaintiff's counsel expressly implored the jury to "actually change[] the world" and become a "part of history." Edwards Dec. Ex. A at 5058: 1-5. The Court told counsel that his "statement to the jury … suggesting to the jury that they should send a message with the amount of punitive damages that they award … is an incorrect statement of the law, because the purpose of punitive damages is to punish the defendant for any alleged conduct related to harm to Mr. Johnson only, not to others past or future." *Id.* at 5254:14-21. Although the Court gave a curative instruction, it was not curative as Plaintiff's counsel admits. He repeatedly told the press that he *believes the verdict shows the jury heeded his instruction* to send a message to Monsanto:

> The punitive damages are not really about Mr. Johnson; they are really about Monsanto. …
>
> When I was talking to the jury in our closing argument, I told them that this was a chance to send a message to Monsanto, that this was a chance to actually maybe even change the world. And I think that resonated with the jurors because they saw that if they could make Monsanto pay a certain amount of money, that it actually might lead to future correct conduct…

Edwards Dec. Ex. B. This invitation was made worse by counsel's repeated invocation of the "liberals and morons" email, which he used to invite the jury to punish Monsanto for the political views of a non-Monsanto employee forwarded in a single email. Edwards Dec. Ex. A at 5105:23-24, 5106:5. This amounts to dangerous misconduct that warrants reversal.

Improper Arguments Characterizing Evidence Not Introduced. The requirement that an attorney limit his argument to evidence *in the record* also necessarily constrains the boundaries of what an attorney may argue regarding evidence a party *did not* introduce. It is "serious

misconduct" for an attorney to argue "the importance of [an] excluded document." *Hansen v. Warco Steel Corp.*, 237 Cal. App. 2d 870, 878 (1965). Yet, throughout his closing, Plaintiff's counsel made one inaccurate representation after another to the jury about *why* an EPA study was not fully in evidence and was "given limited significance," including that "the 2017 report is not in evidence" because, if it were, "they'd have to own up to that." Edwards Dec. Ex. A at 5065:25-5066:14. He then speculated to the jury about why evidence was not introduced: "Why didn't [Monsanto] call somebody?" and "They didn't present anybody [to testify] about mechanism" because, "they couldn't find" a witness and "if they did, I would have torn that person apart" on cross-examination. *Id.* at 5063:20-5064:13, 5065:11-12.[21] These arguments improperly invited the jury to speculate why evidence was not admitted and to shift the burden of proof to Monsanto.

Counsel used the same tactic when mischaracterizing the EPA 2016 OPP report (DX 2481), and commenting upon the Court's limiting instruction to mean that the jury "can look at" the IARC Monograph and that "you can believe the truth of the statements made in it, but you cannot believe the truth of this document." *Id.* at 5064:14-5065:5. He went on to say, "And the reason why is a really important one, because Monsanto didn't put anyone in this stand right here to talk to you about it intelligently" because "they know if they did, I would have torn that person apart." *Id.* at 5065:6-12. Counsel thus tried to leverage an evidentiary ruling about the proper purposes for which a jury could consider certain evidence—a ruling that itself severely prejudiced Monsanto by placing EPA's findings about the science on a different level than IARC's far less considered ones—to draw conclusions that *had evidence been presented* about the scientific reliability of EPA's conclusions, it would have been devastating to Monsanto's case, which is why no such evidence was offered. This was highly improper and unduly prejudicial. These repeated false statements and speculation about evidence not in the record amount to attorney misconduct

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[21] *See also id.* at 5070:7-12 ("They could have brought in a mechanism person, but they didn't even bother because if they had brought in an expert to try to tell you the mechanism data wasn't strong or didn't support causation, it would have been a disaster for him. I would have put study after study in front of them and said, sir, how can you say that?"); 5126:24-5127:4 ("Why? Why didn't they bring anybody? There's two possibilities. One, they couldn't find somebody who could do that and not commit perjury. Or, two, they were afraid of all the documents I would have to run through them showing that there's no conceivable way they didn't know the risk.").

warranting a new trial. *McCoy v. Pac. Mar. Assn.*, 216 Cal. App. 4th 283, 304 (2013) (affirming grant of new trial, in deference to trial court's role as 13th juror, based on counsel's violation of evidentiary rulings during closing argument).

Improper Statements Divorced from the Evidence and Designed to Inflame Prejudice Against a Corporation. Plaintiff's counsel invited the jury to travel down a rabbit hole of his own imagination, in which Monsanto executives were "waiting for the phone to ring" in a headquarters conference room, and "in that board room . . . behind them is a bunch of champagne on ice." Edwards Dec. Ex. A at 5117:2-7. The jury was specifically invited to "tell[] those people . . . they have to put the phone down, look at each other, and say 'We have to change what we're doing'" because, if the damages number "is not significant enough, champagne corks will pop" and "'Attaboys'" will abound. *Id.* at 5117:12-19. While lawyers are permitted to "vigorously argue" their case, *Garcia v. ConMed Corp.*, 204 Cal. App. 4th 144, 147–48 (2012), an attorney "cannot overreach by stating his personal belief based on facts not in evidence." *People v. Bandhauer*, 66 Cal. 2d 524, 529 (1967). Counsel's comments about champagne on ice were pure fiction. Such blustering was designed to "[a]ppeal[] to the sympathy of the jury based on the size or corporate status of [the] defendant[.]" *Brokopp v. Ford Motor Co.*, 71 Cal. App. 3d 841, 860 (1977); *Seimon v. Southern Pac. Transp. Co.*, 67 Cal. App. 3d 600, 606 (1977) (attorneys may not appeal to jurors' social or economic prejudices by referring to litigants' wealth or poverty). This is especially problematic because Plaintiff's counsel continued to argue his champagne-on-ice fantasy without abatement *even after* an objection to it was sustained.[22] *See People v. Tully*, 54 Cal. 4th 952, 1035 (2012) (misconduct is exacerbated if the attorney continues to attempt to elicit this evidence after the opposing attorney has objected.).

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[22] Edwards Dec. Ex. A. at 5117:5- 5117:23 ("And in that conference room, in that board room, there's a bunch of executives waiting for the phone to ring. Behind them is a bunch of champagne on ice. MR. LOMBARDI: Your Honor, I object. This is supposed to be about the evidence. This is complete fantasy. **THE COURT: *Sustained.*** MR. WISNER: The number that you have to come out with is the number that tells those people – they hear it, and they have to put the phone down, look at each other, and say, "We have to change what we're doing." Because if the number comes out and it's not significant enough, champagne corks will pop. "Attaboys," are everywhere. MR. LOMBARDI: Your Honor, it's the same objection. ***THE COURT: Sustained***. Mr. Wisner, please do not engage in speculation.") (emphasis added).

Improper References to Excluded Evidence. Plaintiff's counsel intentionally undermined the Court's evidentiary rulings and elicited inadmissible evidence. The entire purpose of a trial court's ruling on evidence outside the presence of the jury "is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." *Ulloa v. McMillin Real Estate & Mortg., Inc.*, 149 Cal. App. 4th 333, 337 (2007) (citation omitted). Plaintiff's counsel, however, repeatedly rang forbidden evidentiary bells.

This happened most obviously in Plaintiff counsel's repeated references to tobacco. Argument linking the Formulation to cigarettes violates the Court's express prohibition and counsel's stipulation. Edwards Dec. Ex. A at 332:15-25, 5030:19-5031:14. Plaintiff's counsel nevertheless elicited extensive comparisons between tobacco companies and Monsanto via the testimony of Dr. Neugut. *Id.* at 2553:15; 2554:23; 2555:15; 2556:1-12; 2580:17-21; 2585:13; 2609:1; 2623:7. Plaintiff's counsel was then admonished again, immediately before closing argument, not to renew the tobacco comparison. *Id.* at 5030:19-5031:14. Monsanto argued that any comparison to the tobacco industry was far beyond the evidence presented, and the Court agreed.[23] Nevertheless, Plaintiff's counsel argued that the experts who testified for Monsanto were "hiding the risk" of the Formulation in the exact same way that experts did to conceal the cancer-causing properties of tobacco. *Id*. at 5073:12-20. Defense counsel immediately objected, and the Court sustained the objection. *Id.* at 5073:21-24. Yet Plaintiff's counsel continued undeterred to link the testimony of Monsanto experts to the testimony of "scientific organizations that held out to the end and argued that the science [is] really clear about tobacco and causing cancer," a similarity that Plaintiff's counsel opined to the jury, "should tell you a lot." *Id.* at 5074:16-5075:2. The prejudice is patently obvious.[24]

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[23] Edwards Dec. Ex. A at 5032:24-5033:8 ("There's been no testimony whatsoever, no witness that saying every substance that's ever been claimed to be carcinogenic and ultimately proved to be carcinogenic was defended by these same methods, by arguments about confounding, that this happened with asbestos, this happened with tobacco, et cetera. That's something Mr. Wisner came up with, and it's far beyond the record. . . . THE COURT: Yes, I agree.").

[24] Worse still, the tobacco references made in closing argument were not the only time that Plaintiff's counsel violated the Court's evidentiary rulings by making explicit reference to excluded evidence. For example, the Court prohibited Plaintiff's counsel from eliciting testimony

Objections Were Timely Made, but Continual Objections Would Have Been Futile. To the extent counsel did not contemporaneously object to any of Plaintiff's counsel's misconduct, such failure did not constitute waiver. Repeated objections to Plaintiff's counsel's continual misconduct would have been futile because the damage had been done, Plaintiff's counsel was disregarding the Court's rulings, and a curative instruction would only bring further attention to the prejudicial arguments. A defendant is excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. *Hill*, 17 Cal. 4th at 820-21 (despite lack of contemporaneous objections, defense did not forfeit objections where it was subjected to "constant barrage of" prosecutorial misconduct).

The misconduct described above is sufficiently prejudicial to require a new trial. The standard is whether the moving party can demonstrate a probability that it would have achieved a "result more favorable," absent the misconduct. *See Cassim v. Allstate Ins. Co*., 33 Cal. 4th 780, 800 (2004), *as modified* (Oct. 13, 2004); *Garcia*, 204 Cal. App. 4th at 149. That bar is not particularly high: California courts have "made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." *Cassim*, 33 Cal. 4th at 800 (citing *College Hospital Inc. v. Superior Court*, 8 Cal. 4th 704, 715 (1994)). In evaluating prejudice, courts consider the seriousness of the misconduct, the judge's control of counsel's conduct and the efficacy of objections or admonitions to counsel, and the likelihood of actual prejudice to the jury. *Martinez*, 238 Cal. App. 4th at 568; *see also Sabella v. S. Pac. Co.*, 70 Cal. 2d 311, 320-21 (1969). Each of these factors point to prejudice here.

Many of the offending statements at issue, taken on their own, should compel a new trial. California courts have noted that a single flagrant misstatement that amounts to attorney misconduct can sustain a new trial motion. *Cassim*, 33 Cal. 4th at 803 (stating that "[i]t is true, as the Court of Appeal majority observed . . . that a single instance of misconduct can justify

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that POEA surfactants were banned in other parts of the world, including in the European Union. *See* Edwards Dec. Ex. A at 3584:2-8. Yet, the same day, Plaintiff's counsel did exactly that. *See id.* at 3627:16-17. Likewise, the Court excluded any reference to Agent Orange. *Id.* at 156:8-11, 2591:11-21 (reiterating exclusion). Yet Plaintiff's counsel elicited five such references from a witness (s*ee id.* at 2448:2-23; 2548), misconduct that appeared to be intentional. *See id.* at 2590.

reversal" and collecting examples). Because these pervasive and repeated misstatements could justify a new trial on their own, it is *at least* prejudicial error when they are taken together. *Garden Grove Sch. Dist. of Orange Cty. v. Hendler*, 63 Cal. 2d 141, 143 (1965) (combination of misconduct, which included "alluding to facts not in evidence . . . allud[ing] to his personal knowledge in his summation to the jury, and . . . appeal[ing] to the jurors' economic self-interest and provinciality" amounted to prejudicial error).

The Court repeatedly warned Plaintiff's counsel before his closing argument even began to stick to the evidence presented at trial and contained in the record. Edwards Dec. Ex. A at 5031:11-14, 5033:9-11, 5034:17-20. He didn't listen. Worse still, Plaintiff's counsel ignored contemporaneous admonitions given during his closing argument when defense counsel objected. *Id.* at 5117:8-11, 5117:20-21; 5073:21-24. By ignoring instructions from the bench, Plaintiff's counsel modeled for the jury that they, too, could ignore the Court's instructions. *Martinez*, 238 Cal. App. 4th at 569 ("By simply ignoring the trial judge's rulings, [counsel] made it inevitable that the jury would conclude it didn't have to pay attention to the trial judge either.").

After defense counsel renewed its objection in writing to specific improper statements, the Court gave a curative instruction that vaguely addressed only the statement about "changing the world." *Id.* at 5267:6-5268:2. This limited instruction did not cure the actual prejudice. First, the instruction was limited (by vague reference) to only one instance of misconduct. Second, the instruction was given a day after the misconduct and did not identify the improper statements. Finally, the misconduct constituted some of the last things the jury heard before deliberations. When, as here, an attorney repeatedly engages in multiple instances of misconduct in closing argument, a passing curative instruction cannot suffice to correct the error. *Love v. Wolf*, 226 Cal. App. 2d 378, 392 (1964) ("As any experienced trial lawyer knows, multiple objections have a tendency to alienate a jury's good will," and "[a]s for curing error by admonishing a jury, while this may be possible when error is isolated and unemphasized, an attempt to rectify repeated and resounding misconduct by admonition is, as counsel here has expressed it, like trying to unring a bell."). A new trial is warranted.

B. Plaintiff Presented Evidence That Should Have Been Excluded.

Prejudicial evidentiary errors require grant of a new trial. Cal. Civ. Proc. Code § 657(1), (7); *Hernandez v. Cnty. of Los Angeles*, 226 Cal. App. 4th 1599, 1616 (2014).

1. Expert Testimony Should Have Been Excluded Under *Sargon*.

On a motion for new trial, this Court can reconsider evidentiary rulings under *Sargon* even if they were made at an earlier stage of the proceedings by a different judge. *See* Cal. Civ. Proc. Code § 657(1); *Sandco Am., Inc. v. Notrica*, 216 Cal. App. 3d 1495 (1990). This Court has now had the benefit of seeing the actual testimony offered by the witnesses, and should grant a new trial based on numerous instances of expert testimony that were not based on reliable methodology, as Monsanto argued in its *Sargon* briefing, incorporated by reference herein.

Dr. Nabhan. First, Dr. Nabhan was not qualified to opine that the Formulation is a cause of NHL, the materials he reviewed did not support that opinion, and he provided no opinion as to whether the amount to which Plaintiff was exposed could have a carcinogenic effect. *See Talcum* Order at *14 (improper to rule in chemical as plausible cause where epidemiology did not support it, and expert testified that "epidemiology was just one of the factors she looked at," but "did not mention any others"). Second, Dr. Nabhan's conclusion that the Formulation more likely than not caused Plaintiff's MF was based entirely on temporal proximity and speculation. *Compare id.* at *15 ("the court is of the firm view that [expert's] ruling out of [other risk factors] amounted to no more than speculation."). He admitted that most cases of NHL are of unknown origin and that Plaintiff "could have" developed MF even if he had never been exposed to the Formulation. Dr. Nabhan thus had no basis to find that the Plaintiff's MF was not idiopathic. Dr. Nabhan's conclusion came down to the temporal association between Plaintiff's exposure and his MF diagnosis, which is particularly problematic because he had no opinion on and, in fact, intentionally ignored the significance of latency.

Dr. Sawyer. Dr. Sawyer gave a specific-causation opinion based on his "cancer slope" methodology. But after Judge Karnow's *Sargon* ruling gutted his opinion, he instead provided general-causation opinions for which he had insufficient expertise, methodology, and scientific basis. He opined that the Formulation can cause NHL, but he provided no basis for that opinion.

He opined that there was sufficient time between Plaintiff's exposure and diagnosis for the Formulation to cause his MF, but that opinion was based on epidemiological studies, and he was not proffered as an expert in epidemiology, oncology, or NHL, nor had he ever published on latency. Tr. at 3594:4-11; 36754:25-3675:16; 3682:8-18; 3765:24-3666:1. Finally, Dr. Sawyer's opinion that the amount of Plaintiff's exposure was sufficient to cause his MF should have been excluded because he did not offer testimony about Plaintiff's actual amount of exposure,[25] has never researched or published on dermal absorption (Tr. at 3718:4-23; 3736:6-11), and had no reliable methodology for his opinions. He instead opined that Plaintiff's exposure put him the "middle" of the same epidemiology studies Plaintiff's experts and counsel agree are not sufficient to establish causation. Tr. at 3674:25-3675:16. Furthermore, there was no evidence on how much exposure is required for carcinogenicity—leaving a huge analytical gap between the scientific evidence and Dr. Sawyer's conclusion. Similar opinions by Dr. Sawyer have been excluded as unreliable under *Daubert*. *See Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1163-64 (E.D. Wash 2009).

Dr. Portier. Dr. Portier's testimony that the animal toxicology studies supported causation was not reliable. Rather, he analyzed the data using a variety of different statistical tests that were designed after the fact in order to get a particular result. Likewise, Dr. Portier's opinion that it was biologically plausible that the Formulation causes NHL in humans based on mouse studies lacked a reliable methodology. Dr. Portier had based this opinion on his "pooling analysis," which was excluded by Judge Karnow. *See* 5/17/18 *Sargon* Order at 27-28. Therefore, his opinion at trial lacked any non-speculative methodology.

Dr. Portier and Dr. Neugut. Drs. Portier and Neugut's opinions that the epidemiological studies demonstrated an association between the Formulation and NHL were unreliable because: (1) the studies were not adjusted for other pesticides; (2) the results lacked statistical significance; (3) the opinions failed to consider the larger and more recent Agricultural Health Study; and (4) they admitted the weak associations found could be the result of bias, confounding, or chance. In

[25] *See e.g.* Tr. 3692:3-7 (Q: And you didn't do any calculation yourself of the amount of drift that Mr. Johnson was exposed to; correct? A. Of course not.).

addition, Judge Karnow's *Sargon* order made clear that genotoxicity and animal studies were relevant only because they were factors in the Bradford-Hill analysis. Since the epidemiology did not demonstrate a statistically significant association, it was improper for any expert to apply Bradford-Hill or to testify about genotoxicity and animal studies.

The Court should strike all of these opinions as unreliable and grant a new trial.

2. Other Testimony and Evidence Was Prejudicially Admitted.

a. EPA and Foreign Regulatory Documents

Despite permitting the unlimited introduction of the IARC Monograph, the Court erroneously excluded official EPA documents (dated from 1993 to 2017) reflecting the agency's contrary conclusion (DX 2489, 2486, 2437, 2481), along with official documents from EFSA, ECHA, and JMPR. The Court found these documents to be hearsay, and only allowed—quite late in the trial—the admission of two documents (from 1993 and 2016) for "the limited purpose of showing Monsanto's state of mind regarding the state of the science and for no other purpose." 8/7/2018 Tr. at 5054–55. Plaintiff's counsel then improperly argued that the jury could conclude from this limiting instruction that the science behind EPA's conclusions was flawed. The documents should have been admitted for their truth under the "official records" exception.

An official record is exempt from the hearsay rule if "(a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event; and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness." Cal. Evid. Code § 1280. These EPA and foreign regulatory documents satisfy each criterion: They were drafted by EPA employees. *Id.* § 1280(a). They each memorialized a recent official determination by the agency. *Id.* § 1280(b). And they were prepared by the very entity tasked by law with reviewing and approving glyphosate and, in particular, with determining its carcinogenic potential, and a government entity is presumptively trustworthy for its legally appointed purposes. *Id.* § 1280(c); *see Coates v. AC&S, Inc.*, 844 F. Supp. 1126, 1134 (E.D. La. 1994). The documents are not hearsay. *See, e.g.*, *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th, 51, 139–40 (2017) (affirming admission under § 1280 of government reports, including NIH report, "weekly report" published by the CDC, and WHO

booklet on lead poisoning); *Palmisano v. Olin Corp.*, 2005 WL 677560, *3 (N.D. Cal. June 24, 2005) ("EPA reports are generally admissible" under analogous Federal Rule 803(8)(C)) (quoting *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1206 (8th Cir. 1990)).

It was extraordinarily prejudicial that Plaintiff was able to introduce IARC's findings while the contrary EPA Reports and foreign regulatory reports were excluded.[26] *See* [1993 R.E.D. at 2, 7] ("EPA classified glyphosate as a Group E oncogene—one that shows evidence of non-carcinogenicity for humans—based on the lack of evidence of carcinogenicity in adequate studies. . . . [Its proper] use will not pose unreasonable risks or adverse effects to humans or the environment."). The documents demonstrated that not only Monsanto, but independent regulators and scientists, disagree with IARC's findings. Moreover, the documents would have shown that EPA *twice* considered and rejected IARC's conclusions. DX 2437, Cancer Assessment Review Committee, Cancer Assessment Document: Evaluation of the Carcinogenic Potential of Glyphosate Final Report (p. 7-10); DX 2486, Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential. But the jury was unable to consider many of the documents, and for the two documents that were admitted, it could not consider them for their truth—a point Plaintiff's counsel repeatedly hammered in closing. *See* Tr. at 5064-65 ("This [limiting] instruction does not apply to the IARC Monograph. You can look at that document, and you can believe the truth of the statements made in it, but you cannot believe the truth of [the EPA documents]."). In short, the jury got only one side of the regulatory "truth."

[26] Even if the documents could not be admitted for their truth, the Court erred in not admitting the 2017 OPP Report with a limiting instruction. The Court denied admission on grounds that no witness had testified to it. *See* 7/30/18 Tr. at 4170–71. But *Dr. Portier* testified to it (Tr. at 2208-2210) and, in any event, the "official records" exception allows for admission "without necessarily requiring a witness to testify as to [a document's] identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness." Law Rev. Comm'n Comments, Cal. Evid. Code § 1280. The EPA's official certification of these documents meets that exception. *See Jacobson v. Gourley*, 83 Cal. App. 1331, 1335 (2000). This error was prejudicial. Indeed, the 2017 OPP Report was so important that not only did Plaintiff's counsel explicitly highlight that the 2017 Report was missing from evidence, he *affirmatively misled the jury regarding why*. *See* Closing Tr. at 5066 ("They didn't explain anything. And that's why the 2017 report is not in evidence . . . [,] Monsanto didn't put that in evidence. They only want you to see this little part of the story, and even this part of the story is limited.").

b. Azevedo Testimony

The Court improperly admitted prejudicial testimony from Kirk Azevedo over Monsanto's objection. 6/20/18 Tr. at 127-29; Azevedo Tr. at 4016. Azevedo testified that "one of the vice presidents" told him "we're about making money, so get it straight." Azevedo Dep. at 51:4-52:24. This is pure hearsay. Cal. Evid. Code § 1200. The Court ultimately struck this evidence just before closing, but the jury had seen and heard it in opening and seen the video played during the trial. It should have been excluded as irrelevant and creating a substantial danger of prejudice. Cal. Evid. Code §§ 350, 353. The error was undoubtedly prejudicial. Plaintiff played the testimony in his opening and then immediately told the jury that Monsanto's greed explains their conduct in this case. Opening Tr. at 1451:21–1452:2.

c. "Liberals and Morons" Email

The Court improperly allowed Plaintiff to admit an email drafted by a third party regarding Proposition 65 that was forwarded by Monsanto employee suggesting that persons who believe the Formulation is carcinogenic are "liberals," "morons," and "zombie[s]." PX 290. The evidence had no probative value whatsoever. The Monsanto employee was a product sales manager with no control of the design or labeling of the Formulation. He was not a "managing agent," and his act of forwarding an email he did not draft has no relevance to punitive damages. And whatever minimal probative value that can imagined was substantially outweighed by the danger of undue prejudice and therefore the evidence should not have been admitted. Cal. Evid. Code § 353.

C. There Were Inaccurate and Prejudicial Instructional Errors.

A new trial is required when the instructions given to the jury contain errors of law. Cal. Civ. Proc. Code § 657(7).

Consumer Expectation Instruction: For all the reasons stated in Section I(C), the consumer-expectation test did not fit this case and should not have been used for Plaintiff's design defect claim.

Thirty-Three Year Life Expectancy Error: The Court erred when it instructed the jury about Plaintiff's life expectancy. 8/7/18 Tr. at 5050. This instruction was erroneous because it invited the jury to make a factual finding that was inconsistent with the evidence presented by

Plaintiff that his life expectancy did not exceed two years. Nabhan Tr. at 2884:1-15; 2886:20-2887:12. A plaintiff cannot recover noneconomic damages for years that exceed his projected life expectancy. *See, e.g., Bigler-Engler*, Cal. App. 5th at 305-06. The prejudice of this error was directly reflected in the $33 million verdict for future non-economic losses.

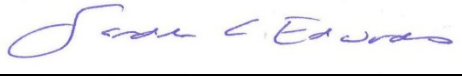
Punitive Damage Instructional Error: The punitive damage instruction provided to the jury was incompatible with due process and California law. 8/7/18 Tr. at 5050-5053. Consideration of wealth raises due process concerns because wealth "provides an open-ended basis for inflating awards" as "the punitive damage award must not punish the defendant simply for being wealthy." *Roby*, 47 Cal. 4th 719 (quoting *Gore*, 517 U.S. at 591 (Breyer, J. concurring)). The Court's refusal to give Monsanto's Proposed Special Instructions Nos. 5 (Compliance with Legal, Regulatory, or Industry Standards), 6 (Lawful Conduct), and 9 (Mitigating Evidence) violated due process and California law. Although a jury is required to consider mitigating evidence in evaluating punitive damages, this jury was never told that it must do so. *See E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 904 (9th Cir. 1994) ("[I]n calculating punitive damages, the court must consider the reprehensibility of the defendant's actions as well as any mitigating conduct."); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 753-54 (1980) (considering mitigating factors in finding punitive award excessive). These instructional errors were obviously prejudicial in light of the size of the verdict. A new trial is necessary to correct these instructional errors.

CONCLUSION

A verdict of this size requires exacting scrutiny. This one cannot survive it. The evidence was insufficient as a matter of law and the verdict was against its weight. The size of the award demonstrates the significant prejudicial misconduct that inflamed this jury. As the "thirteenth juror," this Court should exercise its singular authority to vacate this flawed judgment.

Dated: September 18, 2018

FARELLA BRAUN + MARTEL LLP

By: 

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