

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE: ROUNDUP PRODUCTS)
LIABILITY LITIGATION)
) NO. 16-md-02741 VC
)
)
_____)

San Francisco, California
Thursday, May 11, 2017

TRANSCRIPT OF PROCEEDINGS

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1 Thursday - May 11, 2017

2:04 p.m.

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

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4 **THE CLERK:** Calling Case Number 16-md-2741, In Re
5 Roundup Products Liability Litigation.

6 Counsel, please state your appearances for the record.

7 **MS. WAGSTAFF:** Good afternoon, Your Honor.
8 Aimee Wagstaff for the plaintiffs.

9 **MR. MILLER:** And Michael Miller. Good afternoon.

10 **THE COURT:** Good afternoon.

11 **MR. LASKER:** Good afternoon, Your Honor. Erik Lasker
12 for Monsanto.

13 **THE COURT:** Good afternoon.

14 Okay. Let's see, shall we talk about the mice first?

15 Let me ask you, Mr. Lasker --

16 **MR. LASKER:** Sure.

17 **THE CLERK:** Hold on one second, Judge.

18 Counsel, I don't have the microphones on at counsel table,
19 so I'll have you speak from the podiums because we do have
20 people appearing via telephone.

21 **THE COURT:** All right. Is Mr. Rowland's counsel
22 appearing by telephone to argue? Is that right?

23 **MR. LAWLER:** Yes, Your Honor. Bill Lawler,
24 Vinson & Elkins, on behalf of Mr. Rowland.

25 **THE COURT:** Okay. Hello.

1 **MS. NORRIS:** And Raven Norris on behalf of the EPA
2 just appearing.

3 **THE COURT:** Mr. Lasker, on the -- well, you know what?
4 Maybe so that -- since the EPA is only here for the Rowland
5 piece and since Mr. Lawler is here by phone only for the
6 Rowland piece, why don't we deal with that first.

7 I will tell you, Mr. Miller, that my reaction to this is
8 that it's probably a little bit of overreaching to want to find
9 out more about what Mr. Rowland is doing for these companies.
10 So you want to sort of give it one more shot just to try to
11 explain it to me --

12 **MR. MILLER:** Yes, Your Honor.

13 **THE COURT:** -- why I should compel Mr. Rowland to give
14 more information?

15 **MR. MILLER:** Yes, Your Honor, I will, and I'll
16 hopefully be compelling but I'll be brief.

17 Mr. Rowland was instrumental in writing the only
18 negative -- there's been several positive, we believe for the
19 plaintiff, reports from EPA, but the critical negative report
20 he wrote.

21 **THE COURT:** Negative from your standpoint.

22 **MR. MILLER:** Yes, Your Honor.

23 **THE COURT:** Okay.

24 **MR. MILLER:** And so we went to that deposition and we
25 called Your Honor, and Your Honor ruled. And remember the

1 proffer from Mr. Rowland and his counsel that day and for weeks
2 before that depo had been he had no work after the EPA with the
3 chemical industry.

4 Your Honor ruled he had to tell us the general -- the name
5 of where he worked and the nature -- general description, and
6 we asked him, and it turned out that was a false proffer. He
7 worked for the chemical industry.

8 And so --

9 **THE COURT:** As I sit here today, I don't have a
10 recollection of being told that he didn't work for chemical
11 companies. I'm not saying you're wrong. I'm just saying as I
12 sit here today, I don't have a recollection of what the initial
13 response was.

14 **MR. MILLER:** On page 17 of his deposition, Mr. Lawler,
15 as we proffered --

16 **THE COURT:** Hold on. Let me pull it up. Hold on a
17 second.

18 **MR. MILLER:** Yes, Your Honor.

19 (Pause in proceedings.)

20 **THE COURT:** Page 17 you said?

21 **MR. MILLER:** Line 24-25, Your Honor, page 17.

22 **THE COURT:** Hang on. I'll get there.

23 (Pause in proceedings.)

24 **THE COURT:** Page 17 --

25 **MR. MILLER:** And that's the --

1 **THE COURT:** -- line 24-25?

2 **MR. MILLER:** Yes. I'm looking at --

3 **THE COURT:** Oh, okay. I -- so there's some weird
4 pagination on what's been submitted. There's different --
5 there are two different paginations, but I think I am there
6 now. Okay.

7 **MR. MILLER:** "As we proffered," this is Mr. Lawler,
8 "it's unrelated to the chemical industry."

9 **THE COURT:** Okay. So I'm not in the right place. I
10 thought that I was on page 17, Rowland transcript, line 24; is
11 that --

12 **MR. MILLER:** And 25, Your Honor.

13 **THE COURT:** Are you sure that's where it is?

14 **MR. MILLER:** There is a rough cut and then there is a
15 final one.

16 **THE COURT:** Yeah. I'm looking at the uncertified
17 rough.

18 **MR. MILLER:** This is, I believe, the page number
19 from -- oh, I don't know.

20 **THE COURT:** I believe that's what was put in front of
21 me --

22 **MR. MILLER:** Okay.

23 **THE COURT:** -- was the --

24 **MR. MILLER:** Well, I'm quoting it, Your Honor. I
25 mean, it's, "As we proffered, it's unrelated to the chemical

1 industry."

2 And then -- and I'm sure Mr. Lawler will correct me if
3 it's not 100 percent correct. It is 100 percent correct.

4 **MR. LAWLER:** I will correct you.

5 **MR. MILLER:** Well, then we'll have to look at it hard.

6 **THE COURT:** Okay. Well, why don't -- Mr. Lawler, why
7 don't you see if you can point me to -- so you -- so you filed
8 a motion to compel -- Mr. Miller, you filed a motion to compel
9 testimony?

10 **MR. MILLER:** Yes, Your Honor.

11 **THE COURT:** And you attached Exhibit 2 to that motion,
12 which was the unredacted version of the deposition transcript?

13 **MR. MILLER:** Yes, Your Honor.

14 **THE COURT:** That's what I have in front of me.

15 **MR. MILLER:** Yes, Your Honor.

16 **THE COURT:** And what you are pointing me to, page 17,
17 line 24-25, does not have the text that you are reading to me.

18 So, Mr. Lawler, can you help me with that?

19 **MR. LAWLER:** Yes, I hope so, Your Honor, because I
20 think you and I are looking at the same transcript.

21 So if you go to page 252 --

22 **THE COURT:** Page 252?

23 **MR. LAWLER:** Right.

24 **THE COURT:** You mean the page numbers down at the
25 bottom there?

1 **MR. LAWLER:** Yes, sir.

2 **THE COURT:** Okay.

3 **MR. LAWLER:** Yes, sir.

4 **THE COURT:** All right. I'm there.

5 **MR. LAWLER:** Okay. And then you see -- on mine it has
6 page -- line 24 says (reading):

7 "So we proffered he has not worked for EPA -- excuse
8 me -- for Monsanto. We proffer that he hasn't done
9 anything to do with glyphosate."

10 Are we on the same page, Your Honor?

11 **THE COURT:** Yeah.

12 **MR. LAWLER:** Okay. So the point on the --

13 **MR. MILLER:** Your Honor, before --

14 **THE COURT:** Hold on, Mr. Miller. Hold on, Mr. Miller.

15 **MR. MILLER:** Yes, Your Honor.

16 **THE COURT:** Okay. Go ahead.

17 **MR. LAWLER:** So there are -- the core of the proffer
18 was exactly that. And if the Court can just flip through the
19 transcript, this is where -- the discussion we had with
20 Your Honor during the deposition. So the previous page on
21 page 251, we proffered to defense counsel I understood there
22 are valid areas of inquiry; for example, whether Mr. Rowland
23 worked for Monsanto or ever worked for Monsanto.

24 There are a number of different times when -- I think the
25 Court did this -- we proffered that he had never worked for

1 Monsanto, which is true. We proffered that he'd never
2 worked -- post-EPA -- that he'd never worked on glyphosate,
3 which is true.

4 In fairness to Mr. Miller, there was some, I think,
5 imprecision on probably both of our parts as between the
6 difference between the chemical industry and chemical
7 companies. Both of those terms were used, and it may be that,
8 you know, there wasn't a common understanding of that.

9 But in terms of the proffer which is being -- the
10 transcript that we've just seen, the core of that was that he
11 has not worked for Monsanto and hasn't done anything with
12 glyphosate, and that was, I think, the core part of what they
13 were -- what they're asking about.

14 So, you know, I think that, with all due respect, the lack
15 of a common understanding of what the difference between
16 "chemical industry" and the "chemical company" is really was
17 not the core of the issue and it shouldn't be the core today.

18 **THE COURT:** Okay. And so -- all right.

19 Okay. Go ahead, Mr. Miller.

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

21 **THE COURT:** What is your theory -- what is your theory
22 of what you are going to get? What are you trying to find?
23 What are you seeking?

24 **MR. MILLER:** Can I give you a two-minute answer,
25 Your Honor? And I'm just asking because it's important. It's

1 important.

2 **THE COURT:** Yeah, if you actually have the answer, but
3 you couldn't even direct me to the right quote in the
4 deposition.

5 **MR. MILLER:** I have --

6 **THE COURT:** So, yes, you can give a two-minute answer
7 if what you are saying in your two-minute answer is meaningful.

8 **MR. MILLER:** I believe it will be, Your Honor.

9 **THE COURT:** Okay. Go ahead.

10 **MR. MILLER:** And may I give you the right quote on the
11 rough? It's page 11, line 14 to 17.

12 And I apologize for the confusion, Your Honor.

13 **MR. LAWLER:** Your Honor, that's not what I have.

14 **THE COURT:** "No, I didn't."

15 "Did you apply for Medical School?"

16 **MR. LAWLER:** Yes.

17 **MR. MILLER:** I was just handed that by counsel.

18 Answering the Court's question, what I'm trying to get at,
19 Your Honor, is Mr. Rowland was at the IARC hearing as a
20 nonvoting observation person. We know that Monsanto is talking
21 among themselves so what a nice job Mr. Rowland's doing at
22 IARC.

23 Four days after he comes back, we know that Monsanto asked
24 each other *Is there some way we can get in to the EPA on this*
25 *issue?*

1 We know the next day they decide to call Jess Rowland.
2 That's a fact. These are all facts that we know.

3 We know that on the 23rd Monsanto gives talking points to
4 Mr. Rowland in March.

5 We know on April 28th Mr. Rowland calls Monsanto and says,
6 *I deserve a medal for stopping other scientists in the federal*
7 *government who have real training in this issue from doing a*
8 *report.*

9 **THE COURT:** You know, you're mischaracterizing the
10 evidence.

11 **MR. MILLER:** I don't believe I am, Your Honor.

12 **THE COURT:** You just totally misstated the
13 statement -- the hearsay statement by Mr. Rowland. I've seen
14 IARC's description -- I mean, excuse me, I've seen the Monsanto
15 e-mails describing what Rowland said, and you're totally
16 mischaracterizing it.

17 **MR. MILLER:** I respectfully disagree.

18 **THE COURT:** And so I'm going to ask you to sit down --

19 **MR. MILLER:** Yes, Your Honor.

20 **THE COURT:** -- unless you can be straightforward with
21 me about what the facts are in this case.

22 **MR. MILLER:** I believe I am, and I apologize if the
23 Court thinks otherwise but I believe I am. I read that a
24 hundred times, and I believe I am.

25 By September, Your Honor --

1 **THE COURT:** You totally misstated it. You completely
2 misstated it, and you inserted into it your own very slanted
3 characterization of what he said. You did not --

4 **MR. MILLER:** I apologize.

5 **THE COURT:** -- describe what he actually said or what
6 Monsanto said that he said. I mean, that's indisputable.

7 So I need you --

8 **MR. MILLER:** I can sit down. It speaks for itself.

9 **THE COURT:** -- I need you to start being a responsible
10 lawyer --

11 **MR. MILLER:** Yes, Your Honor.

12 **THE COURT:** -- and stop conducting your public
13 relations campaign in this case.

14 **MR. MILLER:** I apologize, Your Honor.

15 **THE COURT:** I need you to start being a responsible
16 lawyer and start -- and stick with the facts and argue in
17 support of your motion based on facts, not based on your
18 mischaracterization of the evidence.

19 **MR. MILLER:** Yes, Your Honor.

20 **THE COURT:** Do you understand me?

21 **MR. MILLER:** Yes, Your Honor.

22 **THE COURT:** Okay. Last chance.

23 **MR. MILLER:** We think when he went to work for these
24 three companies, how much he was getting paid and how these
25 companies found out about him are relevant to bias, and we

1 would like to ask Mr. Rowland about that in a half an hour or
2 less.

3 **THE COURT:** Okay. But you know which companies he
4 worked for.

5 **MR. MILLER:** We do, Your Honor.

6 **THE COURT:** And so what -- why do you need more detail
7 about what he did? I mean, your theory -- it seems like your
8 theory is that this was, like -- his work for these companies
9 was that Monsanto was somehow responsible for it and it was his
10 reward for doing Monsanto's bidding in the EPA. Is that
11 basically your theory?

12 **MR. MILLER:** Yes, Your Honor.

13 **THE COURT:** Okay. Well, so you know that he went to
14 work for these three companies.

15 **MR. MILLER:** We do, Your Honor.

16 **THE COURT:** And why do you need to know the details
17 about what he did? I mean, they could -- the reward could have
18 been, you know, *You're going to -- we're going to require*
19 *you -- we're hiring you to sweep the porch on our vacation*
20 *bungalow in Hawaii once a month while you stay there for the*
21 *rest of the year.* Okay?

22 **MR. MILLER:** Yes, Your Honor.

23 **THE COURT:** And that -- I mean, that would have
24 nothing to do with whether Monsanto was involved in giving him
25 some reward.

1 So the details of what he did for the company it doesn't
2 seem matters to your theory of whether he ended up with those
3 companies at the behest of Monsanto.

4 **MR. MILLER:** I think how soon he went to work for
5 those companies after he left the EPA would, Your Honor.

6 **THE COURT:** But you're asking about the details of his
7 work -- his projects for these companies.

8 **MR. MILLER:** No, Your Honor. I just --

9 **THE COURT:** How does that matter?

10 **MR. MILLER:** I would like to ask him when he went to
11 work for those companies, how those companies found out about
12 him, and how much those companies are paying him.

13 **THE COURT:** Okay. Motion denied.

14 **MR. MILLER:** Thank you for your time, Your Honor.

15 **THE COURT:** Okay. So that disposes of -- we do -- the
16 only other thing we need to talk about with respect to Rowland
17 is the motion to seal.

18 **MR. LAWLER:** Yes, sir.

19 **THE COURT:** We might as well knock that out. I don't
20 know if that matters for Mr. Rowland or for the EPA or not.

21 **MS. NORRIS:** Not for the EPA.

22 **THE CLERK:** Up to the microphone, please.

23 **THE COURT:** Since we have people on the phone.

24 **MS. NORRIS:** I understand.

25 Not for the EPA. We did not take a position with regards

1 to this topic.

2 **THE COURT:** Okay.

3 **MS. NORRIS:** We are just here to observe.

4 **THE COURT:** Then you're free to hang out or you're
5 free to leave.

6 **MS. NORRIS:** As always, thank you, Your Honor, but I
7 will decline. Thank you.

8 **MR. LAWLER:** Your Honor, this is Bill Lawler.

9 I can't see if anyone is getting ready to talk or not.

10 **THE COURT:** Yeah, which is why I generally don't allow
11 argument by phone, but I made an exception for you because I
12 didn't want Mr. Rowland to have the expense of you flying out
13 here.

14 **MR. LAWLER:** Thank you.

15 **THE COURT:** No, there's nobody getting ready to talk.
16 What do you want to say?

17 **MR. LAWLER:** Okay. Well, on the motion to seal, you
18 know, we did file on behalf of Mr. Rowland requesting that
19 portions as designated of the deposition be sealed, and we
20 would rest on our papers on that.

21 **THE COURT:** I'm sorry. Could you say that one more
22 time? I was having trouble following you.

23 **MR. LAWLER:** Oh. I'm sorry, Judge.

24 If the motion -- if the motion to seal the Court is
25 addressing now are the portions of Mr. Rowland's deposition

1 that we requested be kept, you know, confidential and not
2 public, which goes to the fact that we were just talking about,
3 the nature of his post-EPA work, we do believe that it's
4 appropriate to continue to keep those sealed.

5 The rest of the deposition in terms of his work at EPA --
6 his work at EPA, which was the bulk of the deposition, we think
7 is -- you know, we don't have a view on.

8 **THE COURT:** Okay. Thank you.

9 Let me give this some thought. Hold on a second.

10 (Pause in proceedings.)

11 **THE COURT:** Okay. Now let me ask the plaintiffs, and
12 I'm going to ask you the same question about the motion to seal
13 in connection with the mice, let me ask the plaintiffs: What
14 do you -- you know, I put out an order which made very clear
15 that you are only permitted to attach documents that really are
16 pertinent to the motion; that, you know, this -- you know, you
17 cannot use these proceedings to include as part of the court
18 file documents that you would like to see released to the
19 public if they're not relevant to the motion that you're
20 filing.

21 And so in light of that guidance, I'd like to give you an
22 opportunity with respect to the motion to seal -- you know, the
23 materials that you've submitted in connection with your motion
24 to compel testimony from Mr. Rowland, do you believe -- do you
25 stand by the idea that all of that was properly submitted in

1 connection with your motion?

2 That is to say, all of Exhibit 1 and all of Exhibit 2 to
3 your motion to compel, do you believe that that was all
4 properly submitted; or in light of the order that I issued on
5 an unrelated matter, which made clear that I was going to start
6 sanctioning you if you continued in your effort to file
7 documents that were not related to the motions you were filing
8 in an effort to get them released to the public, are you -- do
9 you have a different position about what parts of Exhibit 1 and
10 Exhibit 2 are relevant to your motion to compel and should be
11 filed in connection with your motion to compel?

12 **MR. MILLER:** I don't have Exhibit 1 and Exhibit 2 in
13 front of me. I can tell the Court we in good faith filed them;
14 but if the Court wants us to withdraw them, we will. I mean,
15 we certainly didn't file them for purposes of press release.
16 We filed them for purposes of prevailing on the motion. I can
17 make that representation. But if the Court wants us to
18 withdraw them, we will.

19 **THE COURT:** Why don't you have Exhibit 1 -- Exhibits 1
20 and 2 to your motion that is being argued here today in front
21 of you?

22 **MR. MILLER:** It's irresponsible of me, and I take full
23 responsibility. I brought the kitchen sink, but I didn't bring
24 them and I accept the responsibility.

25 **MS. WAGSTAFF:** Your Honor, with respect to the mice

1 study motion that we're going to talk about soon, you said you
2 have the same question. Going through the exhibits, Exhibit 1
3 is pretty lengthy, but I will represent to the Court that that
4 is how it was produced to us as a file. So in the interest of
5 completeness, we have submitted that entire thing.

6 We cite --

7 **THE COURT:** Is that a publicly available document? I
8 mean, one question I had was this was a report from Monsanto to
9 EPA back in, like, the '80s or something; right?

10 **MS. WAGSTAFF:** Right. It's --

11 **THE COURT:** I mean, is it a publicly available
12 document?

13 **MS. WAGSTAFF:** So it should be because it was part of
14 the EPA file, but I don't know if it currently is right now
15 because back in the '80s I don't know that everything was
16 electronic like it is now.

17 But if you look at some of these documents, you can see
18 that this is sort of a file folder of sorts.

19 But to answer the question I think you're getting at,
20 which is we cite in Exhibit 1 three or four pages, so I would
21 stand by those pages that we actually cite in Exhibit 1.

22 I would stand by the request in Exhibit 2. Exhibit 3 I
23 would as well. Exhibit 4 is the same thing. It was so large
24 that I have a note here that said I have it on e-mail if we
25 need it. So we would probably do the same thing, like stand by

1 the parts of Exhibit 4 that we cited.

2 **THE COURT:** Do you know how many pages Exhibit 4 is?

3 **MS. WAGSTAFF:** I could look.

4 **THE COURT:** It's 443 pages.

5 **MS. WAGSTAFF:** That's probably why my responsible
6 paralegal said *Look at your e-mail*.

7 **THE COURT:** Do you know how many pages of that
8 443-page document you cited in your motion?

9 **MS. WAGSTAFF:** How many?

10 **THE COURT:** One.

11 **MS. WAGSTAFF:** Okay. So, then, why don't I -- if you
12 let me tell you by the end of our argument today which ones we
13 want to stand by, I can report back and ask someone to tell me.

14 **THE COURT:** Okay. I think what I may -- what I may do
15 is -- I don't know. I'll think about it, but I think probably
16 what I may do is I may give you an opportunity to, you know,
17 request that your exhibits in support of these two motions be
18 stricken and replaced by a more narrowly selected group of
19 exhibits, and then we -- I'll give you the opportunity to do
20 that --

21 **MS. WAGSTAFF:** Okay.

22 **THE COURT:** -- I think. Let me -- I'll think about
23 that a little more after we're done today.

24 **MS. WAGSTAFF:** Okay. And I think truly, from at least
25 the plaintiffs' side, is that we're getting sort of used to

1 what you prefer, and some courts prefer that the entire exhibit
2 be filed and some courts prefer --

3 **THE COURT:** Right. Right.

4 **MS. WAGSTAFF:** -- only a page or two. And it turns
5 out --

6 **THE COURT:** No, and that is an issue -- right? --
7 because you want to make sure that you're not creating a
8 concern about looking at excerpts of documents out of context
9 and not being able to see the context. So that is certainly an
10 issue, and those two concerns are competing. Neither of those
11 concerns relates to the concern that I have, which is you using
12 this litigation as a vehicle to conduct a PR campaign. It's
13 obvious to me that that is what you've been trying to do, and
14 that is going to stop.

15 And so -- but, nonetheless, you still do -- in deciding
16 which documents to submit in connection with motions, you do
17 have to conduct that balancing. And I know that it's not
18 necessarily only going to be the page that you're citing. You
19 may need to include other stuff for context, but you have to
20 give meaningful thought to that.

21 **MS. WAGSTAFF:** Right. And so -- and, like I said, as
22 we're learning what you prefer, we'll continue to do better in
23 the future, but we'll do whatever Your Honor orders with
24 respect to that.

25 **THE COURT:** Well, and normally -- honestly, like,

1 normally in summary judgment motions, for example, I often --
2 you know, the parties will submit excerpts of depositions, and
3 I often issue an order saying the parties are ordered to submit
4 the entire deposition.

5 **MS. WAGSTAFF:** Sure.

6 **THE COURT:** But in this context, given the concern I
7 have about the plaintiffs using this litigation as a vehicle to
8 conduct a PR campaign, I'm going to be, you know, scrutinizing
9 this much more closely, and you need to be much more careful
10 about what you're submitting and what you're not.

11 So, anyway, so that -- I think that leaves the only
12 remaining thing for us to discuss, then, is the mice, yeah?

13 **MS. WAGSTAFF:** I believe so, Your Honor.

14 **THE COURT:** And on that, let me ask Mr. Lasker.

15 **MR. LASKER:** Yes, Your Honor.

16 **THE COURT:** Does Monsanto rely, even in small part, on
17 this study in support of its arguments that Roundup is not
18 harmful?

19 **MR. LASKER:** This is one of the 14 animal studies
20 conducted, so to that extent, yes. We are not -- I can
21 represent we have not gone back to 37-year-old -- 35-year-old
22 slides and nobody has looked at 35-year-old slides in order to
23 render any expert opinions in this case.

24 **THE COURT:** You haven't looked at the slides, but it's
25 one -- you said it's one of 14 animal studies that you do rely

1 on and that I gather that agencies have considered in making
2 the determination -- that IARC and EPA have considered in
3 making their determinations about the effects of glyphosate.

4 **MR. LASKER:** Yes, Your Honor. Our opposition is not
5 based on the question of whether or not this is not one of the
6 animal studies that will be relevant. It's based upon a couple
7 of issues.

8 First is, as we've laid out in our briefing, the timing is
9 a major problem here. It just is. There is -- just so the
10 Court understands, because I know we make reference to it but
11 it may not be clear why this is, when we talk about 1,000
12 slides, you have --

13 **THE COURT:** Well, it wasn't clear to me that the
14 plaintiffs were seeking 1,000 slides.

15 **MR. LASKER:** Well, they would have to. Let me just
16 explain what the slides are so it makes sense.

17 **THE COURT:** Yeah. Okay.

18 **MR. LASKER:** So in a normal study, you may recall from
19 our science day -- but maybe not, probably not -- you have 50
20 male mice and 50 female mice, and so you have initially slides
21 of the kidneys from each of those mice.

22 What happened in this case was because of the regulatory
23 process back and forth, which involved a series of reviews by
24 the EPA, by the Pathology Working Group, and by the Science
25 Advisory Panel, which was independent of Monsanto, there was

1 resectioning and additional slides of those kidneys, which is
2 why we now have 1,000 kidney slides.

3 Now, as I understand what is going on with plaintiffs'
4 request -- so that gives rise to the timing issue. There are a
5 large number of slides that would have to be reviewed; and for
6 there to be any meaningful scientific review, you couldn't say,
7 *Well, I just want to see that one slide*, because that's not
8 really going to be meaningful independent review of the type
9 that was done back in the 1980s by EPA when they looked at all
10 the slides and they looked at them blinded, the Pathology
11 Working Group and also by the Science Advisory Panel members.
12 So you would need to have some way to try and recreate that.

13 Now, I don't -- we don't believe it's even possible,
14 Your Honor, because --

15 **THE COURT:** So if I could interrupt just for one
16 second --

17 **MR. LASKER:** Yes, Your Honor.

18 **THE COURT:** -- and ask you -- I mean, I guess it
19 depends what they want to analyze the slides for. And although
20 I don't yet have a full understanding of that and may never
21 achieve a full understanding of that -- not through any fault
22 of theirs, but through my own limitations -- I gather that
23 there is, again, an allegation here that Monsanto manipulated
24 the science, and I gather that the allegation is that the
25 results from the control group or maybe even just one member of

1 the control group may have been manipulated or something. Am I
2 describing your allegations accurately?

3 **MS. WAGSTAFF:** Yeah. Because you seem like someone
4 who wants more information than less, so if I may just take two
5 minutes to tell you what we're after.

6 So back in the mid-'80s -- well, first of all, I should
7 let you know, maybe you have never had the pleasure of having
8 10 million pages of documents dumped on you, it doesn't quite
9 come in a nice little indexed story.

10 **THE COURT:** If you're responding to their accusation
11 that you didn't make the request in a timely manner --

12 **MS. WAGSTAFF:** Don't do that?

13 **THE COURT:** -- that's not going to prevent me from --

14 **MS. WAGSTAFF:** Okay.

15 **THE COURT:** -- that's not going to affect my ruling on
16 the motion.

17 **MS. WAGSTAFF:** Okay.

18 **THE COURT:** Okay?

19 **MS. WAGSTAFF:** Excellent.

20 So back in the mid-1980s, we have pieced this story all
21 together through documents we have found that have been in
22 different places. So it's the best version of the story we
23 have. If it's not 100 percent accurate, it's what we believe
24 to be as accurate as we can have it right now.

25 Monsanto hired Bio/dynamics, which is a laboratory, to

1 test some mice slides. Okay? And they hired a gentleman named
2 Dr. McConnell. And there were four groups. There were a group
3 of mice that had glyphosate, a group of mice that had a little
4 bit more, and then medium level, and high level. So none, low,
5 medium, and high levels. Okay?

6 And so in his testing they found rare tumors --

7 **THE COURT:** What was the company that he --

8 **MS. WAGSTAFF:** Bio/dynamics.

9 **THE COURT:** Okay.

10 **MS. WAGSTAFF:** And so -- and Monsanto paid for that
11 testing. And so in their testing -- in his testing they found
12 rare tumors in the medium group and in the high group, and
13 these were rare tumors that are not normally found in mice. To
14 find them at all in this number of mice suggests that something
15 was going on, that it was carcinogenic.

16 So these results --

17 **THE COURT:** Well, I'm not sure how relevant this is,
18 but I am curious because I understand that the tumors that were
19 found were benign kidney tumors.

20 **MS. WAGSTAFF:** Well --

21 **THE COURT:** And so why does that suggest that --

22 **MS. WAGSTAFF:** I'm going to take you to that.

23 **THE COURT:** Okay.

24 **MS. WAGSTAFF:** So this testing was submitted to the
25 EPA, and in part because of that -- not solely but in part

1 because of that they labeled it a Class E possible carcinogen.

2 So for no real scientific reason that we can find, a few
3 years later -- well, there's internal correspondence between
4 Monsanto employees, and we've cited to most of it and which are
5 in our exhibits; but for no real scientific reason that we can
6 find, they decide to re-review those slides that Dr. McConnell
7 did. The same original slides.

8 And so there is internal correspondence where they said
9 that Dr. Kushner will find -- that if they could find a tumor
10 in the no glyphosate or the low dosage, then that would make
11 the study not statistically significant and, therefore, it
12 would lower the impact of it being a carcinogen.

13 So they said there was internal e-mail -- internal
14 correspondence, it was all cited in our brief, stating that he
15 will find that tumor in the low-to-no dosage. Sure enough, he
16 re-reviews it -- this is a Monsanto paid employee -- and he
17 finds a benign tumor in the no or the low.

18 So then they submit --

19 **THE COURT:** In one mouse?

20 **MS. WAGSTAFF:** In the -- well, we don't -- we're not
21 exactly sure, but in the same slides that Dr. McConnell had
22 reviewed a few years earlier, the same actual physical slides.

23 So they give that to the EPA.

24 **THE COURT:** So, like, on one slide or on multiple
25 slides, or you don't know?

1 **MS. WAGSTAFF:** We believe it's just one but, again,
2 we're not positive yet.

3 **THE COURT:** Okay.

4 **MS. WAGSTAFF:** And so this is, again, us trying to put
5 all of this together in a very short time frame.

6 And so the EPA then suggests that they recut the slides.
7 So they recut new slides. So now there are new slides. And
8 they hire this PWG, which is the Pathology Working Group that's
9 cited in Monsanto's report.

10 Okay. Now, the PWG, which we believed until recently was
11 related to or set forth or organized by the EPA, was actually
12 paid for by Monsanto, and we've got the invoices to show that
13 Monsanto was paying for the PWG to re-review new slides.

14 And so they confirm Dr. Kushner's review of finding a
15 pathology -- or finding a tumor in the low-to-no dose.

16 **THE COURT:** Okay.

17 **MS. WAGSTAFF:** Okay. And so then what happens is that
18 Monsanto -- we have some trail of evidence where Monsanto has
19 then hired some independent pathologists in case the PWG study
20 doesn't come out how they want it.

21 Now, some of the Monsanto people that they have hired have
22 found no tumors in the low-to-no dosage, which confirms the
23 first original study from Bio/dynamics.

24 And so our understanding now is that Monsanto is --

25 **THE COURT:** Could you say that last part again?

1 **MS. WAGSTAFF:** Sure.

2 So throughout the course of when Monsanto started
3 re-reviewing these slides or cutting new slides, there have
4 been one or two people that have found -- that have agreed with
5 the original analysis that made it a Class C possible
6 carcinogen, meaning no tumors in the zero-to-low and some in
7 the mid-to-high.

8 So that's sort of where we are. And then as a result, the
9 EPA class -- as a result of a lot of this stuff but in part
10 because of that, the EPA has reclassified that back in the '80s
11 as a Class E, which is, you know, not carcinogenic.

12 And so that sort of dominoed the entire next couple of
13 decades we believe, and we think it has an effect that's
14 extremely relevant to this case.

15 I know you said that the timing --

16 **THE COURT:** Was it -- sorry.

17 **MS. WAGSTAFF:** Uh-huh.

18 **THE COURT:** Was it one of the -- was that, like, the
19 first animal study, or where does it fall in the line of the 14
20 animal studies?

21 **MS. WAGSTAFF:** I'm not sure where it falls in the
22 line. I mean, it's in -- glyphosate came on the market in the
23 late '70s, and we're talking '85, you know, so this is fairly
24 early on. If Mr. Lasker knows specifically where it falls in
25 line, I would --

1 **MR. LASKER:** This would be the second rodent study,
2 the first mouse study. There have been four other registrants
3 who have performed independent mouse studies since then. So
4 there are now five mouse studies along with the nine rat
5 studies.

6 **THE COURT:** Okay.

7 **MS. WAGSTAFF:** And so almost a year ago we were
8 sitting in this courtroom -- I think it was on May 1st, 2016 --
9 with the Hardeman case, and the transcript will show that we --
10 my partner Vance was here. I don't know if you remember him or
11 not, but he was talking about buying the science, and that even
12 made its way into the transcript.

13 And so we let the Court know and Monsanto know that we
14 were questioning the validity of all of this science and that
15 this was going to be something we looked at.

16 And we didn't know until we found some of those e-mails a
17 few months ago really that there was something to be concerned
18 about with the validity of this particular study.

19 And as Mr. Lasker just said, that Monsanto is relying on
20 this, we also believe this should have been identified in the
21 initial disclosures back in May 2016 a year ago.

22 But that's sort of generally what we're looking for. And
23 I have -- we have a scientist who is ready to go and start
24 looking at them if Your Honor will so allow, and he said that
25 he would need 30 days from the time that he gets them to issue

1 some sort of a finding. And plaintiffs are very agreeable to
2 working out a protocol with Mr. Lasker and the rest of the
3 Monsanto team if Your Honor so desires.

4 **THE COURT:** Okay. One other question I have I guess
5 for the both of you -- I'll ask you for now -- is, and this may
6 be an ignorant question, but this -- as I understand it, the
7 study revealed that there were benign tumors in the kidneys of
8 mice who experienced medium or high exposure and may or may not
9 have been benign tumors in the kidneys of mice who experienced
10 low exposure. That's the issue that you want to explore. But
11 what does that have to do with non-Hodgkin's lymphoma?

12 **MS. WAGSTAFF:** Okay. Do you want me to go first?

13 **THE COURT:** Please.

14 **MS. WAGSTAFF:** Okay. So what that has to do with
15 non-Hodgkin's lymphoma will best be described by the experts.
16 There's no doubt about that. My scientific level of knowledge
17 is not to the level of being an oncologist, but I do know that
18 the classification and the web of classifications of glyphosate
19 since the '80s, '90s, the '00s, and now the '10s have been in
20 part set forth by this finding and that it was a cancerous
21 finding, and that the crux of it comes down to whether or not
22 there was a tumor found, and benign or not, in the zero and in
23 the low-dose mice.

24 And part of that, whether or not it's benign or not, would
25 have to be explained best by an expert on how that relates to

1 non-Hodgkin's lymphoma and how that actually can play into
2 that. And we would probably supplement our expert reports to
3 educate Your Honor on that.

4 **THE COURT:** So, in other words, you would have your
5 scientist spend 30 days with these slides; and then if the
6 scientist comes up with something that you believe is useful to
7 the proceedings, you would disclose a report from the
8 scientist, and then presumably they would have a rebuttal
9 report, and that would just be incorporated into the
10 proceedings that we have scheduled for October?

11 **MS. WAGSTAFF:** Well, Your Honor, actually, it can be a
12 lot simpler than that. Monsanto has access to these slides.
13 They could be testing them right now if they so choose.

14 They've relied on -- Mr. Lasker has told you that they're
15 relying on these in their defense, so presumably they'll be
16 incorporated into the defense reports that are due June 1.

17 Today is May 11th. If we can have the slides by May 15th,
18 we could submit a rebuttal report by our deadline to submit a
19 rebuttal report and supplement the reports, you know, as
20 necessary.

21 So it doesn't have to have that much of a disruption on
22 the schedule currently before Your Honor. And plaintiffs have
23 not asked for an extension. We will, you know, supplement well
24 in advance of any deposition that an expert has, and the impact
25 that this new information would have on anyone's report is

1 minimal. It relates to one study that Monsanto has and has
2 always had, and it's -- like I said, the substance of it is
3 very small.

4 **THE COURT:** Okay.

5 **MR. LASKER:** So, Your Honor, if I may just respond and
6 starting with the point that counsel just made and the question
7 you just asked.

8 Even under plaintiffs' theory, we're talking about
9 something that they've now characterized as minimal and we
10 would characterize as virtually irrelevant to the *Daubert*
11 decision that Your Honor will be facing.

12 You're exactly correct to raise the question of what one
13 mouse in one study and one kidney has to do with the general
14 causation non-Hodgkin's lymphoma.

15 They have submitted --

16 **THE COURT:** I don't know if it's one mouse and one
17 kidney.

18 **MR. LASKER:** That's the issue that is in the case,
19 this one control mouse and whether or not there was one -- a
20 tumor in that kidney of that mouse. That's -- the whole issue
21 is based upon that issue.

22 **THE COURT:** So why do they have to -- why do they need
23 all 1,000 slides then? Why don't they need -- why can't they
24 just look at -- I mean, this may be an ignorant question, but
25 why can't they just get that one slide or whatever slides

1 relate to that mouse's kidney and --

2 **MR. LASKER:** Your Honor --

3 **THE COURT:** Go ahead.

4 **MR. LASKER:** Your Honor, if I may.

5 Because scientifically, and this is also part of *Daubert*
6 case law, you would not -- a scientist would not reliably just
7 target and look at one tissue to see if they could find
8 anything because that is not the way that science works.

9 And the way these animal studies work is that you look at
10 the slides without knowing if the animal -- this is, for
11 example, the way the Pathology Working Group that EPA requested
12 looked at this. They don't know if the slides are from a panel
13 that has glyphosate or doesn't have glyphosate. They don't
14 have, as this expert would have, a description of the finding
15 in that one isolated study.

16 **THE COURT:** I see.

17 **MR. LASKER:** So it would be preordained.

18 **THE COURT:** I see. So we don't know. In other words,
19 are you saying to me that you wouldn't be able to select out
20 the slide where the scientist later found the tumor?

21 **MR. LASKER:** No. The issue, Your Honor, would be that
22 if an expert is -- or scientist is asked to review slides of an
23 animal study, they would not targetly look at one slide and one
24 tissue knowing whether the animal had glyphosate or didn't have
25 glyphosate administered and having an understanding of being

1 retained for one side of the litigation or not to decide that.

2 The way you would do it scientifically in order to reach
3 any opinion that would be reliable and could provide a basis
4 for a *Daubert* opinion -- and this goes back actually to the
5 Ninth Circuit's ruling in *Daubert* after it came back from the
6 Supreme Court. The Ninth Circuit talked about
7 litigation-inspired science. You can't -- that that's not
8 reliable. If a litigation expert is doing something --

9 **THE COURT:** Well, wait a minute. But, I mean, it
10 depends on the inquiry that's being conducted. And maybe I
11 misunderstand, but I got the sense that what Ms. Wagstaff was
12 saying is that we want to check -- you know, there's an
13 allegation that there was -- you know, a mouse had tumors,
14 benign tumors, on its kidneys --

15 **MR. LASKER:** Right.

16 **THE COURT:** -- and that that is what made the
17 correlations statistically insignificant -- rendered the
18 correlations statistically insignificant.

19 Why wouldn't it be enough to just check that one mouse to
20 see if, in fact, there is -- I mean, if it turns out that there
21 is a tumor on that mouse's kidneys, then that sort of confirms
22 the later conclusion drawn by the people at -- was it PWG?

23 **MR. LASKER:** Well, there was a variety of groups. The
24 Pathology Working Group. There's also members of the Science
25 Advisory Panel that EPA impaneled that looked at this.

1 **THE COURT:** So what am I missing? I mean, why
2 wouldn't it be sufficient to just, like, look at that one slide
3 or the set of slides associated with that mouse?

4 **MR. LASKER:** Because the issue for pathologists and
5 part of the issue that was in play in the 1980s is pathologists
6 have to use expertise in determining what they're seeing,
7 they're seeing a lesion there and determining whether or not
8 that is preneoplastic or neoplastic, which means indicative of
9 a tumor. That is a scientific determination that you would
10 make in an objective way to try and figure out whether or not
11 it's a tumor or not.

12 Now, the way --

13 **THE COURT:** You mean, like, comparing it to other --

14 **MR. LASKER:** By comparing it to the other animals, but
15 also by looking at this without any preconceived idea of what
16 you're looking at.

17 If you already know -- and this is for all sciences.

18 **THE COURT:** Okay.

19 **MR. LASKER:** If it's not blinded --

20 **THE COURT:** Go ahead.

21 **MR. LASKER:** -- then it's not reliable and it would
22 not be admitted.

23 **THE COURT:** Okay.

24 **MR. LASKER:** The second issue, Your Honor, is that as
25 counsel has indicated to a certain extent, and we would think

1 it's even more strongly the case, this is a kidney tumor in one
2 of -- one mouse in 14 animal studies that's not related to
3 non-Hodgkin's lymphoma.

4 They have now submitted that they have a new expert
5 because none of the experts they've retained has the
6 qualifications to actually do the analysis that they are going
7 to say -- none of the experts that they have put forward has
8 talked about this one animal -- this one animal as being the
9 key to anything. It's just one of 14 studies. But they're now
10 saying that it would take their expert 30 days to review this.

11 Now, the idea that we would come forward with an expert
12 report first is completely backwards. They have the burden of
13 proof to establish that.

14 They would -- and just to take a step back, Your Honor,
15 the issue with these slides, these are slides that are
16 maintained for regulatory purposes. That's why they still
17 exist. It's not as simple as us just providing them, so
18 there's going to have to be a protocol worked out and
19 plaintiffs acknowledge this.

20 So putting in time for that and 30 more days, it's now
21 May 11th, so we're talking about towards the end of June at the
22 earliest where we would get their expert's initial report. For
23 us to then have an expert to do a rebuttal report, our
24 discovery deadline for expert discovery is July 24th, I
25 believe. There is no way that this can be done in the schedule

1 that is currently in place, particularly to the extent that
2 plaintiffs are also representing that this may impact other
3 experts' opinions, other experts' reports.

4 All of their experts, frankly, for us to be able to meet
5 this discovery schedule would have been deposed or will about
6 to be deposed by the time at the earliest we could have this
7 new expert that they apparently have who they've not identified
8 conduct his review.

9 So what we're talking about here is something that will
10 require the schedule to be bumped at least two or three months
11 at the earliest in order to get this done.

12 **THE COURT:** I don't understand that. I don't
13 understand that. I mean, why can't we proceed as planned with
14 all of the other experts and just have them, you know, submit
15 an expert report at the appropriate time about this issue,
16 which seems to be a discrete issue and as you characterize it
17 as a relatively unimportant issue?

18 I'm not in a position, of course, to make a decision about
19 whether this is important or unimportant in the grand scheme of
20 things. I just don't have the equipment at this point to do
21 that; right?

22 But you characterize it as a relatively minimal issue,
23 almost -- and it seems like a discrete issue. So why can't we
24 just do -- why can't we just have them set a schedule whereby,
25 you know, they put out an expert report by around the end of

1 June like you said and then you put out a rebuttal expert
2 report by, like, the end of July or something? And, you know,
3 if you think depositions need to be taken, you can do that in
4 August.

5 **MR. LASKER:** Well, Your Honor, the issue we have is
6 that each one of the five experts they've identified thus far
7 who have submitted an expert report -- and they have a sixth
8 who they may be submitting -- have already discussed --

9 **THE COURT:** The sixth they may be submitting is --

10 **MR. LASKER:** Dr. Jameson.

11 **THE COURT:** -- the person from IARC?

12 **MR. LASKER:** Yes, Dr. Jameson.

13 Each of them have already, of the ones they submitted --
14 already submitted discussed --

15 **THE COURT:** By the way, that fact deposition did
16 happen?

17 **MR. LASKER:** It did, Your Honor.

18 **THE COURT:** Okay.

19 **MR. LASKER:** Each of their experts already discussed
20 animal studies in their report. Some of them rely upon the
21 kidney findings in this study as part of their opinion. So --
22 and, in fact, they have one expert who uses that as part of a
23 large statistical analysis that he does that has lots of issues
24 and problems with it, but it is part of his opinion.

25 So it's not simply -- well, it is an issue that is in the

1 *Daubert* analysis; does not, we believe, have an impact on a
2 *Daubert* opinion because it's a kidney in a mouse and not a
3 human. It does impact all these depositions because as
4 plaintiffs' counsel mentioned at one point in her argument
5 talking about something -- and I think they mention this also
6 in their pleading -- they would have their experts supplement
7 their reports based upon the finding or at the *Daubert* hearing
8 rely upon this finding in this tissue to be able to make
9 arguments that we would then not have deposed them on.

10 And, you know, I understand --

11 **THE COURT:** But it doesn't seem like that would need
12 to happen.

13 **MR. LASKER:** I'm sorry?

14 **THE COURT:** It doesn't seem like that would need to
15 happen. It seems like the way it could happen is that they
16 have an expert present a report on this and you, if you want,
17 have an expert rebuttal report; and if they want that expert to
18 come and testify at the *Daubert* hearings, they can do that.
19 And if you want your rebuttal expert to come and testify at the
20 *Daubert* hearings, you can do that.

21 But none of these other people are going to change the
22 opinions that they provide based on what this new expert does
23 with the slides. I mean, why can't it be done that way?

24 **MR. LASKER:** Well, Your Honor, if we are at a hearing
25 in which the -- for example, one of their experts has done a

1 statistical analyses based upon the information they have now.
2 I suppose you can tell him that he cannot consider the findings
3 of the tissue slide review, but you're now in a situation where
4 you're trying to create a different line of scientific
5 evidence, and there are experts who will say -- you know,
6 because a pathologist, if they're having somebody who is expert
7 in this, can talk about whether or not there's a finding in
8 this one tissue or not.

9 It's a separate question what that means in the context
10 even of that study because the initial finding in that study
11 was that, you know, even without that control tumor, the study
12 still did not show anything that was indicative of a
13 carcinogenic effect.

14 I mean, some of the things that the Pathology Working
15 Group, for example, discussed in review of the slide was that
16 it's -- not only is there a tumor in the control animal, but
17 there are other things that animal toxicologists look at with
18 respect to that finding and the other findings in the tissues.

19 For example -- and I apologize for getting into the
20 scientific weeds, if you will -- but whether there is what's
21 called preneoplastic lesions and whether or not there's a
22 progression to cancer, and whether there are other things
23 looking at the study as a whole that would indicate whether or
24 not there is a finding in this control animal or not, that that
25 is indicative of, in that study, a carcinogenic effect.

1 And so they're trying to now --

2 **THE COURT:** But I've sort of lost track of the -- in
3 your response I've sort of lost track of the answer to my
4 question --

5 **MR. LASKER:** Yes.

6 **THE COURT:** -- which is -- and that may be my fault,
7 but my question is: Why can't -- I mean, we've got all these
8 people -- we've got all these different experts who are
9 presumably looking at the totality of it or portions of the
10 totality of it; right? And they've got their opinions, and
11 their depositions are being taken on their opinions, and
12 they're not going to have any information by the time they
13 provide their deposition testimony about this new expert's
14 study of these slides. And so those are going to be the
15 opinions that they're stuck with when they come in here and
16 testify in October, and then we're going to have somebody who
17 can testify about these kidney slides if their expert draws
18 some conclusions that they believe would be helpful to their
19 case, and we consider that too.

20 I mean, I don't -- I'm not -- I've sort of lost track of
21 your answer to that question, like, why that couldn't happen
22 that way.

23 **MR. LASKER:** Because the issue, Your Honor, is that in
24 responding to -- let's hypothesize that plaintiffs' expert
25 comes back, the vet path, looks at this and says, *There's*

1 not -- I don't see a tumor here, and our vet path comes back
2 and says *We do see a tumor*. Then you have a dispute over
3 whether or not there's a tumor in this one control animal.

4 But how that impacts the larger general causation question
5 has not been addressed, and it can't be addressed unless you
6 have the other experts address it because then Your Honor will
7 be faced with a dispute between two pathologists and you will
8 say, *Okay. What does that mean?* And unless the other experts
9 talk to you about that, you don't have any -- that is not
10 useful.

11 So that's the problem of trying to separate this out in
12 that way.

13 **MS. WAGSTAFF:** So, Your Honor, if I may.

14 We served our expert reports on May 1 pursuant to your
15 order. On May 3rd, two days later, we gave dates for every
16 single person of our experts. As you can imagine, experts are
17 pretty busy, and we're mindful of the fact that you have
18 previously ordered that by discipline we produce our expert
19 first, we know that, and we've provided dates. All of them are
20 at the beginning -- the beginning of them are the end of June.
21 The first one is June 19th, and that's Dr. Ritz.

22 So I would submit to you that if we could get the
23 pathology that we're seeking very soon, that we could
24 supplement reports as necessary before.

25 And I'd like to remind the Court that we're in this time

1 crunch not by plaintiffs' doing. Mr. Lasker sat here and told
2 you how they're going to rely on this study. And if I called
3 it minimal before, I'm sorry, I didn't mean minimal in
4 importance; I meant minimal and discrete in scope. I didn't
5 mean in importance.

6 **THE COURT:** That's how I took it.

7 **MS. WAGSTAFF:** Okay. And, you know, presumably
8 Monsanto has said all along, 14 mice studies -- or animal
9 studies, 14 animal studies. They said that from the very
10 beginning. I remember Mr. Hollingsworth saying that. And,
11 yet, they didn't disclose these within their tangible items
12 within their custody or control back in May of '16.

13 We asked for these documents in our requests for
14 production before the MDL was formed. We didn't get them. We
15 finally got these documents produced in December. We had to
16 piece it all together, and then we asked in time to hopefully
17 get it within our original reports and they said, *No, we're not*
18 *giving it to you.*

19 So it's unfortunate that we're here right now in this
20 situation, but we're here because Monsanto hasn't provided this
21 information that it should have provided a year ago.

22 **MR. LASKER:** Your Honor, if I may speak to that issue,
23 because I've not addressed it based upon your earlier
24 statements about timing.

25 That representation that this is a new issue is just

1 completely false. This study, this -- the findings of the
2 kidneys of the mouse in this study, the findings with respect
3 to the control animal in one of the mice in this study was
4 expressly discussed in the IARC monograph in March of 2015.

5 The documents that plaintiffs cite in their brief, in
6 their motion to compel, include documents from EPA that have
7 been publicly available and publicly discussed *ad nauseam* in
8 public forum forever that expressly address this exact issue.
9 Their motion cites to the 1986 SAP, which has been public for a
10 long time. They cite to the 1991 review, RED, that EPA issued
11 that has been public for a long time.

12 All of those documents talk about this study, talk about
13 this issue, talk about this finding. The EPA throughout has
14 determined, after an extensive analysis of a huge number of
15 different pathologists frankly, including SAP members for the
16 independent EPA, what their finding was, why they -- why they
17 reached the conclusion they did. This is not a new issue.

18 The plaintiffs, for whatever reason, decided that in these
19 tissue slides, which they've known from the beginning existed
20 and they knew from the beginning there was this issue with the
21 control animal, for whatever reason they did not seek them
22 earlier on.

23 **THE COURT:** When did they seek them?

24 **MR. LASKER:** I think it was in the motion --

25 **MS. WAGSTAFF:** It was --

1 **MR. LASKER:** It was March 15th?

2 **MS. WAGSTAFF:** It was March 15th --

3 **MR. LASKER:** 15th.

4 **MS. WAGSTAFF:** -- and it's not for whatever reason.

5 **THE COURT:** So hold on a second.

6 **MS. WAGSTAFF:** Yeah.

7 **THE COURT:** So they sought them March 15th?

8 **MR. LASKER:** Yes.

9 **THE COURT:** So I assume -- I mean, I know you-all were
10 incredibly busy during that period but, theoretically, I mean,
11 it could have been in their expert's hands by April 15th and
12 there could be a report by now --

13 **MR. LASKER:** Well, Your Honor, our --

14 **THE COURT:** -- from the expert.

15 **MR. LASKER:** First of all, it would not have been by
16 April 15th because of the issues that I've already mentioned,
17 but we also have --

18 **THE COURT:** Well, I assume that you could have put
19 together a protocol within a month.

20 **MR. LASKER:** Well, Your Honor, we have legitimate
21 objections to production. There's a reason why document
22 requests have a 30-day response time. It was not only with
23 respect to this document request. There were other document
24 requests that we responded to.

25 The fact that there is -- that we could have done

1 something faster than the federal rules require is not -- it's
2 not our burden to act more quickly because plaintiffs decide to
3 wait that period of time.

4 **THE COURT:** But wait a minute. You could have had it
5 in their -- they asked for it May 15th.

6 **MS. WAGSTAFF:** March 15th.

7 **THE COURT:** Excuse me, March 15th. I'm saying you
8 could have had it in their hands April 15th.

9 **MR. LASKER:** Yes, Your Honor, if we did not have
10 objections to this. I mean, this is --

11 **THE COURT:** What was your objection?

12 **MR. LASKER:** The issue -- the objections were a series
13 of them. Some of them is that this is an improper discovery
14 request given the nature of, you know, the proportionality with
15 respect to --

16 **THE COURT:** But it's part of your defense. I mean,
17 this is an animal study that's part of your defense. It's part
18 of your case for why glyphosate doesn't cause cancer.

19 **MR. LASKER:** Respectfully, Your Honor, we don't have
20 an affirmative burden here. This is plaintiffs who decided
21 this is part of their case. It is one of the animal studies.
22 It isn't --

23 **THE COURT:** Well, wait a minute. I mean, I don't
24 understand that response. I mean, you relied on it as part of
25 your argument. Okay? Forget about burden.

1 **MR. LASKER:** Right.

2 **THE COURT:** It's part of your argument for why Roundup
3 doesn't cause cancer; right?

4 **MR. LASKER:** It is part of the scientific evidence,
5 yes, Your Honor.

6 **THE COURT:** Right.

7 **MR. LASKER:** It's a very large --

8 **THE COURT:** This study is part of the evidence that
9 you will present, and people's conclusions about this study is
10 part of the evidence that you will present in support of your
11 argument that Roundup does not cause cancer and there's not
12 even enough evidence to allow the question whether Roundup
13 causes cancer to go to the jury; right?

14 **MR. LASKER:** Yes, Your Honor, but there's -- the
15 question, again, is -- and there are hundreds of studies on
16 this that have been raised in this litigation -- the question
17 is -- you know, we're not doing 1,000 slides for every animal
18 in every study. There's a question of proportionality.
19 There's a question of whether or not there's any reasonable
20 basis --

21 **THE COURT:** They're not asking for 1,000 slides for
22 every study.

23 **MR. LASKER:** Well, respectfully, Your Honor, what
24 they're asking for is a fishing expedition because this is not
25 an issue that's new. It's not an issue that hasn't been

1 studied. It is an issue where they are trying to hope that
2 they'll find something different without any basis to conclude
3 that. I mean, again, this is a study that has been analyzed
4 probably -- certainly more than any of the other studies that
5 are out there. They are using this study to try and at the
6 last minute, Your Honor, submit a new issue.

7 We have an expert discovery schedule here that it is
8 impossible to divorce from this question.

9 **THE COURT:** Okay. So if I order you to produce the
10 slides to them pursuant to an appropriate protocol, how do you
11 want -- what do you want to do? How do you want to go about
12 things from here on out? How do you want to go about phase I?
13 How do you want it to affect the rest of your schedule?

14 **MR. LASKER:** Well, Your Honor, we don't want it to
15 affect the rest of the schedule certainly. We have a schedule.
16 We have expert deadlines. We have some dispositive *Daubert*
17 briefing and a *Daubert* hearing. So we will adhere to that
18 schedule however the Court responds.

19 **THE COURT:** Well, but you are telling me it's not
20 practical, it's not possible on the current schedule to
21 order -- to make these slides part of the case; and I'm telling
22 you if I decide I want these slides to be part of the case, I
23 will want you to tell me what you think the schedule should be.

24 **MR. LASKER:** Well, Your Honor, then we would have to
25 try and figure out a way -- we would oppose any supplementation

1 of the other experts' reports.

2 **THE COURT:** But you just --

3 **MR. LASKER:** The plaintiffs would have -- I'm sorry.

4 **THE COURT:** But you just made a pretty compelling
5 argument to me that if there are two pathologists disagreeing
6 about what the -- about the condition of the mice in this study
7 and all the other expert reports are based on an assumption
8 about the condition of the mice in that study, then it sort of
9 infuses a great deal of uncertainty into, you know, the rest of
10 that expert testimony.

11 And so what's your proposal for how to resolve that
12 problem if I exclude that the slides are going to be part of
13 this case?

14 **MR. LASKER:** There would have to be, then -- it would
15 determine the type of expert, then, who would be able to
16 provide the review of the tissue slides because you wouldn't be
17 able to have somebody who did not have the broader expertise
18 with respect to what that means within the context of that
19 study.

20 And then it would have to be a separate expert who would
21 be able to then -- and, Your Honor, I'm sort of at a loss for
22 how you would then -- well, it would have to be an expert who
23 would be beyond -- would have expertise not only to review the
24 one tissue slide but would have to offer a broader opinion with
25 respect to, I guess, the animal toxicology so that that could

1 be a separate stand-alone expert opinion that would provide
2 context. Now, that -- so that Your Honor would have a context
3 within -- with respect to that one expert to consider that.

4 But otherwise -- and, you know, we will have -- there will
5 be a big issue, and I've already mentioned this. I don't know
6 how an expert can review the slides in a scientific manner at
7 this point because of the reasons I've already mentioned,
8 but --

9 **THE COURT:** Sorry. You don't know how an expert can
10 review the slides what?

11 **MR. LASKER:** In a scientifically reliable manner at
12 this point.

13 The issue, again, one of the issues here that is a part of
14 our objection to this whole procedure to begin with is it is
15 much different to look at slides blindly the way that a vet
16 path does in the ordinary course of their scientific endeavors.
17 Scientists in a lab conduct a study, and they have the ability
18 to look at these things blindly and then try and reach
19 determinations that are not going to be biased, they're not
20 going to be informed by what the results might be or whether
21 the animal has received treatment or not.

22 To now go back 35 years later with slides where the
23 tissues and the findings have been described -- I mean, even if
24 you were to try to recreate a blinded review, the expert will
25 know exactly what this tumor looks like. It's already been

1 described and so, therefore --

2 **THE COURT:** So my question to you, though --

3 **MR. LASKER:** Yes.

4 **THE COURT:** -- is if I -- notwithstanding your
5 concerns about that --

6 **MR. LASKER:** Yes.

7 **THE COURT:** -- if I conclude that the slides will be
8 part of this case --

9 **MR. LASKER:** Yes.

10 **THE COURT:** -- maybe I'm wrong to conclude that --

11 **MR. LASKER:** I understand.

12 **THE COURT:** -- maybe it's going to turn out to be a
13 totally useless exercise, but if I conclude that you have to
14 turn the slides over to them, how do you want the case to
15 proceed from here? Do you want it to affect the experts'
16 schedule, the deposition schedule, the expert disclosure
17 schedule, the hearing schedule? How do you want -- how do you
18 believe it should affect the case?

19 **MR. LASKER:** Oh, well, if Your Honor is going -- if
20 the Court is going to order that, we would request that
21 whatever opinion is to be expressed with respect to causation
22 based upon a finding with respect to this one slide review
23 would be expressed by that expert, whoever they retained, in
24 the broader context. It wouldn't just be a vet path who would
25 say, *I see a tumor there. I don't see a tumor there.*

1 It would be an expert who then would provide a broader
2 opinion that we can respond to. That expert would be handled
3 outside of the current schedule but would provide an opinion
4 that would be rebutted to or not that would provide Your Honor
5 with context.

6 And then we would address that on a separate schedule, but
7 the other experts would not be able to now change their
8 opinions and sort of revise their opinions based upon that.
9 That would be separate.

10 They would have an expert --

11 **THE COURT:** So what you're saying is there would be --
12 they have their expert pathologist to look at the slides, and
13 you will be able to have a rebuttal expert to rebut whatever
14 conclusion their expert offers regarding the slides, and then
15 there would be a separate expert to opine on the significance
16 of those conclusions --

17 **MR. LASKER:** No, Your Honor.

18 **THE COURT:** -- in the grand scheme of things?

19 **MR. LASKER:** There are, and it would depend on who
20 they are, but there are experts who look at slides and also
21 look at studies and have the expertise to also put this into
22 context.

23 And so it would be one expert. It would be an expert who
24 can do both of those things. So it would not just be somebody
25 who said, *I've looked at the slide and I've seen this and,*

1 *therefore, I think there's a tumor.*

2 If plaintiffs want to raise this issue, they have an
3 expert who would review that finding -- review that tissue
4 slide. If they find something different -- and I do think it
5 would have to be conditioned upon that because otherwise
6 there's no basis for a new expert -- but if they were to find
7 something different, if they were to say, *I don't believe*
8 *there's a tumor here*, then they also, that same expert, would
9 need to be an expert who could then further opine as to what
10 significance that has with respect to this study.

11 **THE COURT:** Why would it have to be the same expert?

12 **MR. LASKER:** Because we're now getting to the point
13 where we are adding now it would be two experts per side, it
14 would be pushed two or three months out of the schedule, and
15 then we're at an issue where it's making the schedule -- it's
16 pressing up against the schedule.

17 And if they -- you know, if there is -- we would obviously
18 be in the same situation, Your Honor. We would have one expert
19 who would have to respond on both those issues.

20 But that would allow us to address these tissue findings
21 if -- and, again, it would be conditioned on whether there's
22 something found without it impacting the rest of the schedule.

23 **MS. WAGSTAFF:** Your Honor, if I may.

24 I find it telling that Mr. Lasker is bringing the topic of
25 a blinded and unblinded study up to you. I actually wrote down

1 a quote from him earlier where he said, *If it's not blinded, it*
2 *wouldn't be reliable and, therefore, it's not admitted.*

3 And if you remember the story I was telling you of
4 Dr. Kushner --

5 **THE COURT:** Yeah, I remember. I thought of that
6 too --

7 **MS. WAGSTAFF:** -- that was unblinded.

8 **THE COURT:** -- but let's just talk about how the
9 schedule would be affected.

10 **MS. WAGSTAFF:** Okay. So one of the ways that I think
11 it could work, we have offered dates, like I said, to them; and
12 if they would accept those dates, we could present a report
13 prior to the first date, which is June 19th. So presumably
14 today is the 11th. If we could agree to have a path protocol
15 in place by the -- what day is -- maybe the 16th or the 17th,
16 which is Tuesday or Wednesday of next week, we could get
17 working on it right away, and then we could have the slides or
18 have access to the slides by the 19th. Presumably we could
19 stay within the dates that we've lumped and nothing changes.

20 And if --

21 **THE COURT:** Well, wait a minute.

22 **MS. WAGSTAFF:** Sure.

23 **THE COURT:** Let's talk through the schedule in a lot
24 more detail --

25 **MS. WAGSTAFF:** Okay.

1 **THE COURT:** -- to see if what you're saying is really
2 correct.

3 **MS. WAGSTAFF:** That's probably a good idea.

4 **THE COURT:** So the plaintiffs' expert reports were due
5 on May 1st with the possible exception of -- was it Jameson?
6 Is there going to be an expert report from Jameson?

7 **MS. WAGSTAFF:** I think that there will be, Your Honor.

8 **THE COURT:** Okay.

9 **MS. WAGSTAFF:** It's due tomorrow and --

10 **THE COURT:** It's due tomorrow?

11 **MS. WAGSTAFF:** Yeah.

12 **THE COURT:** Okay.

13 **MS. WAGSTAFF:** Tomorrow is the deadline.

14 **THE COURT:** So tomorrow you know whether there's going
15 to be an expert report from Jameson or not.

16 **MS. WAGSTAFF:** I'm pretty sure there will be, but I
17 don't know 100 percent.

18 **THE COURT:** Okay. So the plaintiffs' expert reports
19 are in with the final one to be in tomorrow.

20 Monsanto's expert reports are due on June 1st; right?

21 **MS. WAGSTAFF:** Correct.

22 **THE COURT:** All right. So plaintiffs' reports
23 May 1st. Monsanto reports June 1st. So those reports -- and
24 so how many experts are you talking about? How many experts
25 does the plaintiff have?

1 **MS. WAGSTAFF:** We identified five and Jameson would be
2 six.

3 **THE COURT:** Okay. And how is it going to work? I
4 mean, are there going to be some experts who talk about animal
5 studies and other experts who talk about epidemiology? Or
6 how -- who are your experts?

7 **MS. WAGSTAFF:** Sure. So we have a little bit of
8 overlap, and Mr. Lasker and I were just talking about that
9 earlier. It's not a clear-cut in their mind that this is our
10 tox so it goes before their toxicology person, and that sort of
11 thing.

12 But some of our experts have more strengths than others.
13 We've got Dr. Jameson; Dr. Nabhan, who is -- and then
14 Dr. Nuget, who you met; Dr. Portier, who you met; Dr. Ritz,
15 who's an epidemiologist --

16 **THE COURT:** Their names don't mean a lot to me.

17 **MS. WAGSTAFF:** Okay. Dr. Weisenberg.

18 We have --

19 **THE COURT:** If you could just say the topics that
20 they're going to -- the topics that they're going to address.

21 **MS. WAGSTAFF:** Sure. Epidemiology, oncology, an NHL
22 expert, a pathologist.

23 And what am I missing?

24 **MR. MILLER:** Toxicology.

25 **MS. WAGSTAFF:** A toxicologist.

1 **THE COURT:** I thought that was the first one you
2 mentioned, but I'm not sure.

3 **MS. WAGSTAFF:** What am I forgetting?

4 **UNIDENTIFIED SPEAKER:** Hematologist.

5 **MS. WAGSTAFF:** Hematologist?

6 Hematologist.

7 **THE COURT:** Okay.

8 **MR. LASKER:** Your Honor, just to be clear on one of
9 the issues I think in response to your question, if I
10 understand it correctly, we received obviously the expert
11 reports. The five experts that we received, I believe it's the
12 case that every single one of them offers opinions on the
13 epidemiology, the toxicology, and the genotoxicology. So all
14 five of the experts talk about all of the different substantive
15 scientific fields, so there's not a demarcation where this
16 expert is an epidemiologist and only offers epidemiology
17 opinions.

18 **THE COURT:** Okay. All right. And then Monsanto's
19 expert reports are due June 1st?

20 **MR. LASKER:** Correct, Your Honor.

21 **THE COURT:** And plaintiffs' expert rebuttal reports
22 are due June 15th.

23 Okay. And you were contemplating the production of a
24 report from your expert on the slides --

25 **MS. WAGSTAFF:** Uh-huh.

1 **THE COURT:** -- when?

2 **MS. WAGSTAFF:** Well, our expert has told us that 30
3 days after he has access to the report -- to the slides, he
4 could have a report. So it's whenever Your Honor --

5 **THE COURT:** So late -- end of June let's say, just --

6 **MS. WAGSTAFF:** Yeah, sure.

7 **THE COURT:** -- roughly. We can argue later about the
8 dates if we have to, but let's say June 30th.

9 **MS. WAGSTAFF:** Okay.

10 **THE COURT:** Okay. And then depositions start
11 happening?

12 **MS. WAGSTAFF:** Yes, Your Honor. Depositions -- I
13 don't have the case management order in front of me, but
14 depositions would start happening I think right after rebuttal
15 reports; right? So presumably on the 15th they could start
16 happening, although the first date we offered was the 19th.

17 **THE COURT:** Okay. And then -- so we've got -- so some
18 of your experts will have done opening reports, rebuttal
19 reports, and their depositions will have been taken by the time
20 the expert on the slides provides his or her report?

21 **MS. WAGSTAFF:** Well, yes, and I just thought of
22 something while you were talking about this. If we -- you
23 know, since we're kind of working with all of the experts, we
24 know which ones will want to supplement their reports based on
25 whatever the person looking at the slides sees. Well, no, not

1 all five I don't think, maybe they will, but not all five I
2 don't think will want to supplement their reports. And
3 typically it's not a lot of the same experts who supplement
4 reports too.

5 So we could -- if you moved it back to June, we could take
6 two weeks out of that depo.

7 **THE COURT:** If I moved what back to June?

8 **MS. WAGSTAFF:** If you give us till you said June 29th
9 or June 30th, I think you just said late June, to review the
10 slides and produce a report.

11 **THE COURT:** Okay.

12 **MS. WAGSTAFF:** If you give that as a deadline for us
13 to supplement the reports too and we start depositions on July 1
14 versus June 15th and we could take a week out of the briefing
15 schedule, then we're only missing seven days for this very
16 important topic to stay on schedule for the October 11th
17 *Daubert*. I don't know if you followed me. I kind of said it
18 in my head.

19 **THE COURT:** No, I think I followed you.

20 So contemplate still putting out all these reports in May
21 and June, and it would contemplate providing a supplemental
22 report, you know, in early July; and then I guess they would
23 have to do like a -- do, like, rebuttals to that -- to whatever
24 supplemental reports come in?

25 **MS. WAGSTAFF:** Well, so we've given our expert

1 reports. So if we have until June 20th to provide a report on
2 the slides, if any, then they could start deposing our people
3 in July, although we probably want their expert reports before
4 the depositions start.

5 So presumably their -- this would be in the protocol, but
6 their expert could start looking at the slides while our expert
7 is looking at the slides; right? I mean, there's no reason why
8 they both can't be looking at the slides at the same time.
9 They could get out a report and then serve one a few weeks
10 later.

11 **THE COURT:** I don't know. I don't know how it works
12 looking at slides.

13 **MS. WAGSTAFF:** So it's not -- you know, both of them
14 would be an independent review of the slides. If they wanted
15 someone to review the slides as well, my thought would be that,
16 you know, when they become available pursuant to the protocol,
17 one of the things they had suggested was that an independent
18 person would go in there. Maybe the two pathologists could go
19 in together and, you know, take photos, or whatever the
20 pathologists need to do; and then they could write their own
21 reports, and we would give you ours, you know, a week before
22 you had to serve yours, or something like that.

23 **THE COURT:** All right. I'm going to -- I'll give this
24 a little bit more thought.

25 You know, I mean -- you know, one question is whether -- I

1 mean, what I wouldn't want to do -- again, I don't -- let's
2 just be totally honest here. I do not have the ability to make
3 a decision about how important this is. You know, I just
4 don't. I don't -- I would need to take days and days and hear
5 testimony from experts -- right? -- to make an informed
6 decision about how important this is.

7 So I'm operating on incomplete information, and I have to
8 engage in a certain amount of speculation on this, and there's
9 just no -- you know, there's no -- unless we're going to have
10 *Daubert* hearings about how important these slides are --

11 **MR. LASKER:** Understood, Your Honor.

12 **THE COURT:** -- right?

13 And so, you know -- so, you know, one -- I mean, this
14 process -- and I don't think there's any question that it would
15 have been a lot better to have, you know, done -- you know,
16 gotten an examination -- an expert to examine these slides
17 earlier so that it could just be part of the regular expert
18 report process.

19 But, you know, I'm just -- I'm staring at the dates and
20 I'm trying to get a sense of whether -- you know, if I decide
21 to allow the slides to be part of the case and allow their
22 expert to examine the slides, you know, if it makes sense to
23 try to keep -- to insist on keeping all the experts on the same
24 schedule as opposed to just delaying things a little bit so
25 that everybody can incorporate all the information they want.

1 I mean, that's the -- you know, the proposals that you-all have
2 sound a little complicated and convoluted to me.

3 **MR. LASKER:** Yes, Your Honor. I think it may be clear
4 from my statements previously, if Your Honor's view is that
5 this is something that you'll be granting the request, we will
6 work with the plaintiffs and try and figure out a way to work
7 it within the schedule we have.

8 I mean, we've been all working very hard for the last year
9 under the schedule. We've maintained the schedule, and I think
10 that's been a tribute to the parties and a tribute to
11 Your Honor that we've done that. And, you know, for this issue
12 to blow that up I don't think is appropriate or necessary.

13 But I do understand the issue Your Honor has raised, and
14 that's the concern we've had since this issue first came up
15 about the timing of this. And, again, this is -- I don't think
16 this issue should drive everything else that we've done for the
17 past year.

18 **THE COURT:** If you put a gun to my head and force me
19 to guess, my guess would be that this issue should not drive
20 the schedule. But, again, you know, I don't have the tools and
21 I don't think it makes sense for us to have a bunch of *Daubert*
22 hearings to give me the ability to determine how important
23 these slides are.

24 **MR. LASKER:** I understand, Your Honor.

25 **THE COURT:** So let me go back and think about it a

1 little bit. I may summon you-all for a follow-up phone
2 conversation tomorrow. I may just issue an order. Let me
3 think about it a little bit more.

4 **MR. LASKER:** Thank you, Your Honor.

5 **THE COURT:** Okay.

6 **MS. WAGSTAFF:** Your Honor, just one last thing. If
7 you do order that this discovery is allowed and you don't talk
8 to us before you enter an order, if you could please enter a
9 deadline for us to submit a protocol. That would be very
10 helpful in keeping it going along.

11 Thank you, Your Honor.

12 **THE COURT:** Okay. Thank you.

13 **MR. LASKER:** Thank you, Your Honor.

14 (Proceedings adjourned at 3:26 p.m.)

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CERTIFICATE OF REPORTER

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

DATE: Monday, May 15, 2017



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