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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **FOR THE COUNTY OF SAN FRANCISCO**

17 DEWAYNE JOHNSON,  
18 Plaintiff,  
19 v.  
20 MONSANTO COMPANY,  
21 Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S OPPOSITION TO  
MONSANTO COMPANY'S MOTION FOR  
NONSUIT**

Hon. Suzanne R. Bolanos

Department: 504  
Hearing Date: July 30, 2018  
Hearing Time: 9:00 a.m.  
Trial Date: June 18, 2018

**ELECTRONICALLY  
FILED**  
*Superior Court of California,  
County of San Francisco*  
**07/30/2018**  
**Clerk of the Court**  
BY: VANESSA WU  
Deputy Clerk

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## I. INTRODUCTION

Mr. Johnson has produced at trial the same expert testimony that Judge Karnow considered in rejecting Monsanto's Sargon motions and substantially more evidence with respect to liability and punitive damages than that considered by Judge Karnow in ruling on the summary judgment motion. Monsanto's current motion is simply a rehash of its failed motions infused with gross misrepresentations of the record and should likewise be denied. With respect to causation, Monsanto's motion is inappropriate as it attacks the admissibility of Plaintiff's experts and not whether their actual opinions are sufficient to support a jury verdict. There is no dispute that Plaintiff's experts are eminently qualified to offer causation opinions and did in fact opine that glyphosate based herbicides (GBH) causes non-Hodgkin Lymphoma (NHL) and caused NHL in Mr. Johnson. 5/17/2018 Order re: Sargon and Summary Judgment, (SJ Order) at 7. ("credentials of the expert[s] are unassailable").

Plaintiff's experts considered the whole of the scientific data in coming to their opinions that GBHs cause NHL as required by California law. It is essential that the "body of studies be considered as a whole." *Cooper v. Takeda Pharm. Am., Inc.*, (2015) 239 Cal. App. 4th 555, 589–90. Here, in addition to the epidemiology, there is strong biological plausibility that GBHs cause NHL. Under such circumstances, the Federal Judicial Center's Reference Manual on Scientific Evidence (3rd. Ed.) (Reference Manual) instructs:

... In applying the scientific method, scientists do not review each scientific study individually for whether by itself it reliably supports the causal claim being advocated or opposed. Rather, as the Institute of Medicine and National Research Council noted, "summing, or synthesizing, data addressing different linkages [between kinds of data] forms a more complete causal evidence model and can provide the biological plausibility needed to establish the association" being advocated or opposed. P. 20.

In addition to offering more than sufficient evidence that GBHs cause NHL, Dr. Nabhan and Dr. Sawyer properly conducted a "a differential diagnosis to "rule in" and "rule out" other possible causes of a disease in arriving at an opinion that Mr. Johnson's use of GBHs was a substantial cause of Johnson's NHL. *Cooper*, 239 Cal. App. 4th at 578.

The evidence presented at trial is more than sufficient to support an inference that Mr. Johnson's NHL was caused by Monsanto's products, and is the only logical inference. Mr. Johnson

1 was diagnosed with non-Hodgkin Lymphoma (NHL) after over two years of spraying dangerously high  
2 levels of RangerPro with a power washer that covered his face and clothing with the carcinogens in the  
3 RangerPro formulation. This exposure is not Mr. Johnson's fault. July 26 Tr. at 3695:2 (Mr. Lombardi  
4 stating "I'm not blaming Mr. Johnson"). Defendant agrees that Mr. Johnson "went well beyond what  
5 the label requires" in trying to minimize his exposure. July 9 Trns. Tr. at 1502:15-16. As a safety  
6 conscious employee, Mr. Johnson relied on the product label and safety data sheets for RangerPro. July  
7 23 Trns. At 3230:14-16. Unfortunately, Monsanto not only failed to warn about the risk of NHL, but  
8 was grossly inadequate in instructing users about how to minimize exposure to its product. 26 Trns. at  
9 3661:17-22. Mr. Johnson's use of a hydraulic nozzle, however, created "a dangerous aerosol." *Id.* at  
10 3694:20-22. Unfortunately, Mr. Johnson "didn't know any better" because Monsanto never bothered to  
11 tell him. *Id.* at 3695:1.

12 Had Monsanto informed Mr. Johnson that GBHs cause cancer, he would not have sprayed the  
13 product. Mr. Johnson stated "It's just unethical. It's not what you would do. It's wrong. I have children  
14 that go to school, and I've been in schools, and people just don't deserve that. They deserve better." July  
15 23 Tr. at 3235:2-5. Mr. Johnson twice called Monsanto asking if the RangerPro was causing his cancer  
16 and Monsanto never called him back. P-Exhs. 332, 334. Fearing that RangerPro might be a cause of  
17 Mr. Johnson's NHL, Mr. Johnson's treater, Dr. Ofodile, wrote a letter in March 2015, to the school  
18 board asking that Mr. Johnson not be required to spray RangerPro at work. *Id.* at 3154:6-16. That  
19 letter did not have the desired effect and in 2016, Mr. Johnson ultimately had to simply refuse to  
20 continue spraying. *Id.* at 3236:4-13.

21 Mr. Johnson's story is tragic and could have been prevented if Monsanto actually showed a  
22 modicum of care about human safety. Unfortunately as Judge Karnow ruled, the evidence supports the  
23 conclusion that "Monsanto has long been aware of the risk that its glyphosate-based herbicides are  
24 carcinogenic, and more dangerous than glyphosate in isolation, but has continuously sought to  
25 influence the scientific literature to prevent its internal concerns from reaching the public sphere and to  
26 bolster its defenses in products liability actions." SJ Order p. 45. As Dr. Kirk Azevedo testified,  
27 Monsanto's Vice President told him "we're about making money. So get it straight." Azevedo Depo. at  
28 50:7-51:25.

## II. LEGAL STANDARD

Nonsuits are disfavored in jury cases and courts have taken a very restrictive view of the circumstances under which it is proper to take a case away from the jury. “[A] nonsuit in a jury case may be granted only when disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference that may be drawn from the evidence in the plaintiff's favor, it can be said there is no evidence to support a jury verdict in their favor”. *Elmore v. American*, (1969) 70 Cal. 2d 578, 583 emphasis added); *Alpert v. Villa Romano Homeowners Ass'n*, (2000) 81 Cal. App. 4th 1320, 1328; *County of Kern v. Sparks*, (2007) 149 Cal. App. 4th 11, 16; *Carson v. Facilities Develop Co.*, 2 (1984) 6 Cal. 3d 830, 839 (the inferences need not be the only possible inferences, nor even the strongest inferences; it is enough that there is “some substance to plaintiffs evidence upon which reasonable minds could differ.”) Simply stated, nonsuit is an *extraordinary remedy* with a *very high standard* and should be denied here where Plaintiffs have presented more than sufficient evidence to support a verdict on all causes of action and punitive damages.

## III. ARGUMENT

### A. Plaintiff Has Offered Sufficient Evidence For a Jury to Find that RangerPro was a Substantial Cause of Mr. Johnson's NHL.

Each argument offered by Monsanto with respect to causation has already been rejected by Judge Karnow. The issues raised by Monsanto are all foundational issues with respect to the admissibility of the experts' opinions and should not be raised in the context of the sufficiency of the evidence. Once the expert opinion is deemed admissible and presented to the jury, the jury determines the credibility of the expert opinion and not the basis for its admissibility. Here, four highly qualified experts offered admissible opinions that GBHs cause NHL, and two of those experts specifically looked at Mr. Johnson's case and determined that Ranger Pro caused his NHL.

Judge Karnow did indeed make a determination that Plaintiff's experts' opinions are sufficient to support a finding of general and specific causation, holding “Monsanto's motion for summary judgment based on causation turns on the admissibility of Johnson's experts. As discussed above, most of the opinions of Johnson's causation experts are admissible. These suffice as evidence of both general and specific causation.” SJ Order at 38. Plaintiff's experts gave the same testimony at trial that



1 was considered by Judge Karnow with respect to summary judgment. Defendant goes to great lengths  
2 to avoid citing California law or Judge Karnow's directly controlling order. Defendant also  
3 misleadingly cite Judge Chhabria's opinion<sup>1</sup>, applying federal law, by omitting the conclusion that "the  
4 plaintiffs have presented evidence from which a reasonable jury could conclude that glyphosate can  
5 cause NHL at human-relevant doses. Monsanto's motion for summary judgment is denied." *In re*  
6 *Roundup Prod. Liab. Litig.*, No. 16-MD-02741-VC, 2018 WL 3368534, at \*36 (N.D. Cal. July 10,  
7 2018).

8 Under California law, to create a jury question on cancer causation "[t]he plaintiff must offer an  
9 expert opinion that contains a reasoned explanation illuminating why the facts have convinced the  
10 expert...that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury."  
11 *Cooper*, 239 Cal. App. 4th at 578. Furthermore "Under the applicable substantial factor test, it is not  
12 necessary for a plaintiff to establish the negligence of the defendant as the proximate cause of injury  
13 with absolute certainty so as to exclude every other possible cause of a plaintiff's illness, even if the  
14 expert's opinion was reached by performance of a differential diagnosis." *Id.* at 578.

15 Under California law, causation is not segregated into concepts of "general" and "specific"  
16 causation, as Monsanto suggests. Rather, the only causation element that a plaintiff must show is that  
17 the defendant's conduct or product was a "substantial factor" in causing the plaintiff's harm. See CACI  
18 430 ("A substantial factor in causing harm is a factor that a reasonable person would consider to have  
19 contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only  
20 cause of the harm."). The substantial factor standard "is a relatively broad one, requiring only that the  
21 contribution to the individual cause be more than negligible or theoretical." *Hernandez v. Amcord, Inc.*,  
22 (2013) 215 Cal. App. 4th 659, 673. Causation involves "factual questions for the jury to decide, except  
23 in cases in which the facts as to causation are undisputed." *Ortega v. Kmart Corp.*, 26 al. 4th 1200, 1205  
(2001).

24 Monsanto's arguments related to causation are premised entirely on misrepresentations, an utter  
25 disregard of the opinions of Plaintiff's experts, and the misapplication of the nonsuit standard.

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26 <sup>1</sup> Judge Chhabria's ruling under federal law is of limited relevance to this case which requires the  
27 application of California law. This is particularly true where Judge Karnow considered the same  
28 arguments of Monsanto and the same testimony of the experts. Plaintiff does not agree with several  
aspects of Judge Chhabria's ruling particularly where it deviates from Judge Karnow's opinion.

1 Plaintiff's evidence is more than sufficient to establish that his NHL was caused by his exposure to  
2 GBHs.

### 3 **1. The IARC Monograph Supports Causation**

4 Dr. Neugut, an esteemed oncologist and epidemiologist with forty years of experienced,  
5 testified that "I would say that within the scientific and academic cancer community, IARC is  
6 recognized as the main arbiter of -- the prime arbiter of what constitutes a carcinogen or a cancer-  
7 causing agent. I would have trouble even naming a second -- I would have trouble naming a second  
8 choice." Tr. at 2550:12-17 (7/18/2018). Dr. Portier also described the IARC process in great detail and  
9 explained how it supports a general causation opinion. Tr. at 1718:4-1760:12 (7/12/2018). Dr. Portier  
10 rejected Monsanto's arguments that IARC does not consider real world exposure, testifying "Well, of  
11 course they do. That's what this chapter is on, and in -- all of the human epidemiology studies are based  
12 upon human exposures, which means they're in the real world." *Id.* at 1741:21-24. Dr. Neugut concurs  
13 stating "[o]f course it's a real-world carcinogen -- obviously, the epidemiologic studies are relying on  
14 how people are really exposed in day-to-day life." 2600:8-2601:21 (7/18/2018).

15 In fact, the very safety data sheets relied upon by Mr. Johnson require the inclusion of IARC's  
16 assessment. (Unfortunately, Monsanto did not include that information while Mr. Johnson was  
17 spraying RangerPro.) As explained by Dr. Sawyer "All MSDSes -- that stands for Material Safety Data  
18 Sheet -- are required to provide the IARC classification of carcinogenicity, as IARC has been for many  
19 years the key agency internationally that determines whether or not a chemical is carcinogenic..." Tr.  
20 3637:2-6. *See also* 29 C.F.R. § 1910.1200, Appendix A. IARC is one "of the most well-respected and  
21 prestigious scientific bodies," whose assessments of carcinogenicity of chemicals "are generally  
22 recognized as authoritative..." Reference Manual on Scientific Evidence at 20, 565.

23 Defendant is simply wrong that IARC did not consider the carcinogenicity of glyphosate  
24 formulations. IARC explicitly states that it considered human studies looking at "commercial  
25 formulations that include glyphosate and other ingredients" and "experimental studies of 'pure'  
26 glyphosate and of glyphosate-based formulations." P-Exh. 302. Furthermore, neither Dr. Neugut nor  
27 Dr. Nabhan mimicked IARC. Tr. at 2654:2-19 (7/18/2018) (Dr. Neugut reviewed all of the studies in  
28 depth after reviewing the IARC monograph); Tr. at 2789:7-2790:18 (7/21/2018) (Dr. Nabhan  
conducted comprehensive review of the literature.)

## 2. The Epidemiology Supports Causation

Judge Karnow considered Defendant's arguments with respect to epidemiology and rejected them holding that "Johnson's epidemiology experts should not be excluded." SJ Order at 12. In coming to this conclusion, Judge Karnow considered and rejected the exact arguments made by Monsanto in the present motion. Judge Karnow correctly applied California law which holds that it "is generally correct that in many (or even most) instances epidemiological studies provide the best evidence of causation." *Davis v. Honeywell Internat. Inc.*, (2016) 245 Cal. App. 4th 477, 491. However, it is also proper for experts to rely on "other tools to determine causation" in cases of rare cancer. *Id.*; *Roberti v. Andy's Termite & Pest Control, Inc.*, (2003) 113 Cal. App. 4th 893, 901 (opinion admissible where expert relied upon animal studies with pesticide and examination of plaintiff). Where the "validity of these studies, and both their strengths and their weaknesses, are subject to considerable scientific interpretation and debate" it is not the court's role to resolve these debates. *Cooper*, 239 Cal. App. 4th at 589–90.

Defendant claims that epidemiology alone must be sufficient to establish causation and that experts can't rely on toxicological data. Judge Karnow and Plaintiff acknowledged that "Johnson's experts do not view epidemiological evidence as dispositive on causation... They conceded that confounding and bias may explain the association found in the epidemiological evidence if the epidemiological evidence were viewed in isolation." SJ at 11. However, it would be entirely improper to view the epidemiological evidence in isolation, and Plaintiff's expert did not do so. *Id.* (Dr. Neugut too does not base his conclusion solely on that epidemiological evidence.)

When asked whether it would be scientifically appropriate to just look at the epidemiology and ignore the animal studies and the mechanistic data, Dr. Portier explained that "Under no condition would it be... it's never good to look at just one set of data" and that its "common practice... it's good practice" to look at all the data. Tr. at 1965:11-1966:7 (7/13/2018). Dr. Neugut concurs. Tr. at 2736:25-2737:17 (7/18/2018). Based solely on the epidemiology data Dr. Portier concluded that that "there's a demonstrated association" and that "causality is reasonable here." Tr. at 1964:1-17 (7/13/2018). Based on all of the data Dr. Portier concluded that "glyphosate is carcinogenic, causing NHL in humans." Tr. at 1994:19-21 (7/13/2018). Dr. Neugut concurred, stating that after applying the Bradford-Hill criteria and factoring in all of the evidence that "there is indeed a causal association

1 between glyphosate and NHL.” Tr. at 2646:16-23 (7/18/2018)

2 Defendant claims that there are no statistically significant studies that adjust for other pesticides.  
3 This is not true. Judge Karnow already determined Defendant’s claim to be false, holding “[w]hile  
4 Johnson’s experts concede the limitations of the epidemiological evidence, there is at least one study  
5 that controlled for other pesticides and still found a statistically significant association between  
6 glyphosate and NHL.” SJ Order at 7; Tr. at 2700:24-2701:4 (7/18/2018) (Dr. Neugut explaining that  
7 Defendant’s claim is “not true.”). That study is De Roos (2003) and it showed a 2.1 statistically  
8 significant increased risk after adjustment for dozens of pesticides. *Id.* at 2736:12-24; Tr. at 1886:9-  
9 1894:12 (7/12/2018) (Portier explaining methodology and results of De Roos (2003) study). Judge  
10 Karnow further noted that:

11 Johnson's experts appreciated the risk the confounders could create an  
12 unreliable association between glyphosate exposure and NHL but  
13 believed, in light of the studies they reviewed and the other information  
14 that they considered, that potential confounders were not the cause of the  
association. Motion, 6 n.16 (citing evidence), 8:9-9:3. And Monsanto has  
not identified any pesticides that may, in fact, have confounded the data.

15 SJ Order at 12-13. Dr. Neugut explained at trial that most errors in epidemiology studies push the  
16 relative risk down closer to one meaning that the relative risks reported in the studies are actually  
17 underestimates of the true relative risk. Tr. at 2584:21-2589:14 (7/18/2018). Dr. Neugut also explained  
18 that these errors pushing down the true relative risk are much more of a concern than any potential  
19 confounding. *Id.*; *see also* Tr. at 1965:3-5 (Portier) (“And whereas most of them did a pretty good job  
20 with cofounders, some maybe didn't, but I don't think confounders are a big problem in this set of  
21 data.”);

22 Although statistical significance is not required to show causation, there are other statistically  
23 significant findings for GBHs and NHL, including the meta-analysis. *Id.* at 2682:23, 2683:9; 2685:18-  
24 20. As Dr. Neugut explains:

25 And if you look, all of them are above 1. All of them. That's a  
26 phenomenon referred to in causal epidemiology as consistency. They're  
27 consistently elevated above 1. Whatever flaws, problems, issues we're all  
28 going to raise about these studies, one or the other, no studies are perfect,  
whatever things each study does, no study is identical. One does

1 something. One – each study does something differently. Each study -- but  
2 all the circumstances under which these six studies – some of them control  
3 for different things, some of them are done in different populations. Some  
4 of them in Scandinavia. Some of them are in America. Some of them in  
5 Canada. Some of them are with farmers. Some of them are not. But all of  
6 them are consistently above 1, and that's none random.

7 *Id.* at 2612:3-18.

8 Defendants claim “none of the studies show a statistically significant risk ratio that is above 2.0  
9 as required by California law.” This is not true. As Judge Karnow explained, California law clearly  
10 does not require a risk ratio above 2.0, holding “Johnson's experts discuss epidemiological studies just  
11 as one factor in their opinion that glyphosate-based herbicides cause NHL...Cooper does not mandate  
12 exclusion of these opinions for this purpose even if none of the studies shows a relative risk of greater  
13 than 2.0.” SJ Order at 10. Judge Karnow appropriately applied controlling law which holds that  
14 “[t]here is no such requirement [for a relative risk of 2.0] in California.” *Davis.*, 245 Cal. App. 4th at  
15 493.

16 In any event there are several studies showing an odds ratio over 2.0, including De Roos (2003).  
17 While Dr. Neugut testified that the odds ratio for ever using GBHs from all of the studies combined  
18 was about 1.5, he further explained that “if you start to look at dose response of people who are really  
19 significantly exposed to glyphosate, got exposed in a more dramatic way, for longer periods of time, for  
20 higher doses, they're going to have a significantly higher risk.” Tr. at 2617:21-2618-4, 2644:21-2645:1.  
21 Dr. Nabhan also reached the same conclusion after his review of the epi studies: “There's a study  
22 published by McDuffie and colleagues in 2001. There's another one in 2003 by De Roos and  
23 colleagues. There's another one by Eriksson and colleagues that also published in 2008. All of these  
24 showed doubling the risk.” Tr. at 2825:9-18 (7/20/2018); *Id.* at 2827:15-2830:5 (explaining that  
25 Eriksson and McDuffie showed a dose-response); Tr. at 1880:3-1884:24, 1894:13-1898:3 (Portier  
26 explaining the dose-response relationship in McDuffie and Eriksson showed over a doubling of the risk  
27 for use greater than 2 days per year (McDuffie) and 10 days per year (Eriksson)).

28 Finally, Judge Karnow explained that “Johnson's experts considered the strengths and  
weaknesses of the AHS and the strengths and weaknesses of the case control study in reaching their  
conclusions about epidemiology and causation... This is what was required of them.” SJ Order at 13.  
Further stating that “the absence of dose response in AHS does not foreclose the existence of other data

1 supporting a positive dose response finding.” *Id.* at 22. Dr. Neugut persuasively explained why  
2 exposure misclassification, loss to follow-up and the exponential increase in GBHs during the  
3 enrollment period made the results of the AHS study (with respect to GBHs) unreliable. Tr. at  
4 2618:18-2626:13, 2635:8-2640:18 (7/18/2018); Tr. at 1954:3-1959:17 (7/18/2018) (Portier) (“very  
5 serious flaws associated” with the AHS study).

### 6 **3. The Animal Carcinogenicity and Genotoxicity Studies Support Causation.**

7 Again Judge Karnow has decided this issue holding that “[a]s a general matter, Monsanto  
8 suggests that it objects to any consideration of genotoxicity or mechanism testimony. This approach is  
9 unsupported by Monsanto’s citations and conflicts with the Bradford Hill criteria, which require  
10 consideration of biological plausibility.” SJ Order at 18. Judge Karnow also admitted Dr. Portier’s  
11 opinion on animal studies because “he concludes the fact that, according to his analysis, glyphosate  
12 causes cancer in mammals (i.e., rodents) renders it biologically plausible, under the Bradford Hill  
13 rubric, that glyphosate could cause a specific form of cancer, NHL, in humans.” *Id.* at 15; *Roberti*, 113  
14 Cal. App. 4th at 901 (opinion admissible where expert relied upon animal studies with pesticide and  
15 examination of plaintiff); *Ruff v. Ensign-Bickford Indus., Inc.*, 168 F. Supp. 2d 1271, 1281 (D. Utah  
16 2001) (expert testimony admissible where it is “...based on the genotoxicity and carcinogenicity of  
17 these chemicals in animals, the EPA and the International Agency for Research on Cancers classified  
18 hydrazines as probable carcinogens posing a significant cancer risk to exposed humans.”); Tr. at  
19 2002:10-2003:10 (7/13/2018) (Portier explaining that mechanistic and animal studies support positive  
20 epidemiological findings); 2445:6-15 (7/18/2018) (Neugut explaining that toxicology studies in animals  
21 are applicable to biological plausibility in Bradford-Hill analysis)

22 It is entirely misleading to suggest that animal studies are not relevant to humans because they  
23 use higher dose. Dr. Portier explained the reason why animal studies use high doses stating:

24 [t]he reason you do that is because -- what you're interested in, of course,  
25 in human populations is much lower exposures. But you're also interested  
26 in human risk in the range of 1 in a million to 1 in 100,000 to 1 in 10,000.  
27 And we can't use that many animals to get at that type of risk. And so you  
28 don't do studies at human exposure levels. You extrapolate them. You take  
what you see in high doses, and you draw a line or some other technique

1 to get you into the low region.<sup>2</sup> That's how you estimate human risk.  
2 1806:22-1807:7.

3 Here the animal and mechanistic studies strongly support causation with respect to the  
4 biological plausibility and coherence among the different lines of evidence. There is solid evidence  
5 that in addition to other tumors “malignant lymphoma is being caused in these mice by glyphosate.” Tr.  
6 at 1835:7-9 (7/12/2018). There is also evidence that GBHs are genotoxic in blood cells and  
7 lymphocytes. Tr. at 1973:16-25 (7/13/2018). Glyphosate and GBHs have been shown to cause  
8 oxidative stress which can operate to promote tumors. *Id.* at 1990:10-1992. GBHs have been shown to  
9 promote skin tumors in mice. Tr. at 1857:22-1860:13 (7/12/2018).

10 Finally, there is clearly a jury issue with respect to who has the correct interpretation of the  
11 animal data. Dr. Portier thoroughly explained how the EPA and EFSA failed to follow established  
12 guidelines in evaluating this data and was joined by 94 other scientists in a published commentary  
13 supporting IARC and Dr. Portier’s conclusions. Tr. at 2010:16-2021:2 (7/13/2018).

#### 14 **B. Plaintiff Has Established Causation for MF.**

15 Again, Judge Karnow ruled that “I reject Monsanto's argument that there is no scientific basis  
16 for Dr. Nabhan to rely on studies that apply to NHL generally in the context of mycosis fungoides.  
17 There is a scientific basis for Dr. Nabhan’s opinion - mycosis fungoides is a subtype of NHL.” *See also*  
18 *Ruff*, 168 F. Supp. 2d at 1285 (“that plaintiffs' expert opinion need not include data showing studies of  
19 the exact subtype of plaintiffs' NHL to satisfy their general causation burden.”). SJ Order at 23.

20 Dr. Neugut explained that epidemiologists look at all NHL subtypes as a group:

21 [E]very disease splits into an absolute panoply of multiple, multiple  
22 subtypes. There are more than 60 types of breast cancer. There are more  
23 than 60 types of colon cancer. And if you would split and lump into 60

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24 <sup>2</sup> Dr. Portier is referencing the Cancer Slope Factor, which Dr. Sawyer did calculate and came to the  
25 conclusion that Johnson’s exposure levels were with the range of the exposure levels causing cancer in  
26 animals. In exchange for not referencing the Cancer Sloper Factor at trial, the parties agreed not to  
27 “reference, argue or offer testimony that Mr. Johnson’s dose/exposure is below or above any threshold  
28 reference dose derived from animal studies.” July 24, 2018 Email from Sandra Edwards to Department  
504. Defendant’s argument that “the level of exposure to glyphosate in the real world is ‘very low’ is  
actually about even more than 10 million times lower than the quantities that in one day we had to use in  
animals in order . . . to assess possible carcinogenicity” violates this agreement. Dr. Sawyer would have  
refuted the defendant’s claims by opining that the Cancer Slope Factor demonstrates that the mouse  
studies, particularly the lymphoma findings, are relevant to Mr. Johnson’s exposure levels. (Sawyer  
Report) Plt.Ex 750 at 145-152.

1 types every disease, you would know absolutely nothing about any disease  
2 if you're going to argue that each one has its own spectrum of causes or  
3 outcomes. To some degree, it is true that each one has a unique risk factor  
4 or a unique prognosis or a unique treatment, and to some degree one can  
5 make universal statements or integrated statements across the -- across the  
6 integrated group. We talked about non-Hodgkin's lymphoma as a group.  
7 We treat them as a group.

8 Tr. at 2656:6-21 (7/18/2018). Dr. Nabhan concurs, explaining that it would be impossible to do  
9 epidemiology studies for each of the 70 subtypes of NHL and that a scientist should rely on  
10 epidemiology studies that look at NHL as a group. Tr. at 2807:22-2809:3 (7/20/2018). In any event,  
11 two studies do look specifically at T-cell lymphoma (which is comprised mainly of Mycosis  
12 Fungoides). Dr. Nabhan explained that the Eriksson study showed a non-statistically significant odds  
13 ratio of 2.29 for T-cell lymphoma. *Id.* at 2828:4-20. Dr. Portier explained that the AHS study, which  
14 Defendants rely on exclusively, demonstrated a quadrupling of the risk for T-cell lymphoma and  
15 statistically significant tripling of the risk in a lag analysis. Tr. at 2447:10-2449:19 (7/17/2018).

16 **C. Plaintiff Has Presented Sufficient Evidence Showing That Mr. Johnson's Exposure to  
17 Roundup and Ranger Pro Was a Substantial Factor in Causing His NHL.**

18 **1. Plaintiff's Experts Testified That Mr. Johnson Had Sufficient Exposure to Roundup  
19 and Ranger Pro To Cause NHL.**

20 Judge Karnow has already ruled that both Dr. Sawyer and Dr. Nabhan appropriately considered  
21 Mr. Johnson's exposure in rendering causation opinions. SJ Order at 25, 28. Monsanto does not  
22 challenge that Mr. Johnson was continuously exposed to GBHs from June 2012 through the date of his  
23 NHL diagnosis in August 2014. Therefore, Monsanto's sole argument is that "there is every reason to  
24 believe that Plaintiff's exposure prior to the onset of his disease was not significant." Def's Mot. for  
25 Nonsuit at 10. First, Plaintiff's medical experts offered reams of evidence and testimony detailing the  
26 basis for their opinions that Mr. Johnson's substantial exposure to GBHs was a cause of his NHL.  
27 Testimony from a medical expert that the plaintiff's exposure to a carcinogen is "almost certainly  
28 sufficient" to have caused cancer is sufficient to submit the causation question to the jury. *See Sparks v.*  
*Owens-Illinois, Inc.*, (1995) 32 Cal.App.4th 461, 477.

Dr. William Sawyer, a forensic toxicologist, undertook his review of the case in order to  
specifically determine whether Mr. Johnson's exposure was substantial enough to have caused his NHL.



1 Hoke Decl. (Sawyer Test. Tr. at 3601:20-3602:8). In reaching his opinions, Dr. Sawyer spoke with Mr.  
2 Johnson by telephone and reviewed pertinent medical records, deposition transcripts, published studies,  
3 animal studies, and internal Monsanto documents. *Id.* at 3587-3598. Dr. Sawyer testified that 10% of  
4 the total exposure dose would have been absorbed through Mr. Johnson's skin each time that he sprayed  
5 the GBHs. *Id.* at 3649:8-20. The majority of the absorption would have occurred within the first hour of  
6 his exposure. *Id.* 3673:25-3674:6.

7 Despite Monsanto's claims to the contrary, Dr. Sawyer did compute Mr. Johnson's dose using  
8 the available literature and the dermal absorption rate of 10 percent. Sawyer Test. Tr. at 3746:7-19. Dr.  
9 Sawyer calculated Mr. Johnson's dose based on days of exposure and milligrams per kilogram per day  
10 using a tested model. *Id.* at 3747:2-16. By using this model, Dr. Sawyer was able to specifically  
11 compute Mr. Johnson's exposure based on the protective gear he was wearing. *Id.* at 13-19. Dr. Sawyer  
12 testified that Mr. Johnson's total exposure was sufficient to have caused his NHL. *Id.* at 3747:13-19;  
3791:12-25.

13 Monsanto's claim that Dr. Sawyer testified that Plaintiff's dose was "less than the average in the  
14 peer-reviewed epidemiology studies" is simply not true. After calculating the total exposure levels, Dr.  
15 Sawyer opined that Mr. Johnson was "beyond the worst case that I've found in the literature which I  
16 used as my basis of calculations." *Id.* at 3674; see also 3596-3597 (testifying that Mr. Johnson was  
17 "heavily exposed" at a rate far higher than the individuals in scientific studies). Dr. Sawyer further  
18 explained that Mr. Johnson's "Tyvek" suit would have done "very little" in protecting him from  
19 exposure to GBHs. The nozzle that he would use would produce a huge aerosol resulting in substantial  
20 spray drift. *Id.* at 3663-3664. Furthermore, Mr. Johnson's sweat would have actually created an  
21 "immediate diffusion pathway to the skin." *Id.* at 3673:2-11.

22 When asked whether Mr. Johnson's exposure combined with the 10 percent dermal absorption  
23 rate was enough to have caused a carcinogenic response resulting in his NHL, Dr. Sawyer opined: "Yes,  
24 absolutely. He is – I can say that emphatically, and base it on the peer-reviewed literature, in that his  
25 exposure – his levels of exposure were far higher than that in the literature . . ." *Id.* at 3673:25-3674:16.

26 Monsanto incorrectly asserts that Plaintiff's experts relied on only "two particular incidents" of  
27 exposure in reaching their opinions in this case. Once again, this is a blatant misrepresentation of the  
28

1 record; Monsanto did not even bother to cite to trial testimony.<sup>3</sup> In fact, Dr. Sawyer did not even factor  
2 the two “incidents” into his exposure analysis lending even more credibility to his opinion that his  
3 estimates are actually below Mr. Johnson’s true exposure. Based on his experience, education and his  
4 review of all of the materials, Dr. Sawyer reached his opinion to a reasonable degree of scientific  
5 certainty that Mr. Johnson’s NHL was caused by his massive exposure to GBHs. *Id.* at 3601:9-13; 3606.  
6 In reaching his opinions, Dr. Sawyer relied on Monsanto’s own official studies as it would not have  
7 been possible to replicate Mr. Johnson’s exact exposure amount. *Id.* at 3689; 3691-3692; 3790.

8 Dr. Chadi Nabhan, Plaintiff’s expert medical oncologist, also concluded that Mr. Johnson’s  
9 chronic exposure to GBHs was a substantial contributing factor to his development of mycosis fungoides.  
10 Nabhan Trans. Tr. at 2799:4-11 (7/20/2018). He explained that Mr. Johnson had chronic dermal  
11 exposure to GBHs including at least two acute high-level exposures. *Id.* at 2867. The epidemiology  
12 support a dose-response whereby the more exposure a person gets, the more likely they will develop  
13 NHL. *Id.* at 3027. Based on this information, he was able to conclude that GBHs were a substantial  
14 cause to Mr. Johnson’s NHL.

## 15 **2. There is Sufficient Evidence That Mr. Johnson’s Exposure to GHBs Caused His** 16 **Cancer In 2.25 Years**

17 Latency is measured from the time of first exposure until the time of diagnosis. Sawyer Trans.  
18 Tr. at 3677:4-12 (7/26/2018). Both Dr. Sawyer and Dr. Nabhan agree that the latency for NHL can be  
19 much shorter than two years and can vary based on the individual. Sawyer Trans. Tr. at 3781  
20 (7/26/2018); Nabhan Tr. at 2857-2858 (7/20/2018). Plaintiff’s experts both provided numerous  
21 examples of short latency periods which confirmed their understanding that NHL can be diagnosed

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22 <sup>3</sup> The consistent misrepresentations in Monsanto’s nonsuit motion is alarming. Monsanto cites to Mr.  
23 Johnson missing a “whole season of spraying” to support its argument that Plaintiff failed to specify the  
24 amount of exposure prior to the onset of his NHL. Def’s Mot. at 10. Monsanto is well aware that this  
25 occurred *after* Mr. Johnson was diagnosed with cancer. Johnson Test. Tr. at 3306:14-3307:23  
26 (7/23/2018). Monsanto states that Plaintiff sprayed for “approximately only one year prior to  
27 manifesting symptoms of his MF.” Def’s Mot. at 10. Dr. Nabhan testified that Mr. Johnson sprayed for  
28 over two years prior to his first symptoms of mycosis fungoides. There is no testimony to the contrary  
other than Mr. Lombardi’s arguments. Monsanto cites to Dr. Nabhan’s testimony that “it was not until  
April 2014 that he experienced his first high-level exposure to the formulation” Def’s Mot. at 10. Dr.  
Nabhan specifically testified that he did not remember the exact dates. Nabhan Test. Tr. at 2969-2970  
(7/20/18).

1 within a year of exposure to a carcinogen or other offending hazard. *Id.* at 2855-2859; Sawyer Trans.  
2 Tr. at 3676-3677 (7/26/2018). The fact that Mr. Johnson received a very high dosage of GBHs for a  
3 shorter period of time, his latency would generally be much shorter. Sawyer Trans. Tr. at 3678-3679  
4 (7/26/2018). Furthermore, the fact that Mr. Johnson's cancer behaved so aggressively would suggest  
5 that you would expect a shorter latency. Nabhan Trans. Tr. at 3050 (7/20/2018). Judge Karnow actually  
6 excluded the latency opinion of a Monsanto's Expert, Dr. Kuzel, because his opinion that Mr. Johnson's  
7 latency was too short was speculative. SJ Order at 36.

8 It is undisputed that Mr. Johnson's first exposure to GBHs was in June 2012 and he was  
9 diagnosed with mycosis fungoides in August 2014. Therefore, the latency for Mr. Johnson's cancer is  
10 2.25 years. Sawyer Trans. Tr. at 3676:8-3677:16. Dr. Nabhan and Dr. Sawyer both discussed the "bell  
11 curve" associated with latency periods and both concluded that Mr. Johnson's NHL was caused by his  
12 exposure to GBHs. Monsanto cannot cite to any evidence to the contrary. Instead, Monsanto makes the  
13 conclusory statement that "Plaintiff introduced no competent evidence on latency" and then proceeds to  
14 ignore Plaintiff's evidence on latency. Even if Monsanto disagrees with the opinions of Plaintiff's  
15 experts, at this state, "evidence most favorable to the plaintiff must be accepted as true and conflicting  
16 evidence must be disregarded." *Miller v. Los Angeles County Flood Control Dist.*, (1973) 8 Cal.3d 689,  
700.

17 **3. Dr. Nabhan Properly Performed a Differential Diagnosis and Determined That**  
18 **Mr. Johnson's Exposure to GBHs Was a Substantial Contributing Factor to His**  
**Development of NHL**

19 Judge Karnow determined that Dr. Nabhan conducted a proper differential diagnosis. SJ Order at  
20 25. Dr. Chadi Nabhan is a board-certified oncologist specializing in the diagnosis and treatment of  
21 lymphoma's and leukemias, including Non-Hodgkin's lymphoma. Nabhan Test., Tr. at 2773:10-21;  
22 2776:22-24; 2779:6-12. He has authored over 300 journal articles, abstracts and book chapters relating  
23 to cancer with the substantial majority dealing with Non-Hodgkin's lymphoma. *Id.* at 2785:13-2786:4.  
24 Dr. Nabhan testified that mycosis fungoides is simply a form of non-Hodgkin's lymphoma. *Id.* at  
25 2780:7-17. As such, it is appropriate to rely upon scientific literature related to NHL generally in  
26 reaching causation opinions. Dr. Nabhan explained that NHL is a "large umbrella" and due to the  
27 changing nature of classifications and the difficulty in specifically testing each particular subtype,  
28 physicians must apply causation evidence to every subtype including mycosis fungoides. *Id.* at 2900.

1 In reaching his specific causation opinions in this case, Dr. Nabhan reviewed epidemiology,  
2 animal studies, toxicology studies, thousands of pages of Mr. Johnson's medical records,  
3 correspondence from Mr. Johnson's employer, and relevant deposition transcripts. *Id.* at 2789-2795. Dr.  
4 Nabhan also personally met and examined Mr. Johnson. Dr. Nabhan considered the amount of Mr.  
5 Johnson's exposure in reaching his opinions. *Id.* at 2831. He considered the amount and duration of  
6 exposure as well as the number of reported times that the GBHs would have contacted his skin. *Id.* at  
7 2834-2836.

8 Next, Dr. Nabhan employed a differential diagnosis in which he considered every possible or  
9 plausible cause of Mr. Johnson's NHL. *Id.* at 2841-2842. He considered the known risk factors and  
10 causes of NHL including age, race, immunosuppressant therapies, autoimmune diseases, skin  
11 conditions, occupation, occupational exposures and viruses. *Id.* at 2842-2852. Dr. Nabhan explained  
12 that sun exposure, tobacco, and alcohol are not known causes of NHL and could therefore be excluded.  
13 *Id.* at 2852-2853. After properly conducting a differential diagnosis, Dr. Nabhan concluded that Mr.  
14 Johnson's only known risk factors were his race (African American) and Roundup exposure. Dr.  
15 Nabhan therefore concluded that Roundup was the most substantial contributing factor to Mr. Johnson's  
16 NHL. *Id.* at 2853:24-2854:2.

17 Despite Monsanto's argument to the contrary, Dr. Nabhan did consider whether Mr. Johnson's  
18 NHL was idiopathic. Dr. Nabhan testified that because Mr. Johnson was far younger than the typical  
19 mycosis fungoides patient this would constitute a "red flag" suggesting to him that there was something  
20 behind the NHL. July 20 Trns. 2843:2-2844:19. In other words, Mr. Johnson's cancer was not  
21 idiopathic. *Id.* at 2997. Dr. Nabhan is "very certain" that if Mr. Johnson had not been exposed to  
22 Roundup he would not have developed mycosis fungoides. *Id.* at 2849:9-21.

23 Under the applicable substantial factor test, "it is not necessary for a plaintiff to establish the  
24 negligence of the defendant as the proximate cause of injury with absolute certainty *so as to exclude*  
25 *every other possible cause of a plaintiff's illness*, even if the expert's opinion was reached by  
26 performance of a differential diagnosis." *Cooper.*, 239 Cal. App. 4th at 578. In reaching a specific  
27 causation opinion, clearly a medical expert "need not exclude all other possibilities before he or she can  
28 express an opinion that the defendant's conduct or product caused the plaintiff's harm." *Cooper*, 239 Cal.  
App. 4th at 580. It is defendant's burden to proffer "the existence of an alternative explanation,

1 supported by substantial evidence and not mere speculation...” to defeat Plaintiff’s claims as a matter of  
2 law. *Id.* Judge Karnow agreed that Dr. Nabhan was not required to rule out every other possible cause  
3 to render a causation opinion. SJ Order at 25.

4 The recent case of *Wendell v. GlaxoSmithKline*, (cited with approval by Judge Karnow, SJ Order  
5 at 24) applying California substantive law, is particularly relevant because it involves a rare subtype of t-  
6 cell lymphoma. 858 F.3d 1227, 1230, 1236 (9th Cir. 2017). Under *Wendell*, it is not necessary for an  
7 expert to “rely on animal or epidemiological studies” for a differential diagnosis to be “found reliable  
8 and admissible” particularly in case of rare cancers where it would be difficult to conduct studies  
9 powerful enough to create statistically significant results. *Id.* at 1235. In conducting a differential  
10 diagnosis one “[a]ssumes the pertinence of all potential causes, then rules out the ones as to which there  
11 is no plausible evidence of causation, and then determines the most likely cause among those that cannot  
12 be excluded.” *Id.*

13 Monsanto claims because the causes of t-cell lymphoma mycosis fungoides are mostly unknown  
14 (as one would expect with a rare tumor), it is impossible to conduct a differential diagnosis. This is not  
15 true. As explained in *Wendell*:

16 the district court erred when it excluded Plaintiffs' experts' opinion  
17 testimony because of the high rate of idiopathic [unknown] HSTCL and  
18 the alleged inability of the experts to rule out an idiopathic origin or IBD  
19 itself. We do not require experts to eliminate all other possible causes of a  
20 condition for the expert's testimony to be reliable. *Messick*, 747 F.3d at  
21 1199. It is enough that the proposed cause “be a substantial causative  
22 factor.” *Id.* This is true in patients with multiple risk factors, and  
23 analogously, in cases where there is a high rate of idiopathy. ..Moreover,  
24 when an expert establishes causation based on a differential diagnosis, the  
25 expert may rely on his or her extensive clinical experience as a basis for  
26 ruling out a potential cause of the disease. See *id.* at 1198

27 *Id.* at 1237. *Wendell* concluded that “[w]ere, as here, two doctors who stand at or near the top of their  
28 field and have extensive clinical experience with the rare disease or class of disease at issue, are  
prepared to give expert opinions supporting causation, we conclude that Daubert poses no bar based on  
their principles and methodology.” *Id.*

#### 29 **IV. Monsanto’s Motion Fails to Consider the Elements for Product Liability Which do not** 30 **Require Any Evidence of A Safer Alternative Design**

1 Monsanto's Motion for Nonsuit claims that Roundup cannot be found to be defective in design  
2 because Plaintiff did not prove that there was a safer alternative design. Unfortunately for Monsanto,  
3 California's strict product liability law contains no such requirement. In fact, Plaintiff is pursuing strict  
4 liability under California's failure to warn and consumer expectation tests. However, Monsanto fails to  
5 discuss the elements of the consumer expectation test because Plaintiff presented ample evidence to  
6 support both failure to warn and consumer expectation. Thus, Monsanto's motion must be denied.

7 California courts specifically exclude consideration of a product's benefits unless the plaintiff  
8 pursues a defect claim based on the risk/benefit test. The Supreme Court has repeatedly described two  
9 tests for strict product liability design defect:

10 Design defects appear in products that, although properly manufactured, are  
11 dangerous because they lack a critical feature needed to ensure safe use.  
12 (Brown, *supra*, 44 Cal.3d at p. 1057.) We discussed design defects at length  
13 in *Barker, supra*, 20 Cal.3d 413, establishing two alternative tests for  
14 liability. A product design may be found defective if (1) "the product failed  
15 to perform as safely as an ordinary consumer would expect when used in an  
intended or reasonably foreseeable manner" (consumer expectations test)  
(*id.* at p. 432), or (2) the risk of danger inherent in the product's design  
outweighs the design's benefits (risk-benefit test) (*ibid.*).

16 *Webb v. Special Electric Co., Inc.*, (2016) 63 Cal.4th 167, 180. Here, Plaintiff is only pursuing a design  
17 defect claim under the first test, the consumer expectation test. Under the consumer expectation test, a  
18 Plaintiff is not required to "prove that there was a safer alternative design." *Sparks v. Owens-Illinois,*  
19 *Inc.*, 32 Cal. App. 4th 461 (1995). In fact, Judge Karnow explicitly ruled that "Johnson is entitled to an  
20 instruction on the consumer expectations test... *Monsanto may not defend a claim under the consumer*  
21 *expectations test by relying on the risk-benefit test.* *Sparks v. Owens-Illinois, Inc.*, 32 Cal.App.4th 461,  
22 473 (1995); *see also Soule v. General Motors Corp.*, 8 Cal 4th 548 (1994) ('party is entitled upon  
23 request to correct, non-argumentative instructions on every theory of the case *advanced by him* which is  
24 supported by substantial evidence.'"). May 17 Order on Jury Instructions at 5. (emphasis added).

25 Under these circumstances, the benefits of Roundup are not only irrelevant, they are to be  
26 excluded:

27 ...the consumer expectation test applies in 'cases in which the everyday  
28 experience of the product's users permits a conclusion that the product's  
design violated minimum safety assumptions, and is thus defective

1 regardless of expert opinion about the merits of the design.’ A plaintiff  
2 may show the objective condition of the product, and the fact finder may  
3 use its own ‘sense of whether the product meets ordinary expectations as  
4 to its safety under the circumstances presented by the evidence.’ *A*  
*defendant may not rebut such a claim with evidence of the design's*  
*relative risks and benefits...*”)

5 *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1186 (quoting Soule 8 Cal 4th at  
6 567, 607) (emphasis added). Furthermore Comments K and J are inapplicable as a defense, as  
7 “Monsanto does not cite—and the Court cannot find—a California case applying comment k outside the  
8 medical context, ... On the contrary, California courts appear willing to apply comment k only where a  
9 product is “available only through the services of a physician,” *Hardeman v. Monsanto Co.*, 216 F.  
10 Supp. 3d 1037, 1040 (N.D. Cal. 2016)

11 Instead of presenting the elements for the causes of action or tests of product defect that Plaintiff  
12 is pursuing, Monsanto attempts to set up a straw man regarding argument of some safer alternative  
13 design that does not apply to this case. Monsanto has already admitted, in a Request for Admission  
14 entered into evidence in this case, that it did not warn Mr. Johnson of any of the cancer dangers of its  
15 glyphosate-based products. July 23 Trns. at 3186:2-13. Knowing that it cannot defeat Plaintiff’s failure  
16 to warn or design defect claims, Monsanto now attempts to create a test for liability that does not exist  
17 here. Plainly, the benefits of Roundup or a safer alternative design are irrelevant.

18 As discussed below, Plaintiff has presented more than sufficient evidence of the fact that he did  
19 not expect Roundup to cause cancer and Monsanto admitted it did not warn of such a danger. July 23  
20 Trns. at 3234:21-25, 3279:1-12 (“Q. Had you seen something, that Ranger Pro could cause non-  
21 Hodgkin's lymphoma or cancer, would you have sprayed this product? A. I would never have sprayed  
22 that product on school grounds or around any people if I knew it would cause them harm...”). Mr.  
23 Johnson also testified that he read the label every time he used the formulation. *Id.* at 3231:3-24. The  
24 jury certainly has enough evidence to “use its own sense of whether the product meets ordinary  
25 expectations as to its safety under the circumstances presented by the evidence” and whether Monsanto  
26 failed to warn. *Arena* 63 Cal.App.4<sup>th</sup> at 1186 (quoting *Soule* 8 Cal 4th at 567, 607). Thus, Monsanto’s  
27 Motion for Nonsuit must be denied.

28 **V. Plaintiff Has Presented Sufficient Evidence for Strict Liability Failure to Warn**

1 A plaintiff alleging a failure to warn strict liability cause of action need prove that the defendant  
2 either (1) knew of the risks involved at the time of manufacture and/or distribution, or (2) based on the  
3 state of scientific knowledge at the time of manufacture and/or distribution, should have known of the  
4 risks. *Webb*, 63 Cal.4th at 180. “Manufacturers have a duty to warn consumers about the hazards  
5 inherent in their products. *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64. The California  
6 Supreme Court has traditionally imposed strict liability for failure to warn of either known or *reasonably*  
7 *scientifically knowable* risks of a product. *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53  
8 Cal.3d 987, 1000, 1002 (“[t]he rules of strict liability require a plaintiff to prove only that the defendant  
9 did not adequately warn of a particular risk that was known or knowable in light of the generally  
10 recognized and prevailing best scientific and medical knowledge available at the time of manufacture  
11 and distribution.”). When adjudicating failure to warn under strict liability principles, “the  
12 reasonableness of the defendant's failure to warn is immaterial.” *Carlin v. Superior Court* (1996) 13  
13 Cal.4th 1104, 1112.

14 **A. The NHL Risks of GBHs Were Known and Knowable by Monsanto Before Mr.**  
15 **Johnson Started Spraying RangerPro**

16 Monsanto contends that a warning requirement was not triggered by the prevailing scientific  
17 evidence for Roundup carcinogenicity because 1) the 2015 IARC classification of glyphosate as a  
18 probable human carcinogen did not render knowable the risk of cancer; 2) the EPA’s review and  
19 registration of glyphosate militates against a warning; and 3) Mr. Johnson’s injury preceded the IARC  
20 classification. Monsanto Brief at 18. Such assertions not only sound in abandoned preemption  
21 arguments, but are factually inaccurate. It is well-settled that “reasonably scientifically  
22 knowable...refers to knowledge obtainable ‘by the application of reasonable, developed human skill and  
23 foresight....[t]he actual knowledge of the individual manufacturer, even if reasonably prudent, is not the  
24 issue....the manufacturer is held to the knowledge and skill of an expert in the field; it is *obliged to keep*  
25 *abreast of any scientific discoveries and is presumed to know the results of all such advances.* *Carlin*  
26 13 Cal.4th at 1113, fn. 3 (emphasis added) (quoting *Anderson, supra*, 53 Cal.3d at 1002, fn. 13). The  
27 IARC monograph *reviewed* prevailing epidemiological, toxicological, and mechanistic literature  
28 associating Roundup exposure with NHL. Evidence presented at trial demonstrated that the data



1 reviewed by IARC was known years before the agency classified glyphosate, as testified to by Plaintiff's  
2 experts.<sup>4</sup> Neugut, July 18 Trns. at 2614: 17-21, 2617:21-25 ("The point that we should walk away with  
3 is that overall, there's a statistically significant increased risk in the 1.3, 1.4, possibly 1.5, range. And  
4 that's basically what the *case control studies are showing us...*" the case control studies range in time  
5 from 1999-2008); Portier July 12 Trns. at 1897 (discussing doubling of the risk in epidemiological  
6 studies from 2001 and 2008); July 12 Trns. at 1965:9-11 (Dr. Portier's review of the epidemiological  
7 literature preceding the IARC decision led him to conclude that a casual association is credible); July 20  
8 Trns. at 2826:18-25 (discussing De Roos (2003) "A. So you will see that it says 2.1. So it doubles the  
9 risk."); Portier July 13 Trns. at 1981:14-22 (concluding that Roundup is genotoxic after reviewing over  
10 100 mechanistic studies going back to the 1990s).

11 Indeed, the toxicologist hired by Monsanto, Dr. James Parry, concluded in the late 1990s and  
12 early 2000s that Roundup is genotoxic and can cause oxidative stress, a precursor to cancer based on Dr.  
13 Parry's review of toxicological data published throughout the 1990s. P-Exh. 217 at 10, 5 (First Parry  
14 Report: "These data indicate that Glyphosate produces oxidative damage *in vivo*... *in vitro* evidence of  
15 genotoxic effect for Roundup mixture.); P-Exh. 220 at 11 (Second Parry Report: "These studies provide  
16 some evidence that Roundup mixture produces DNA lesion *in vivo*, probably due to the production of  
17 oxidative damage."). Dr. Mark Martens, the Monsanto employee who worked closely with Dr. Parry,  
18 confirmed Dr. Parry's conclusions. Martens Depo at 65:3-6, 20-25; 72:3-12. Dr. Parry's toxicological  
19 findings were also confirmed by Dr. Portier after his review of the animal data spanning from the 1980s  
20 to 2010. July 12 Trns. at 1834:16-1837:14, 1863:19-20, 1758:10-11 ("A. glyphosate has the potential to  
21 be a promoter of carcinogenesis...[glyphosate] caused the cancer seen in the animals.").<sup>5</sup>

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23 <sup>4</sup> Monsanto's awareness of such evidence is discussed in the next section when addressing the negligent  
24 failure to warn claim.

25 <sup>5</sup> Dr. Martens confirmed that Dr. Parry was a recognized expert in the field and that the studies reviewed  
26 by Dr. Parry employed generally acceptable methods. Martens Depo. at 29:7-9, 238:4-17 ("Q. Was [Dr.  
27 Parry] an expert in his field? A. Yes... A. the dosage that was used in these studies that you analyzed,  
28 they were following standards and practices that scientists use all over the world, correct? A Yes. Q  
They weren't doing anything abnormal, correct? A No. Q They were following the same practices that  
scientists follow all over that give us results that we -- that are accepted all over the world, correct? A  
Yes, insofar they follow the international accepted test guidelines.").

1 Given that the Court is obliged to take every favorable presumption fairly arising from the  
2 evidence as facts proved in favor of the Plaintiff, nonsuit must be denied when Plaintiff has presented a  
3 plethora of evidence from which the jury could conclude that Monsanto should have warned of a cancer  
4 risk. *Elmore v. American*, 70 Cal. 2d 578, 583 (1969). Indeed, Court is not permitted to weigh the  
5 evidence and must disregard conflicting evidence such as the EPA's review of glyphosate. *Stonegate*  
6 *Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 745 ("evidence most favorable to plaintiff  
7 must be accepted as true and *conflicting evidence must be disregarded.*") (emphasis added).  
8 Notwithstanding this, even if the Court were to weigh contrary evidence such as the EPA's classification  
9 of glyphosate, the evidence viewed in Plaintiff's favor precludes nonsuit because, to date, the EPA has  
10 not reviewed long-term carcinogenicity studies on the formulated product, such as the surfactant, as  
11 confirmed by Dr. Sawyer. July 26 Trns. at 3614, 3615:7-10, 3615:11-25 ("Q. [EPA] haven't actually  
12 looked at any testing as to carcinogenicity? A. No, it's never been tested."). On this record, nonsuit is  
13 wholly inappropriate.

14 **B. Plaintiff Has Presented Sufficient Evidence for a Jury to Conclude that**  
15 **Monsanto was Negligent in Failing to Warn**

16 During trial, Plaintiff marshalled a trove of internal Monsanto documents dating back decades  
17 which demonstrate that Monsanto personnel were aware, or at the very least, should have been aware of  
18 the association between Roundup exposure and cancer. Indeed, as Monsanto's Medical Sciences Lead,  
19 Dr. Daniel Goldstein, conceded at deposition, even prior to IARC, a large body of mechanistic studies  
20 had revealed the association between Roundup exposure and the biological precursors to cancer such as  
21 oxidative stress, of which Monsanto was aware. P-Exh. 315 at 1-2; Goldstein Depo. at 99:1-24 ("You  
22 had been dealing with this issue for a while, fair? A. It had certainly come up before, yes."). The jury  
23 heard evidence that the epidemiological studies relied upon by Plaintiff's experts were all discussed  
24 inside Monsanto at the time of their publication. P-Exh. 282 at 2 (memorandum by Donna Farmer, John  
25 Acquavella and Daniel Goldstein stating that "[t]here are now six published studies that *arguably*  
26 *associate glyphosate and other pesticides with lymphopoietic cancers...*") (emphasis added); Goldstein  
27 Depo at 92:22-96:3 (discussion of email from Dr. John Acquavella regarding association between  
28

1 Roundup and cancer in De Roos (2003) and Hardell (2002)); P-Exh. 309 at 1 (Dr. Acquavella discussing  
2 the results of the McDuffie (2001) paper which found elevated risks of NHL associated with Roundup  
3 exposure; P-Exh. 312 at 1-3 (discussion of results of McDuffie (2001)); P-Exh. 313 at 1-2 (same, Donna  
4 Farmer and John Acquavella celebrating the fact that the reference to glyphosate carcinogenicity was  
5 removed from the paper's abstract); P-Exh. 316 at 1-2 (email regarding "awareness files" sent to Dr.  
6 Goldstein and Dr. Farmer, attaching the Eriksson (2008) paper at the time of its publication; the study  
7 showed an association between Roundup exposure and NHL; P-Exh. 513 at 1 (Dr. Farmer stating that  
8 Monsanto had been aware of the Eriksson (2008) publication for some time). Significantly, Dr.  
9 Heydens admitted that the body of evidence prior to IARC demonstrated that Roundup had  
10 "vulnerabilities" in the areas of epidemiology, genotoxicity and mode of action. P-Exh 294. Dr.  
11 Heydens also admitted in 2015 that the surfactant in the Roundup formulation "played a role" in the  
12 tumor promotion study of George, et al. (2010), discussed at length by Dr. Portier as a basis for his  
13 conclusion that "glyphosate has the potential to be a promoter of carcinogenesis." P-Exh. 366 at 3; July  
14 12 Trns. at 1863:3-20. And, the report submitted to Monsanto by James Parry (discussed above) is also  
15 further evidence that Monsanto knew or should have known that Roundup causes cancer, particularly  
16 since Dr. Parry's conclusions were in regard to the formulated product. P-Exh. 217 (First Parry Report);  
17 P-Exh. 220 (Second Parry Report); Martens Depo at 65:3-6, 20-25; 72:3-12.

18 Furthermore, Monsanto recognized the impact of the prevailing scientific evidence of Roundup  
19 carcinogenicity on regulatory decisions at least five years prior to the IARC classification. P-Exh. 373  
20 at 5 (internal 2010 Monsanto document acknowledging that regulators were growing "increasingly more  
21 concerned" as a result of literature indicating an association between Roundup exposure and health  
22 risks.) In the same document, Monsanto identifies toxicological studies which have concluded that  
23 Roundup poses risks of biological precursors to cancer. *Id.* at 9-10. Monsanto should have known that  
24 Roundup can be carcinogenic when its own scientists admit that the formulation – containing the  
25 surfactant POEA – used by Mr. Johnson is "hazardous." P-Exh. 383 at 2 ("there are non-hazardous  
26 formulations, so why sell a hazardous one?"). Indeed, lead Monsanto toxicologist, William Heydens,  
27 admitted in 2015 that the Roundup formulation contains other known carcinogens such as NNG and  
28

1 formaldehyde. P-Exh. 357 at 1. Plaintiff's experts testified regarding this aspect of the formulation.  
2 July 18 Trns at 2603:18-25 (Dr. Neugut confirming that formaldehyde is an IARC Class 1 carcinogen);  
3 July 26 Trns. at 3609:21-3610:5 (Dr. Sawyer testifying that the presence of 1,4-Dioxane, ethylene  
4 dioxide and NNG contribute to the carcinogenicity of the formulation: "In fact, ethylene oxide is one of  
5 the most potent carcinogens known to man.")). Monsanto's knowledge regarding the carcinogenic  
6 formulation is thus substantiated by Plaintiff's competent expert testimony. Despite such knowledge,  
7 Monsanto refused to conduct a proper long term carcinogenicity study on the formulation, which is why  
8 Dr. Farmer "cannot say that Roundup does not cause cancer....we have not done carcinogenicity studies  
9 with 'Roundup.'" P-Exh. 305 at 1. Such statements evince that Monsanto, at the very least, should have  
10 known that its product could cause cancer.

11 Monsanto also argues that Plaintiff has not presented evidence regarding the applicable standard  
12 of care. However, this is a misstatement of what is required under the law. General negligence, unlike  
13 the medical standard of care, does not require the applicable standard of care to be established by  
14 competent expert testimony. *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 787. The *Anderson*  
15 *Court* made it clear that the applicable standard of care is simply  
16 what reasonably prudent manufacturer would have known and warned about." *Anderson*, 53 Cal.3d at  
17 1002. It is worth noting that Monsanto's citation to *Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363,  
18 1367 (2005) is misguided. *Stephen* is not authority for the proposition that a negligent failure to warn  
19 case requires expert testimony regarding the applicable standard of care. Instead, the *Stephen* court  
20 merely reiterated the trial court's finding that "[plaintiff] did not have any expert testimony to show the  
21 tire failed as the result of a design defect..." Here, CACI 400 governs, namely the Court will instruct the  
22 jury on what the standard of care is and that nothing in this case is so outside common experience that it  
23 would require expert testimony; in fact, expert testimony would be prohibited because it would invade  
24 the province of the jury to decide the ultimate issue in the case. *Ramirez v. Plough, Inc* (1993) 6 Cal.4th  
25 539, 546 ("The formulation of the standard of care is a question of law for the court. Once the court has  
26 formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable  
27 minds might differ as to whether a party's conduct has conformed to the standard."). If Plaintiff proves  
28

1 that Roundup causes cancer, the jury certainly does not need expert testimony to come to the conclusion  
2 that defendant's failure to warn of cancer, while representing it as safe, was unreasonable under the  
3 circumstances.

4 Because Plaintiff has presented sufficient evidence that Monsanto was aware of a cancer risk in  
5 light of the prevailing scientific literature and its own admissions (discussed above), the trier of fact  
6 could properly find that Monsanto was negligent in failing to warn and nonsuit must be denied  
7 accordingly.

8  
9 **C. There is Sufficient Evidence that Monsanto's Failure to Warn Caused Plaintiff's Injury**

10 On the stand, Mr. Johnson testified clearly and unequivocally that he would never have used  
11 Roundup had he known it would cause his NHL. July 23 Trns. at 3234:21-25, 3279:1-12 ("Q. Had you  
12 seen something, that Ranger Pro could cause non-Hodgkin's lymphoma or cancer, would you have  
13 sprayed this product? A. I would never have sprayed that product on school grounds or around any  
14 people if I knew it would cause them harm... Q. And if Monsanto had told you at that time that Ranger  
15 Pro could have caused cancer, would you have kept spraying their product? A. Absolutely not... Q.  
16 Even if Monsanto had said, 'Mr. Johnson, we're not entirely sure, but your cancer might be related to  
17 your Ranger Pro exposure,' would you have continued to spray the product? A. If they said it might be?  
18 Q. Even if they said 'We're not entirely, but it might be,' would you keep spraying? A. No.'). Mr.  
19 Johnson also testified that he read the label *every time* he used the formulation. *Id.* at 3231:3-24.

20 Mr. Johnson's conduct and state of mind *after* his diagnosis are simply irrelevant and cannot be  
21 used by Monsanto to claim that a warning would not have been heeded. In fact, when Mr. Johnson was  
22 asked by his employer *after diagnosis* whether Mr. Johnson knew that Roundup may be carcinogenic,  
23 Mr. Johnson responded: "No, I didn't know that." July 23 Trns. at 3235:21. Similarly, Dr. Ofodile's  
24 (Mr. Johnson's treating physician) letter to the school board requesting that Mr. Johnson not be exposed  
25 occurred after Mr. Johnson's diagnosis, when the opportunity to heed a warning was long moot. July 23  
26 Trns. at 3154:8-13. Importantly, the letter from Dr. Ofodile was in part prompted by the cautionary  
27 principle of preventing repeated exposure to substances that may have contributed to an existing cancer:  
28

1 “My understanding is that, you know, it is okay and advisable to avoid something that could potentially  
2 be -- can exacerbate a condition, even if it's not been conclusive. So, you know, if I had a patient that  
3 was exposed to something and I thought may be causing it, my recommendation is to avoid it rather than  
4 waiting to see whether or not it truly does cause it later on.” *Id.* at 3155:17-25.

5 Monsanto also suggests that Mr. Johnson’s concern for his health after his back-pack leaked,  
6 soaking him in Roundup, somehow indicates that a warning would not have been heeded. Monsanto  
7 Brief at 20. This makes little sense given that Mr. Johnson would not have even used Roundup, much  
8 less been exposed to substantial amounts, if Monsanto had properly warned. Moreover, Mr. Johnson’s  
9 general health concerns following exposure to a chemical are materially different to knowledge that the  
10 product causes a specific type of cancer. For the same reasons, Mr. Johnson’s decision to use protective  
11 clothing is irrelevant to whether he knew that Roundup could cause mycosis fungoides.

## 12 **VI. The Evidence for Punitive Damages is Overwhelming**

### 13 **A. Monsanto’s Conduct Meets the Threshold for Punitive Damages**

14 There is more than sufficient evidence in this case for a jury to find for Plaintiff on his punitive  
15 damages claim. “If a company intentionally proceeds with conduct which will expose a person to a  
16 serious potential danger known to the company in order to advance the company's own pecuniary  
17 interest, punitive damages may be assessed based on a finding that the company has shown a conscious  
18 disregard for the person's safety.” *Ford Motor Co. v. Home Ins. Co.*, 116 Cal. App. 3d 374, 381–82, (Ct.  
19 App. 1981); *Boeken v. Philip Morris Inc.*, 127 Cal.App.4th 1640, 1690 (2005) (intentionally marketing a  
20 defective product knowing that it might cause injury and death is highly reprehensible). Here, Monsanto  
21 continues to hide and suppress evidence that there is a potential deadly danger of NHL associated with  
22 GBHs and it does so because of its own pecuniary interests.

23 As an initial matter, Monsanto underestimates the “crux of Plaintiff’s case for punitive  
24 damages...” *Id.* Certainly, evidence that Monsanto did not conduct the studies suggested by Dr. Parry  
25 evinces reckless disregard for human health. P-Exh. 268 (“we are simply not going to do the studies  
26 Parry suggests.”). Dr. Portier testified that Monsanto only carried out one of Dr. Parry’s  
27 recommendations: “Q. So of all of Dr. Parry's recommendations asking for affirmative action, only one  
28

1 of them was done in this study? A. Yes.” July 13 Trns. at 1997:19-22. Moreover, Monsanto’s  
2 manipulation of the scientific data on Roundup also go to punitive intent, as recognized by Judge  
3 Karnow when ruling that evidence such as ghostwriting is evidence “that a reasonable jury could find  
4 amounts to clear and convincing evidence of malice, fraud, or oppression.” Johnson Sargon Order at 45-  
5 46 (*The internal correspondence noted by Johnson could support a jury finding that Monsanto has*  
6 *long been aware of the risk that its glyphosate-based herbicides are carcinogenic, and more*  
7 *dangerous than glyphosate in isolation*, but has continuously sought to influence the scientific literature  
8 to prevent its internal concerns from reaching the public sphere and to bolster its defenses in products  
9 liability actions.”) *Id.* at 45 (emphasis added). In fact, 6 out of 8 documents that Judge Karnow opined  
10 the jury could use in deciding punitive intent were admitted at trial, namely: P-Exh. 305 at 1 (Donna  
11 Farmer stating that “you cannot say that Roundup does not cause cancer...we have not done  
12 carcinogenicity studies with ‘Roundup.’”); P-Exh. 362 at 2 (Dr. Heydens admitting that Monsanto  
13 ghostwrote Williams (2000) that Monsanto then leveraged with regulatory agencies to support the  
14 registration of glyphosate<sup>6</sup> “keeping costs down and doing the writing ourselves...recall that’s how we  
15 handled Williams, Kroes & Munro (2000)”) (this occurred during Mr. Johnson’s period of exposure); P-  
16 Exh. 217 (First Parry Report concluding that Roundup is genotoxic and has the potential to induce  
17 oxidative stress; P-Exh. 220 (Second Parry Report concluding same); P-Exh. 443 (Monsanto also  
18 ghostwrote the Kier & Kirkland (2012) article, as partly demonstrated by the “manuscript clearance  
19 form” signed by David Saltmiras); P-Exh. 445 (The plans to ghostwrite Kier & Kirkland (2012) were  
20 discussed internally by Monsanto).<sup>7</sup>

21 Judge Karnow viewed only a limited amount of the evidence supporting punitive damages. The  
22 Jury has seen much more. In addition to the evidence which Judge Karnow held could support a  
23 punitive damages award, Plaintiff introduced testimony by former Monsanto employee, Dr. Kirk  
24 Azevedo, who testified that he observed instances when Monsanto’s corporate philosophy led him to

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25 <sup>6</sup> Such use of Williams is demonstrated by P-Exh. 373, an internal Monsanto PowerPoint presentation  
26 which identifies Williams (2000) as an “invaluable asset” that was used for “Monsanto responses to  
27 agencies; Scientific Affairs Rebuttals; [and] Regulator Reviews.” at 12.

28 <sup>7</sup> The Parties stipulated to the admission of Exhibits 443 and 445 in lieu of playing the video deposition  
of Dr. Saltmiras during Plaintiff’s case-in-chief.

1 question Monsanto's commitment to safety, such as when a Monsanto CEO told Dr. Azevedo, in  
2 response to the latter's enthusiasm for a sustainable, environmentally-friendly business model, that  
3 "[t]his sort of thing isn't really what we're about. We're about making money, so get it straight."  
4 Azevedo Depo. at 50:7-51:25. This preoccupation with profits over safety is reiterated by documents  
5 introduced through the testimony of Monsanto sales-representative, Mr. Steve Gould, who was  
6 responsible for calculating the costs on Monsanto's Roundup business in California following the 2015  
7 IARC classification, at a time when Mr. Johnson was still using Ranger Pro. *See* P-Exh. 291.  
8 Monsanto's reckless disregard for human safety is illustrated by the fact that Mr. Gould approved the  
9 statement of a Roundup distributor regarding the impact of the IARC assessment on Roundup's  
10 domestic PR and business: "We're being overrun by liberals, zombies, and morons," who need to be  
11 "taken out one at a time, starting with the elections next year," at a time when Roundup had repeatedly  
12 been associated with NHL, and following the IARC decision. P-Exh. 290 at 1.

13 Monsanto's efforts to curtail domestic regulatory reviews of Roundup could constitute malice,  
14 particularly in light of IARC's decision and Monsanto's reliance on the review of glyphosate by various  
15 regulatory agencies for the argument that Roundup is safe. P-Exh. 402 at 2 ("ATSDR Director and  
16 Branch Chief have promised Jack Housenger (Director of the US Office of Pesticide Programs) to put  
17 their report 'on hold' until after EPA releases its preliminary risk assessment (PRA) for glyphosate.").  
18 Indeed, Monsanto's contact within the EPA's Office of Pesticide Programs ("OPP") – Mr. Jess Rowland  
19 – bragged that he should be awarded a "medal" if able to "kill" the ATSDR review of glyphosate. P-  
20 Exh. 404 at 1-2. Mr. Rowland's role in aiding Monsanto to curtail regulatory safeguards was noted by  
21 Monsanto employees. P-Exh. 401 ("Jess doing a nice job at EPA...is there anyone we can get to inside  
22 EPA?").

23 The same evidence discussed in the previous sections in support of Plaintiff's strict liability and  
24 negligent failure to warn claims also supports the award for punitive damages, such as Monsanto's  
25 awareness of the presence of other carcinogens in the formulated product, and the dangers of POEA. P-  
26 Exh. 357 (William Heydens admitting internally in 2015 – only a couple of weeks after Monsanto was  
27 notified of Mr. Johnson's enquiries – that the Roundup formulation contains other known carcinogens  
28



1 such as NNG and formaldehyde); P-Exh. 383 at 3, 1 (“there are non-hazardous formulations, so why sell  
2 a hazardous one?” Mr. Heydens explicitly states that the reason why it was important for Monsanto to  
3 protect POEA despite its “demise” in Europe was to preserve Monsanto’s world business); P-Exh. 282  
4 (Monsanto’s awareness of the epidemiology literature supporting causation in a memorandum by Donna  
5 Farmer, John Acquavella and Daniel Goldstein stating that “[t]here are now six published studies that  
6 *arguably associate glyphosate and other pesticides with lymphopoietic cancers...*”). Monsanto’s  
7 nefarious intent is clearly illustrated by the fact that Donna Farmer and John Acquavella celebrated the  
8 removal of glyphosate from the McDuffie (2001) paper’s abstract, which made it more difficult for  
9 researchers to pick up on the study’s association between Roundup exposure and NHL. P-Exh. 313 at 1-  
10 2.

11 Despite Dr. Heydens admitting that the surfactant in the formulation may have been responsible  
12 for the tumors observed in the George (2010) study, Monsanto purposefully manipulated the scientific  
13 discourse to disguise Roundup’s carcinogenic potential. P-Exh. 366 at 3; P-Exh 368 at 1 (Dr. Heydens  
14 drafting expert panel manuscript). *Roeken v. Philip Morris Inc.*, 127 Cal.App.4th 1640, 1690 (2005)  
15 (intentionally marketing a defective product knowing that it might cause injury and death is highly  
16 reprehensible). Dr. Sawyer testified that Monsanto has never submitted some of its POEA studies to the  
17 EPA, nor conducted carcinogenicity testing on them. July 26 Trns. at 3651:15-22. This is while  
18 Monsanto is aware that safer alternatives are available. *Id.* at 3627:7-17 and Monsanto’s concerted  
19 efforts to “orchestrate outcry over IARC decision.” P-Exh. 292 at 5.<sup>8</sup> In response to IARC, as oppose to  
20 taking actions by warning about the dangers of its product, Monsanto ghost-wrote papers for an  
21 ostensibly independent expert panel. P-Exh. 336 at 1 (“Manuscript to be initiated by MON as  
22 ghostwriters.”).<sup>9</sup> Monsanto responded to IARC through scientific outreach strategies that can be used  
23 for “litigation support...Majority of writing can be done by Monsanto, keeping \$\$ down.” P-Exh. 391 at  
24

25 <sup>8</sup> Despite anticipating the IARC decision and knowing that Roundup had vulnerabilities in  
26 epidemiology, genotoxicity and mode of action, Monsanto purposefully attempted to rebut IARC and  
27 any suggestion that Roundup may be hazardous in reckless disregard for human health. P-Exh 294 at 1.

28 <sup>9</sup> Indeed, Ashley Roberts (Intertek) forwarded the expert panel manuscript to Dr. Heydens for review  
notwithstanding the acknowledgments section of the final published article explicitly stating that  
Monsanto personnel did not review the paper. P-Exh. 369 at 1.

1 5.<sup>10</sup> Monsanto toxicologist, Bill Heydens, was explicitly told by Monsanto consultant, Dr. John  
2 Acquavella, that ghostwriting is “unethical.” P-Exh. 392 at 2. Such evidence, as Judge Karnow  
3 recognized, could be used by the jury to reach the conclusion that Monsanto has indeed acted in a  
4 despicable manner with reckless disregard for human safety.

5       Importantly, the jury have been presented with evidence that Monsanto never responded to Mr.  
6 Johnson’s two enquiries following Mr. Johnson’s initial health complications from using Roundup,  
7 despite Monsanto being aware of an extensive data set associating Roundup with cancer at the time of  
8 Mr. Johnson’s initial contact in 2014. P-Exh. 332 (“doctors are saying it is skin cancer...[Mr. Johnson]  
9 is just trying to find out if it could all be related to such a large exposure to Ranger Pro since he stated  
10 his skin was always perfect until this happened. He is looking for answers.”); Goldstein Depo. at 37:13-  
11 17 (“As Mr. Johnson has stated under oath that you never called him, can you sit here and say, ‘Oh, no, I  
12 did call him’? A. I do not recall.”); P-Exh. 334 (Mr. Johnson’s second enquiry to Monsanto); Goldstein  
13 Depo. at 49:20-50:6, 53:11-53:21 (Dr. Goldstein confirming that Mr. Johnson’s second call was at the  
14 time of the IARC deliberation. “Q. But you don’t remember ever getting back to Mr. Johnson and telling  
15 him, ‘Hey, this group of scientists have just concluded there is a probable association between  
16 glyphosate and non-Hodgkin’s lymphoma.’ Nothing like that ever happened, right? A. I don’t recall  
17 speaking with him.”). Instead, Dr. Goldstein testified that he would tell Mr. Johnson to continue using  
18 Roundup notwithstanding Mr. Johnson’s prognosis, exposure history, and the mounting evidence for  
19 Roundup carcinogenicity. Goldstein Depo. at 56:18-57:12. As a medical practitioner, Dr. Goldstein  
20 would be expected to adhere to the cautionary principle, as testified to by Dr. Ofodile, Mr. Johnson’s  
21 treating physician. July 23 Trns. at 3155:13-3156:4.

22       Lastly, Dr. Goldstein testified that Monsanto has supported the American Council on Science  
23 and Health (“ASCH”) over the years, a research organization promoting industry products. Goldstein  
24 Depo. at 120:9-16. In fact, Monsanto used the ACSH to respond to IARC. P-Exh. 321 at 1 (Monsanto  
25 discussing funding the ACSH). Despite this support for the ACSH, Dr. Goldstein testified that he has

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26 <sup>10</sup> Monsanto’s initiatives to establish a “global network of third party experts” while Monsanto “works  
27 behind the scenes” to manipulate the scientific information on Roundup safety go straight to punitive  
28 intent. P-Exh. 378 at 1.

1 not always agreed with the ASCH's scientific positions on substances: "some of their positions on  
2 tobacco, some of their positions on lead, are not positions that I would agree with." Goldstein Depo. at  
3 124:11-13. Although Dr. Goldstein disagrees with the ACSH's industry-friendly position on substances  
4 that have since been deemed known carcinogens, Dr. Goldstein has no reservations about his support for  
5 the ACSH in their defense of glyphosate. The credibility of Dr. Goldstein and evidence of Monsanto's  
6 conduct are ripe for consideration by the trier of fact in determining an appropriate punitive damages  
7 award.

### 8 **B. Punitive Damages Would Not Violate Due Process**

9 Monsanto argues that "evidence of conduct that occurred after the onset of Plaintiff's  
10 MF...cannot support an award of punitive damages without violating Monsanto's federal due process  
11 rights because there is no competent testimony that exposure to the formulation after onset of Plaintiff's  
12 MF contributed to the progression of the disease." Monsanto Brief at 21. This is false. Evidence was  
13 presented during Plaintiff's case-in-chief which supports the notion that Monsanto's failure in  
14 responding to Mr. Johnson's repeated enquiries or warning him exacerbated Mr. Johnson's cancer. As  
15 Dr. Nabhan testified, "[i]f [a patient] [is] being exposed to an agent that may be causing the cancer, you  
16 would tell them not to be exposed to this particular agent because it could make the cancer worse or it  
17 could cause another cancer... If anything, it just makes more sense not to spray, if you really have  
18 concerns that this is really causing the problem. July 20 Trns. at 2812:21-24, 2865:14-16. Indeed, Dr.  
19 Ofodile, Mr. Johnson's treating physician, reached the same conclusion, which is what prompted her to  
20 write a letter to the school-board, recommending that Mr. Johnson discontinue spraying:

21 I did write a letter to the School Board, and I requested that he not be  
22 exposed to any airborne environmental allergens as that could exacerbate  
23 his condition. Q. And specifically that was referring to the Ranger Pro and  
24 chemicals that he's talking about? A. Correct... A. My understanding is  
25 that, you know, it is okay and advisable to avoid something that could  
26 potentially be -- can exacerbate a condition, even if it's not been conclusive.  
27 So, you know, if I had a patient that was exposed to something and I  
28 thought may be causing it, my recommendation is to avoid it rather than  
waiting to see whether or not it truly does cause it later on.

July 23 Trns. at 3154:10-16, 3155:17-24.

1           Additionally, Dr. Portier testified that glyphosate can be a tumor promotor, and Dr. Heydens  
2           conceded that Monsanto believed the “surfactant in the formulation will come up in the tumor  
3           promotion skin study [George et al 2010] because we think it played a role there.” P-Exh. 366 at 2; July  
4           12 Trns. at 1834:16-1837:14 (“A. *glyphosate has the potential to be a promoter of carcinogenesis.*”).  
5           The Court must view such evidence in a light most favorable to Plaintiff and draw all reasonable  
6           inferences in Plaintiff’s favor whilst disregarding Monsanto’s reference to contrary evidence of the  
7           regulatory classification of IARC. Plaintiff’s presentation of competent evidence from which a jury  
8           could conclude that repeated Roundup exposure exacerbated Mr. Johnson’s cancer warrants evidence  
9           supporting punitive damages following Mr. Johnson’s onset of cancer.

10                   **C. Punitive Damages Would Not Violate the First Amendment or Inhibit Legitimate**  
11                   **Scientific Dispute**

12           The common law method of assessing punitive damages—i.e., an initial determination by a jury  
13           instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct, followed  
14           by trial—is not “so inherently unfair as to deny due process and be per se unconstitutional.” *Pacific*  
15           *Mut. Life Ins. Co. v. Haslip* (1991) 499 US 1, 17. Indeed, the Supreme Court has made it clear that the  
16           imposition of common law tort liability does not require a pesticide manufacturer to alter its label. *Bates*  
17           *v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 432 (emphasis added) (“A requirement is a rule of law  
18           that must be obeyed; *an event, such as a jury verdict, that merely motives an optional decision is not a*  
19           *requirement.*”) The same logic applies with equal force in nullifying Monsanto’s first amendment  
20           claims. Finding punitive liability against Monsanto does not preclude Monsanto from continuing to  
21           assert that its product is not carcinogenic or continuing to not warn; this is because a jury verdict, as  
22           noted by the Supreme Court, is not a requirement, but an event that may incentivize an optional decision  
23           by a liable defendant. Monsanto can continue to participate in scientific debate and contend that its  
24           product is safe even after a punitive damages award.<sup>11</sup>

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25           <sup>11</sup> The two federal cases cited by Monsanto are completely inapposite. *ONY, Inc. v. Cornerstone*  
26           *Therapeutics, Inc.* (2d Cir. 2013) 720 F.3d 490 concerned claims under the Lanham Act which the court  
27           dismissed because “to the extent a speaker or author draws conclusions from non-fraudulent data, based  
28           on accurate descriptions of the data and methodology underlying those conclusions, on subjects about  
                  which there is legitimate ongoing scientific disagreement, those statements are not grounds for a claim

1 For the above reasons, and the fact that the decision is not binding on this Court, Monsanto also  
2 cannot rely on the recent preliminary injunction issued by the Eastern District of California concerning  
3 Monsanto's First Amendment challenges to Proposition 65 labeling. *National Association of Wheat*  
4 *Growers v. Zeise* (E.D. Cal. 2018) 309 F.Supp.3d 842.<sup>12</sup> Monsanto has repeatedly argued throughout  
5 this trial that Prop 65 is irrelevant to the claims at bar as well as prejudicial, and this Court has agreed,  
6 excluding any evidence of California's decision to list glyphosate as a substance known to the State to  
7 cause cancer. Monsanto cannot now assert that Prop 65 is relevant for defending against the claim of  
8 punitive damages if the Court has unequivocally held that the decision is not relevant to *any* issues at  
9 trial: "The fact that glyphosate is listed under Proposition 65 is really not relevant in this case and is *not*  
10 *probative of any of the issues that the jury is going to have to decide.*" June 28 Trns. at 1187:19-22  
11 (emphasis added). Monsanto cannot have its cake and eat it too.

12 Lastly, Monsanto contends that a punitive damages award cannot be supported in light of  
13 dispute and debate in the scientific community regarding Roundup's carcinogenicity. The slew of non-  
14 binding and unpersuasive federal cases cited by Monsanto have no purchase. For example, in *Satcher v.*  
15 *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), the court noted that the punitive damages award  
16 did not withstand scrutiny because [t]he law of Mississippi allows punitive damages only in "extreme  
17 cases;" they "are not favored in the law and are to be allowed only with caution and within narrow  
18 limits...under these standards, we conclude that [plaintiff] was not entitled to punitive damages..." *Id.*  
19 1316. The record here, unlike *Satcher* (where only "certain studies" were relied upon by plaintiff), is

20 of false advertising under the Lanham Act." at 498. The case is not authority for the proposition that  
21 punitive damages in a toxic tort context violate the First Amendment merely because the liable  
22 defendant disagrees with the scientific evidence which formed part of the verdict. The second  
23 distinguishable case dealt with defamation claims to which a defense under Wisconsin law was lack of  
24 actual malice. *Underwager v. Salter* (7th Cir. 1994) 22 F.3d 730, 736. Indeed, the 7th Circuit made it  
25 clear "that we speak of Wisconsin law, not of the complex of rules under the first amendment..." much  
26 less the constitutionality of punitive liability under the principles of personal injury law. A case is not  
27 authority for a proposition not therein considered. *Stand Up for California! v. State* (2016) 6  
28 Cal.App.5th 686, 703.

<sup>12</sup> Judge Shubb did not have the record presented at this trial or discussed in the instant motion when  
ruling on the partial preliminary injunction, did not consider competent causation evidence, and ruled  
based on otherwise "inadmissible evidence in considering preliminary relief." *Nat'l Ass'n of Wheat*  
*Growers* 309 F.Supp.3d at 842, fn 6.

1 replete with studies over the course of decades associating Roundup with cancer, and troves of internal  
2 Monsanto documents that, according to Judge Karnow, may rise to the less stringent California  
3 standards of malice, oppression or fraud.

4 Similarly, *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) was decided pursuant to  
5 Iowa's restrictive punitive damages statute, where, as Monsanto notes, "an award of punitive damages  
6 is not appropriate when room exists for reasonable disagreement over the relative *risks and utilities of*  
7 *the conduct at issue.*" *Id.* (emphasis added). California law does not require the trier of fact to consider  
8 the risks and utilities of the conduct – in fact, this case, as stated above, is proceeding under a consumer  
9 expectation standard and not a risk/utility test. Additionally, the record in *Burke*, where "there was *no*  
10 *evidence* that [defendant] knew of any similar [faults with the product] when it sold the [product],"  
11 stands in stark contrast to the matter at bar, where, as discussed above (and affirmed by Judge Karnow),  
12 there is a plethora of evidence from which a jury could conclude that Monsanto was aware or should  
13 have been aware of Roundup's cancer risk and acted with reckless disregard in failing to warn. *Id.* at  
14 510 (emphasis added). Monsanto's reliance on inapposite, unpersuasive, non-binding case law provides  
15 no grounds for granting nonsuit on this extensive record.

## 16 VII. CONCLUSION

17 For the foregoing reasons, Monsanto's Motion for Nonsuit should be denied and trial permitted  
18 to continue.

19 Respectfully submitted,

20 July 30 2018

\_\_\_\_\_/s/ Pedram Esfandiary\_\_\_\_

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