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MONSANTO COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
REQUESTED JURY INSTRUCTIONS**

Honorable Judge Suzanne R. Bolanos

Department: 504

Trial Date: June 18, 2018

**ELECTRONICALLY
FILED**

*Superior Court of California,
County of San Francisco*

08/09/2018

Clerk of the Court

BY: VANESSA WU

Deputy Clerk

1 Monsanto hereby submits its proposed jury instructions. Monsanto reserves the right to
2 submit any additional jury instructions as needed based on the evidence or the conduct of the trial, or
3 to modify or withdraw any requested instruction. The submission of these instructions is without
4 prejudice to Monsanto moving for the exclusion of any evidence.
5

6 Dated: August 1, 2018

Respectfully submitted,

7
8 FARELLA BRAUN + MARTEL LLP

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10 By: 
11 Sandra A. Edwards
12 Attorney for Defendant
13 MONSANTO COMPANY
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INSTRUCTION NO. 1

STRICT LIABILITY - FAILURE TO WARN - ESSENTIAL FACTUAL ELEMENTS

Dewayne Johnson claims that the Roundup Pro® and Ranger Pro® products lacked sufficient warnings of risks. To establish this claim, Dewayne Johnson must prove all of the following:

1. That Monsanto manufactured, distributed, or sold the Roundup Pro® and Ranger Pro® products;
2. That the Roundup Pro® and Ranger Pro® products had risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of the manufacture, distribution, or sale;
3. That the risks presented a substantial danger when the Roundup Pro® and Ranger Pro® products are used or misused in an intended or reasonably foreseeable way;
4. That ordinary consumers would not have recognized the risks;
5. That Monsanto failed to adequately warn of the risks;
6. That Dewayne Johnson was harmed; and
7. That the lack of sufficient warnings was a substantial factor in causing Dewayne Johnson's harm.

Source: CACI 1205 (modified to harmonize with case law). The CACI model instruction is erroneous absent modification because it allows tort liability to be based on "potential" risks. This formulation is not consistent with the California Supreme Court's articulation of the legal standard as involving a duty to warn of an actual "risk," not merely a potential, hypothetical, or speculative risk. *E.g., T.H. v. Novartis Pharm. Corp.*, 4 Cal. 5th 145, 164, 407 P.3d 18, 28 (Cal. 2017) ("The manufacturer has no duty to warn of risks that are "merely speculative or conjectural, or so remote and insignificant as to be negligible.") (quoting *Carlin v. Super. Ct.*, 56 Cal. Rptr. 2d 162, 920 P.2d 134 (Cal 1996)); *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 64, 179 P.3d 905, 910 (Cal. 2008) ("Typically, under California law, we hold manufacturers strictly liable for injuries caused by their failure to warn of dangers that were known to the scientific community at the time they manufactured and distributed their product."); *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1002, 810 P.2d 549, 556 (Cal. 1991) ("As we stated, if a manufacturer could not count on

1 limiting its liability to risks that were known or knowable at the time of manufacture or distribution,
2 it would be discouraged from developing new and improved products for fear that later significant
3 advances in scientific knowledge would increase its liability.”); *Brown v. Super. Ct.*, 44 Cal. 3d
4 1049, 1065, 751 P.2d 470, 480 (1988) (“[W]e reject plaintiff’s assertion that a drug manufacturer
5 should be held strictly liable for failure to warn of risks inherent in a drug even though it neither
6 knew nor could have known by the application of scientific knowledge available at the time of
7 distribution that the drug could produce the undesirable side effects suffered by the plaintiff.”);
8 *find necessary to punish and deter Monsanto.*

9 . Ins. Co. v. Campbeosition of liability for breach of an independent duty to conduct long-term
10 where the causal link to the known harm to plaintiff is the unknown outcome of testing that was not
11 done, would be beyond the pale of any California tort doctrine we can identify.”); *see also Finn v.*
12 *G. D. Searle & Co.*, 35 Cal. 3d 691, 701 (Cal. 1984) (“Moreover, both common sense and
13 experience suggest that if every report of a possible risk, no matter how speculative, conjectural, or
14 tentative, imposed an affirmative duty to give some warning, a manufacturer would be required to
15 inundate [the public] indiscriminately with notice of any and every hint of danger, thereby inevitably
16 diluting the force of any specific warning given.”) (citations omitted).

17 The form jury instruction has been modified to delete the word “potential” in the four places
18 it would otherwise appear, because it is inconsistent with the applicable legal standards. The
19 modified version should be given in conjunction with Monsanto’s Proposed Special Instruction No.
20 13, which makes clear that a manufacturer has no duty to warn of speculative or remote risks.
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22 GIVEN AS REQUESTED: _____

23 GIVEN AS MODIFIED: _____

24 REFUSED: _____

25 WITHDRAWN: _____
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INSTRUCTION NO. 2

DAMAGES ON MULTIPLE LEGAL THEORIES

Dewayne Johnson seeks damages from Monsanto under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged.

Source: CACI 3934 (modified)

GIVEN AS REQUESTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

1 **INSTRUCTION NO. 3**

2 **PUNITIVE DAMAGES – ENTITY DEFENDANT – TRIAL NOT BIFURCATED**

3 If you decide that Monsanto’s conduct caused Dewayne Johnson harm, you must decide
4 whether that conduct justifies an award of punitive damages. The purposes of punitive damages are
5 to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in
6 the future.

7 You may award punitive damages against Monsanto only if Dewayne Johnson proves that
8 Monsanto engaged in that conduct with malice or oppression. To do this, Dewayne Johnson must
9 prove one of the following by clear and convincing evidence:

- 10 1. That the conduct constituting malice or oppression was committed by one or more
11 officers, directors, or managing agents of Monsanto, who acted on behalf of
12 2. That the conduct constituting malice or oppression was authorized by one or more
13 officers, directors, or managing agents of Monsanto; or
14 3. That one or more officers, directors, or managing agents of Monsanto knew of the
15 conduct constituting malice or oppression, and adopted or approved that conduct after
it occurred.

16 “Malice” means that Monsanto acted with intent to cause injury or that Monsanto’s conduct
17 was despicable and was done with a willful and knowing disregard of the rights or safety of another.
18 A person acts with knowing disregard when he or she is aware of the probable dangerous
19 consequences of his or her conduct and deliberately fails to avoid those consequences.

20 “Oppression” means that Monsanto’s conduct was despicable and subjected Dewayne
21 Johnson to cruel and unjust hardship in knowing disregard of his rights.

22 “Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked
23 down upon and despised by reasonable people.

24 An employee is a “managing agent” if he or she exercises substantial independent authority
25 and judgment in his or her corporate decision-making such that his or her decisions ultimately
26 determine corporate policy.

27 There is no fixed formula for determining the amount of punitive damages, and you are not
28 required to award any punitive damages. If you decide to award punitive damages, you should

consider all of the following factors in determining the amount:

- (a) How reprehensible was Monsanto's conduct? In deciding how reprehensible Monsanto's conduct was, you may consider, among other factors:
 - 1. Whether the conduct caused physical harm;
 - 2. Whether Monsanto disregarded the health or safety of others;
 - 3. Whether Dewayne Johnson was financially weak or vulnerable and Monsanto knew Dewayne Johnson was financially weak or vulnerable and took advantage of him;
 - 4. Whether Monsanto's conduct involved a pattern or practice.
- (b) Is there a reasonable relationship between the amount of punitive damages and Dewayne Johnson's harm?

Punitive damages may not be used to punish Monsanto for the impact of its alleged misconduct on persons other than Dewayne Johnson.

Source: CACI 3945 (modified); U.S. Const. Amend. XIV. The proposed instruction deletes any reference to "fraud," and "trickery or deceit," which is outside the scope of the pleadings in this case.

In addition, subsection (c) has been deleted pursuant to federal due process restrictions on punitive damage awards. U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 427-28 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."); *id.* (wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm. [Wealth is rather an] argument[] that seek[s] to defend a departure from well-established constraints on punitive damages."); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law.").

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1 **INSTRUCTION NO. 4**

2 **JURORS NOT TO CONSIDER ATTORNEYS' FEES AND COURT COSTS**

3 You must not consider, or include as part of any award, attorneys' fees or expenses that the
4 parties incurred in bringing or defending this lawsuit.
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7 Source: CACI 3964
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1 **INSTRUCTION NO. 5**

2 **NON-ECONOMIC DAMAGES**

3
4 The following are the specific items of non-economic damages claimed by Dewayne
5 Johnson.

6 1. Past and future non-economic damages (including physical pain, mental suffering,
7 loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety,
8 humiliation, and emotional distress).

9 No fixed standard exists for deciding the amount of these non-economic damages. You must
10 use your judgment to decide a reasonable amount based on the evidence and your common sense.

11 To recover for non-economic damages, Dewayne Johnson must prove that he is reasonably
12 certain to suffer that harm.

13 For future non-economic damages, determine the amount in current dollars paid at the time
14 of judgment that will compensate Dewayne Johnson for future non-economic damages.

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16 Source: CACI 3905 & 3905A

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1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 2**

2 **REASONABLE DEGREE OF MEDICAL PROBABILITY**

3 In order to prevail on any of his claims, Dewayne Johnson must prove that Roundup Pro®
4 and Ranger Pro® products medically caused his mycosis fungoides. This requires Dewayne Johnson
5 to prove to a reasonable degree of medical probability that he would not have developed mycosis
6 fungoides if he had not used Roundup Pro® and Ranger Pro® products. A mere possibility is
7 insufficient to prove a reasonable degree of medical probability. Dewayne Johnson must prove that it
8 is more likely than not that his mycosis fungoides was caused by his use of Roundup Pro® and
9 Ranger Pro® products.

10
11 Source: *See, e.g., Jones v. Ortho Pharm. Corp.*, 163 Cal App. 3d 396, 402, 209 Cal. Rptr. 456, 460-
12 61(1985) (“The law is well settled that in a personal injury action causation must be proven within a
13 reasonable medical probability based upon competent testimony. Mere possibility alone is
14 insufficient to establish a prima facie case . . . There can be many possible ‘causes,’ indeed, an
15 infinite number of circumstances which can produce an injury or disease. A possible cause only
16 becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes more
17 likely than not that the injury was a result of its action.”) (citations omitted); *Simmons v. W. Covina*
18 *Med. Clinic*, 212 Cal. App. 3d 696, 702-03, 260 Cal. Rptr. 772, 776 (Ct. App. 1989) (“A less than
19 50–50 possibility that defendants’ omission caused the harm does not meet the requisite reasonable
20 medical probability test of proximate cause.”); *In re Silicone Gel Breast Implants Prods. Liability*
21 *Litig.*, 318 F. Supp. 2d 879, 922 (C.D. Cal. 2004) (finding expert’s methodology failed to support the
22 proposition that plaintiff’s tumor was “more likely than not . . . caused or accelerated by TDA
23 released from [plaintiff’s] implants”).

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25 GIVEN AS REQUESTED: _____

26 GIVEN AS MODIFIED: _____

27 REFUSED: _____

28 WITHDRAWN: _____

1 **MONSANTO'S PROPOSED SPECIAL INSTRUCTION NO. 3**

2 **FAILURE TO WARN – LACK OF WARNINGS MUST BE CAUSE OF INJURY**

3 Dewayne Johnson alleges that the lack of sufficient warnings by Monsanto about the
4 potential risks of Roundup Pro® and Ranger Pro® products was a substantial factor in causing his
5 harm. In order to prevail on these claims, Dewayne Johnson must prove that if Monsanto gave a
6 different warning or disclosed different information, Dewayne Johnson would not have developed
7 mycosis fungoides.

8
9 Source: See, e.g., *Motus v. Pfizer, Inc.*, 358 F.3d 659, 660-61 (9th Cir. 2004) (“We agree with the Second Circuit that a product defect
10 claim based on insufficient warnings cannot survive summary judgment if stronger warnings would not have altered the conduct of the
11 prescribing physician.”); *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 991 (C.D. Cal. 2001) (“A plaintiff asserting causes of action based
12 on a failure to warn must prove not only that no warning was provided or the warning was inadequate, but also that the inadequacy or
13 absence of the warning caused the plaintiff’s injury.”); see *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1018 (10th Cir. 2001) (“In the
14 duty to warn context, assuming that plaintiffs have established both duty and a failure to warn, plaintiffs must further establish
15 proximate causation by showing that had defendant issued a proper warning to the learned intermediary, he would have altered his
16 behavior and the injury would have been avoided.”) (citation omitted); *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 555-56, 863 P.2d 167,
17 177 (Cal 1993) (“Plaintiff’s mother, who administered the SJAC to plaintiff, neither read nor obtained translation of the product
18 labeling. Thus, there is no conceivable causal connection between the representations or omissions that accompanied the product and
19 plaintiff’s injury.”); *Huitt v. S. Calif. Gas Co.*, 188 Cal. App. 4th 1586, 1604 (2010) (“[A] defendant is not liable to a plaintiff if the
20 injury would have occurred even if the defendant had issued adequate warnings.”); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-
21 1596(JBW), 2009 WL 1850970, at *14 (E.D.N.Y. June 22, 2009) (lack of causation under California law where “[n]o further
22 notification of risks . . . would have changed plaintiff’s decision to use [product].”); *Rosburg v. Minn. Mining & Mfg. Co.*, 181 Cal.
23 App. 3d 726, 735 (1986) (“No harm could have been caused by failure to warn of a risk already known.”).

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18 GIVEN AS MODIFIED: _____

19 REFUSED: _____

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MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 5
PUNITIVE DAMAGES – COMPLIANCE WITH LEGAL, REGULATORY,
OR INDUSTRY STANDARDS

In determining whether to impose punitive damages and the amount of any such damages, you should consider whether Monsanto made any good-faith effort to comply with federal regulations or industry customs or standards.

Source: U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred . . . A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”); *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 996-97 (1992) (“[C]ourts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions”); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 893, 120 S. Ct. 1913, 1931-32, 146 L. Ed. 2d 914 (2000) (Stevens, J., dissenting op.) (“In addition, if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages.”); *see also Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (“Stone Man’s compliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to ‘punish, penalize or deter’ are, as a general rule, improper where a defendant has adhered to environmental and safety regulations.”); *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1198 (4th Cir. 1982) (“Clearly, whether or not Tiffin followed industry standards and complied with the state of the art while designing the motor home is probative on the issue of the wantonness, willfulness and maliciousness of their acts, including the placement of the auxiliary gas tank.”).

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3 REFUSED: _____

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1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 6**

2 **PUNITIVE DAMAGES – LAWFUL CONDUCT**

3 You may not punish Monsanto for any conduct that complied with federal or state law, or
4 was otherwise lawful where it occurred.
5

6
7 Source: U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-
8 22 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it
9 occurred.”).

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MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 7
PUNITIVE DAMAGES – FINDING OF MALICE OR OPPRESSION CAN ONLY
BE BASED ON CONDUCT THAT GAVE RISE TO LIABILITY

In deciding whether Monsanto is liable for punitive damages, you may consider only conduct by Monsanto that you believe caused Dewayne Johnson’s injuries. Any evidence you may have heard regarding conduct that was not a cause of Dewayne Johnson’s injuries cannot be a basis for a finding that punitive damages may be imposed.

Source: U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) (“A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”); *Holdgrafer v. Union Oil. Co.*, 160 Cal. App. 4th 907, 929-30 (2008) (citing *State Farm*); *Medo v. Super. Ct.* 205 Cal. App. 3d 64, 68 (1988) (“Punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.*”) (emphasis in original).

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1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 10**

2 **PUNITIVE DAMAGES VERSUS COMPENSATORY DAMAGES**

3 In determining whether to award punitive damages, you should consider whether any
4 compensatory damages you may have awarded are sufficient to punish Monsanto and deter future
5 misconduct. If so, you should not award punitive damages.

6 Source: U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419
7 (2003) (“It should be presumed a plaintiff has been made whole for his injuries by compensatory
8 damages, so punitive damages should only be awarded if the defendant’s culpability, after having
9 paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to
10 achieve punishment or deterrence . . . While we do not suggest there was error in awarding punitive
11 damages based upon State Farm’s conduct toward the Campbells, a more modest punishment for this
12 reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah court
13 should have gone no further.”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving
14 standards that allow determination of “whether a particular award is greater than reasonably
15 necessary to punish and deter”).
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18 GIVEN AS REQUESTED: _____

19 GIVEN AS MODIFIED: _____

20 REFUSED: _____

21 WITHDRAWN: _____
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PUNITIVE DAMAGES – NO GREATER AWARD THAN NECESSARY

Source: U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (“It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence . . . While we do not suggest there was error in awarding punitive damages based upon State Farm’s conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah court should have gone no further.”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving standards that allow determination of “whether a particular award is greater than reasonably necessary to punish and deter”).

GIVEN AS REQUESTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

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2 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 12**

3 **PUNITIVE DAMAGES – REASONABLE RELATIONSHIP**

4 There must be a reasonable relationship between any amount of punitive damages you award
5 and the amount of compensatory damages you have awarded.

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7 Source: U.S. Const. Amend. XIV; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-82 (1996) (“The
8 principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages
9 has a long pedigree.”); *Gagnon v. Cont’l Cas. Co.*, 211 Cal. App. 3d 1598, 1602, 260 Cal. Rptr. 305,
10 307 (Ct. App. 1989) (“Concerning the actual harm to the plaintiff, California has long followed the
11 rule that punitive damages must bear a reasonable relation to the actual injury suffered. The proper
12 proportion punitive damages should bear to the injury suffered is also a question for the jury to
13 determine, and as a result, the defendant is entitled to an appropriate instruction”) (citations omitted);
14 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Exxon Shipping Co. v. Baker*,
15 554 U.S. 471, 503 (2008); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459 (1993); *Pac.*
16 *Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 21 (1991).

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MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 14
PUNITIVE DAMAGES – NOERR-PENNINGTON DOCTRINE

You may not hold Monsanto liable or impose punitive damages based on any lobbying activities by Monsanto with the EPA or other regulatory agencies regarding the registration or review of Roundup Pro® and Ranger Pro®. Lobbying is a protected, legal activity under the First Amendment and cannot form the basis for liability or punitive damages.

Source: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *Prof. Real Estate Investors, Inc., v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (Noerr-Pennington doctrine is not limited to antitrust context).

GIVEN AS REQUESTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

CERTIFICATE OF SERVICE

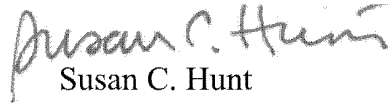
I hereby certify that on this 9th day of August, 2018, I electronically filed the foregoing

- **DEFENDANT MONSANTO COMPANY'S REQUESTED JURY**

INSTRUCTIONS

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Curtis G. Hoke, Esq.
The Miller Firm, LLC
108 Railroad Avenue
Orange, VA 22960


Susan C. Hunt