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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Dewayne Johnson Plaintiff, vs. Monsanto Company Defendant	Case No. CGC-16-550128 **PLAINTIFF'S OPPOSITION TO MONSANTO'S MOTION FOR NEW TRIAL** Hon. Judge Suzanne R. Bolanos Hearing Date: October 10, 2018 Time: 2:00 p.m. Department: 504 Trial Date: June 18, 2018

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MEMORANDUM OF POINTS AND AUTHORITY

I. INTRODUCTION

Monsanto received a fair trial in this case and an independent assessment by a remarkable jury who unanimously found ample evidence that Plaintiff proved all elements of his case. Monsanto's request to vacate the jury verdict runs counter to Lee Johnson's "constitutional right to a jury trial" and California's "policy of judicial economy against willy-nilly disregarding juries' hard work." *Cooper v. Takeda Pharm. Am., Inc*., (2015) 239 Cal. App. 4th 555, 572 ; Cal. Const. art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all").

This jury's hard work should be celebrated; not swept aside. This jury devoted six weeks of their lives taking copious notes of the evidence presented by both sides in this case. This jury then spent three days carefully sifting through the evidence, and asking pointed questions, before coming to a unanimous finding for Mr. Johnson. There is not a scintilla of evidence to suggest that the jury did anything but faithfully execute its duties in following the Court's instructions to give both Johnson and Monsanto its fair and impartial consideration. There was substantial evidence to support each and every finding by this jury. It is not the Court's role to simply substitute its judgment for the judgment of the jury, rather the Court "should respect the jury's verdict" and only grant new trials where the jury was "obviously and clearly wrong" Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.56. Simply put, it is impossible to say this jury verdict was "obviously and clearly wrong."

Defendant raises in the Motion for New Trial precisely the same factual and legal arguments raised and correctly rejected by the Honorable Curtis E.A. Karnow in Defendant's Motion for Summary Judgment on May 17, 2018. Defendant raises the same factual and legal arguments that were correctly rejected by this Court in Defendant's Motions for Non-Suit at the close of Plaintiff's case and correctly rejected by this Court in the Defendant's Motion for Directed Verdict. Defendant raises the same legal argument that were correctly rejected by this Court in Defendant's Motion for a Mistrial. Defendant raises the same worn out causation arguments that have been rejected by the federal court in a seven day *Daubert* hearing. Each of the factual assertions claimed in Defendant's Motion for New Trial were raised in front of the jury and unanimously rejected by the jury. Monsanto's failed arguments date back to the outset of this litigation and have been repeatedly rejected by multiple judges in multiple

jurisdictions.[1] "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". *Coombs v. Hibberd* (1872) 43 Cal. 452, 453 . It is time to end this litigation and respect the jury's judgment.

II. LEGAL STANDARD:

Defendant misstates the new trial standard and fails to acknowledge the statutory and constitutional limitations on the Court's power to grant a new trial. The California Constitution only allows for a new trial to be granted if the verdict constitutes a "miscarriage of justice." Cal. Const., Art. VI, §13. The authority for a court to grant a new trial is further "circumscribed by statute" *Oakland Raiders v. Nat'l Football League* (2007) 41 Cal. 4th 624, 633 . A new trial cannot be granted on the grounds of insufficiency of the evidence unless the "jury clearly should have reached a different verdict or decision." Cal. Civ. Proc. Code § 657. If a trial court could simply disagree with the jury in vacating a verdict then that would render meaningless the two month disruption of the lives of sixteen people who carefully listened to and weighed the evidence.

The Court in reviewing a motion for a new trial must be "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it." *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal. App. 5th 775, 785. For these reasons:

> Most judges grant a new trial on this ground only after finding that the verdict was *obviously* and *clearly* wrong. In other words, most judges give great deference to the jury's verdict and rarely interfere with it. They find that juries generally reach the right result ... [and] judges should respect the jury's verdict, unless it cannot be supported by the evidence.

Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.56.

The trial judge should therefore "decline[] to substitute its own judgment for that of the jury" where "there was sufficient credible evidence to support the verdict, and that the jury was reasonable in believing the witnesses it apparently had believed in." *Kelly-Zurian v. Wohl Shoe Co*., (1994) 22 Cal. App. 4th 397, 414; *Ryan,* 6 Cal. App. 5th at 786*; see e.g. Cty. of Riverside v. Loma Linda Univ.,*

[1] *ThOMAS BLITZ, Plaintiff, v. MONSANTO COMPANY, Defendant.,* No. 17-CV-473-WMC, 2018 WL 1785499, at *3; *Hernandez v. Monsant*o, No. CV 16-1988-DMG (EX), 2016 WL 6822311, at *6 (C.D. Cal. July 12, 2016); *Sheppard v. Monsanto Co.,* 2016 WL 3629074, at *8 (D. Haw. June 29, 2016); *Mendoza v. Monsanto Co,* No. 116CV00406DADSMS, 2016 WL 3648966, at *4 (E.D. Cal. July 8, 2016); *Giglio v. Monsanto Co*., No. 15CV2279 BTM(NLS), 2016 WL 1722859, at *3 (S.D. Cal. Apr. 29, 2016); *Hardeman v. Monsanto Co*., 216 F. Supp. 3d 1037, 1038 (N.D. Cal. 2016); R NO. 45: *In re Roundup Prod. Liab. Litig*., No. 16-MD-02741-VC, 2018 WL 3368534 (N.D. Cal. July 10, 2018)

118 Cal. App. 3d 300, 323 (1981) (Appropriate for trial judge who disagreed with verdict to deny motion for new trial in part because "he thought the jury was an intelligent one and did a fine job.").

The main case cited by Defendant, *People* v.*Robarge*, is a criminal case applying a different standard for a new trial. *Mercer v. Perez* (1968) 68 Cal. 2d 104, 122 ("Similarly, the special rules relating to new trial motions in criminal cases distinguish *People v. Robarge* … in which the trial court misunderstood the extent of its discretionary power to reweigh the evidence on a motion for new trial."). The criminal code for a new trial applies only to verdicts against criminal defendants (not verdicts in favor of criminal defendants) and does not restrict the granting of new trials to situations where the jury is "clearly" wrong. Cal. Penal Code § 1181. This makes sense as a criminal verdict entails the loss of liberty for a defendant. Yet even in a criminal case, the court should not "disregard the verdict" nor should it "decide what result it would have reached if the case had been tried without a jury." *People v. Robarge* (1953) 41 Cal. 2d 628, 633 .

Finally, a "a motion for new trial" cannot be used "as a de facto dispositive motion." *Fountain Valley Chateau Blanc Homeowner's Assn. v. Dep't of Veterans Affairs* (1998) 67 Cal. App. 4th 743, 752 . The court must look "to the substance of a new trial motion rather than just its title" and if it is indeed a "de facto" JNOV motion then the Court must apply the JNOV standards. *Id.* at 753. "Misuse of a new trial motion as a dispositive motion renders surplusage the Legislature's provisions for nonsuits, directed verdicts, and judgments notwithstanding the verdict." *Id.* at 752. The Court is also limited to the grounds for a new trial specified by Monsanto because it is "without power to order a new trial *sua sponte*." *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal. 3d 892, 899 .

III. ARGUMENT

A. The Jurors Faithfully Executed their Civic Duty to Give Both Parties a Fair Trial and It Cannot Be Said That Their Verdict Was "Obviously and Clearly Wrong."

The one point of agreement between the litigants and acknowledged by the Court was the excellence of the jury. The Court stated "I know that you all paid very close attention. You were taking copious notes, and you took your time in carefully considering all of the issues in arriving at your verdict. So I'm very impressed with all of you. You were an excellent group of jurors." Tr. at 5348:3-12. Defense Counsel, Mr. Lombardi, in closing arguments extolled the jury's virtues, stating:

I agree with Mr. Wisner on this, …you've been remarkably attentive and you've paid very close

> attention and we very much appreciate that. One other thing about you folks is we view you as a special group... You could put sympathy aside. You could put prejudice against Monsanto, its products, whatever, aside. And you could decide the case fairly and on the facts, applying the law that Her Honor has told you and the facts as you see them in this courtroom and no place else… and we know you'll continue to do that. 5222:5-21.

Defendant asked the jury to be very focused on the scientific question of whether glyphosate-based herbicides (GBHs) caused Johnson's cancer and that is precisely what the jury did. 1454:13-23. The questions submitted by the jurors demonstrated a remarkable understanding of the complex scientific issues in this case. Six of the jurors had science degrees; eight of the jurors had graduate degrees, two jurors had Ph.D.s. One juror was a genetic engineer who had already had an intimate knowledge of the mechanism of action of glyphosate resistance in genetically engineered plants. 589:13-590:2. With such an attentive and intelligent jury, it cannot be said that their verdict was "obviously and clearly wrong."

Plaintiff's witnesses were highly qualified, credible and thorough in evaluating the scientific evidence. Plaintiff's case was additionally supported by the International Agency for Research on Cancer ("IARC"), the most authoritative and respected scientific body charged with looking at whether a chemical causes cancer.

This verdict was not surprising. The Monsanto corporate executives who testified in video deposition were not credible. In fact, Daniel Goldstein, Monsanto's Director of Medical Toxicology, explicitly stated that "we have some limitations on our credibility when we are speaking as Monsanto publicly." Goldstein Tr. at 75:22-25. Donna Farmer, Monsanto's chief toxicologist and spokesperson on glyphosate safety. was media trained to defend glyphosate by "blocking and bridging" questions, i.e "Moving from the question to the answer you want to give." Ex. 305; Farmer Tr. at 14:11-13; 15:5-7. The jurors studied these videos carefully and watched the body language as Monsanto employees evaded the truth or avoided answering questions.

The jury rightly found that Monsanto's reprehensible behavior should be deterred, not normalized. Monsanto's corporate representatives, abandoned their role as scientists during their employment with Monsanto. As stated in Judge Karnow's Summary Judgment Order, Monsanto "…continuously sought to influence the scientific literature to prevent its internal concerns from reaching the public sphere and to bolster its defenses in products liability actions." Johnson Sargon Order at 45-46. Ethical scientist don't ghostwrite articles in order to influence regulators. 3898:1-21

Ethical scientists don't lie about their role in writing and editing journal articles created for the purpose of "litigation defense." Ex. 391; Ex. 394. Ethical scientists don't try to keep negative data from appearing in abstract searches and they don't try to "orchestrate outcry" against vital public safety institutes such as IARC. Ex. 292, at 5. Ethical scientists would not be part of a "Product Safety Center" that is charged with defending and expanding Monsanto's "business." Ex. 271. Ethical scientists seek the truth; they don't bury the reports of highly qualified experts (such as Dr. Parry's 1999 assessment of toxicology) and refuse to follow advice to test their product for safety. When a customer with non-Hodgkin Lymphoma ("NHL") calls and states that his "level of fear is rising over his continued use of Ranger Pro" ethical scientists would tell that customer there are studies associating GBHs with NHL. Goldstein Tr. at 55:20-56:24.

Neither the compensatory nor the punitive damages verdict were excessive. Monsanto presented no evidence and made no argument at trial to suggest that $33 Million was an excessive amount for future damages for a slow, painful death. 1454:9-12 (Mr. Lombardi stating "Johnson's cancer is a terrible disease"). $31 Million is not an excessive amount for the loss of 31 years of life. California law does not provide Monsanto a discount on compensatory damages because it's product is killing Johnson rather than just injuring him. Under California law, a "shortened life expectancy" is a compensable element of non-economic damages. *Bigler-Engler v. Breg, Inc.*, (Ct. App. 2017)7 Cal. App. 5th 276, 300, 302. , (Noting that verdict was excessive in part because "[t]here was no suggestion of the prospect of suffering a ... shortened life expectancy")

Certainly, $33 Million dollars is not excessive to compensate Johnson for his death sentence; the loss of seeing his sons grow up; the loss of meeting his grandchildren; and the loss of time with his wife. The remaining year or two of Johnson's life are going to be particularly horrific as he is forced to face his mortality as the cancer continues to consume his body. It will be absolutely devastating for Johnson to tell his son that the blue potion – concocted by his son - didn't work. If Johnson lives a full life expectancy as argued by Monsanto's Expert Dr. Kuzel, then $33 million is not excessive for a lifetime of living with the severe effects of cancer cancer. Monsanto's CEO, Hugh Grant is being compensated $32.6 million for losing his job this year as a result of Bayer's purchase of Monsanto.[3]

[3] https://www.sec.gov/Archives/edgar/data/1110783/000119312517375746/d448490ddef14a.htm

The punitive damages award has in fact proven to be inadequate. The $250 million represents less than five percent of Monsanto's net worth of $6 Billion. This award is far below California's punitive damage cap of ten percent of a company's net worth. *Bigler-Engler*, 7 Cal. App. 5th 276 at 308. The single-digit ratio of the punitive damages award to the compensatory of only 6.4:1 is allowed by the U.S. Supreme Court. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425,. The punitive damage award is so small it has had zero deterrent effect on Monsanto (now a subsidiary of Bayer). Bayer's CEO held an investor phone conference on August 23, 2018 to reassure stockholders. He stated that the verdict has no effect on its profits : "nothing has changed concerning our strategy...and longer-term growth and margin expectations for our combined Crop Science business." Exhibit 1 to Declaration of Curtis Hoke, p. 2. In fact, Bayer and Monsanto state they will continue the "**conduct related to a) glyphosate..."** that the jury found reprehensible. *Id.* at p. 6.

B. SCIENTIFIC EVIDENCE SUPPORTS A JURY FINDING THAT RANGERPRO WAS A SUBSTANTIAL CAUSE OF JOHNSON'S NHL

There was more than sufficient evidence to support the jury's findings on causation. In California "the plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury." *Cooper*, 239 Cal. App. 4th at 578. This case was focused heavily on the underlying science of whether GBHs caused NHL, including 11 days of expert testimony. The jury was properly instructed on how to weigh expert testimony. 5044:24-5045:20. The jury faithfully followed those instructions as evidenced by their questions and long deliberation.

It is easy to see why the jury sided with Plaintiff. Plaintiff's experts considered the whole of the scientific data in coming to their opinions that GBHs cause NHL as required by California law and good science. It is essential that the "body of studies be considered as a whole." *Cooper* 239 Cal. App. 4th at 589–90. Here, in addition to the epidemiology, there is strong biological plausibility that GBHs cause NHL. "[S]umming, 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." Federal Judicial Center's Reference Manual on Scientific Evidence (3rd. Ed.) (Reference Manual) P. 20.

Plaintiff's experts' qualifications were unassailable. Dr. Portier (Ph.D. in Biostatistics and M.S. in epidemiology) had an encyclopedic knowledge of the data in this case; was one of the chief scientists in assessing carcinogenicity of chemicals for the U.S.; and helped draft the carcinogenicity guidelines that the EPA was supposed to (but did not) follow. 4585:12-19, 1697:1-23, 1704:19-1706:9, 1706:10-12. Dr. Neugut is a practicing oncologist and professor of epidemiology at Columbia University, with a Ph.D. in chemical carcinogenesis who received the lifetime achievement award from the leading cancer epidemiology organization in the United States. 2535:12-15, 2540:2-6, 2547:19- 2548:23; 2543:10-12. Dr. Nabhan is an oncologist specializing in lymphoma who treated treating 30 to 40 lymphoma patients a week (including mycosis fungoide) as the medical director at the University of Chicago. 2778:15-23; 2779:13-24, 2784:3-2785:15, 2785:15-2786:15. Dr. Sawyer has a Ph.D. in toxicology and a Masters in molecular and cellular biology, and regularly provides consulting services to the federal and state agencies in analyzing toxic exposure and health outcomes. 3586:4-22, 3588:7-12, 3592:2-21.

Plaintiff's experts represent the mainstream of respected independent scientists. Their views on proper methodology are joined by the seventeen independent experts at the IARC working group meeting (including Aaron Blair (lead investigator of the AHS study, and Lauren Zeise, the head of the California EPA) (Ex. 295); the independent scientists at the EPA's scientific advisory panel that concluded that EPA failed to follow its guidelines with respect to glyphosate (2394:18-2395:25); the 93 respected scientists who joined Dr. Portier as co-authors of the article supporting IARC's classification of glyphosate (2016:6-2018:25); the European countries that plan on phasing out the use of glyphosate over the next few years, 2019:12-2020:2; and the 125 preeminent scientists who co-authored an article concluding that industry's criticisms of IARC were "unconvincing." 2607:22-2609:21**.**

1. DEFENDANT'S ATTACK ON PLAINTIFF'S EXPERTS IS A DE FACTO JNOV

Defendant's arguments with respect to the sufficiency of the evidence is a "de facto" dispositive motion and simply a re-litigation of its failed summary judgment, nonsuit, and directed verdict motions. As explained in *Fountain Valley* a new trial is only proper where the motion allows for the "...possibility that the plaintiff has a meritorious case." 67 Cal. App. 4th. at 752. The basis for Defendant's request for a new trial, however, is that there are no set of facts or evidence which would allow Plaintiff to prevail at trial. Defendant argues that causation is legally impossible because 1) the EPA and other

regulatory agencies have not concluded that glyphosate causes cancer and 2) the AHS study did not show an increased risk of NHL with glyphosate. Monsanto already lost these arguments on multiple occasions in multiple courtrooms. Here, Monsanto acknowledges that its motion for a new trial is based on the same reasoning "set forth in Monsanto's JNOV Motion" claiming that "none of the scientific evidence" supports causation. New Trial Brief at 3. As such the Monsanto's motion must fail for the same reasons the JNOV motion fails. *Cooper* 239 Cal. App. 4th at 595.

a. Monsanto's Regulatory Defense was Appropriately Rejected by the Jury

Monsanto's argument based on regulatory authorities is the same "EPA defense" that the U.S. Supreme Court has shot down, and Judge Karnow rejected. Indeed, the EPA preemption argument for GBHs has been consistently rejected. *See supra, fn. 1.* The U.S. Supreme Court holds that public policy favors jury findings that highlight dangers of products not recognized by the EPA:

> By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides such as [the pesticide there at issue], a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement. Ferebee, 736 F.2d, at 1541–1542.

Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431, 451.

It is not surprising that the jury gave more credit to the findings of IARC and Plaintiff's experts than it did to the findings of the EPA[6]. "A jury may repose greater confidence in an expert who relies upon well-established scientific principles." *People v. Sanchez* (2016) 63 Cal. 4th 665, 685–86. The jury in this case was not beholden to Monsanto's political influence; the jury was beholden to the rules. The rules of law and the rules of science. Monsanto (and the EPA) violated both.

No regulatory agency has ever concluded that GBHs are not carcinogenic. Agencies do not assess the carcinogenicity of GBHs; they look only at pure glyphosate. 3290:16-25. No animal carcinogenicity test on a GBH has ever been conducted by Monsanto and therefore as admitted by Dr. Farmer "you cannot say that Roundup does not cause cancer-we have not done carcinogenicity studies

[6] The EPA has not made a final decision on glyphosate. One branch of the Office of Pesticide Products has made assessments on glyphosate. For the sake of convenience the OPP will be referred to as the EPA.

with "Roundup."" Ex. 305, 3850:8-25. Dr. Sawyer testified that the formulations are more carcinogenic than glyphosate itself due to other carcinogens in the formulated product; and the increased absorption of GBHs through the skin due to surfactants in the GBH.. 3596:3-7; 3609:3-3610:6-16, 3611:8-13.

The jury heard repeatedly about the conclusions and methodologies of IARC, the EPA and foreign agencies. The jury heard that IARC and Plaintiff's experts evaluated the formulated product (including the genotoxicity studies on formulated products); whereas the EPA and other foreign agencies only conduct assessments on pure glyphosate. 3290:16-25. The jury listened to the rampant failures of the EPA to follow its own guidelines.[7] The jury heard that the EPA was going to conclude that glyphosate was not carcinogenic before even before it reviewed the science. Ex. 404 ("We have enough to sustain our conclusions. Don't need gene tox or epi."). The jury heard that the EPA would try to "kill" a review of glyphosate by the Agency for Toxic Substances and Disease Registry ("ATSDR"). The jury heard that Monsanto could influence the findings of the EPA by getting "some key Democrats on the hill to start calling jim [jones, Assistant Administrator]" which "shoots across his bow generally that he's being watched." Ex. 402.

The jury saw an email from Monsanto's own consultant agreeing that IARC (unlike the EPA and EFSA) actually followed the rules and guidelines in evaluating GBHs. Ex. 388. That is not surprising considering IARC is one "of the most well-respected and prestigious scientific bodies," whose assessments of carcinogenicity of chemicals "are generally recognized as authoritative..." Reference Manual at 20, 565. Dr. Neugut, an esteemed oncologist and epidemiologist, testified that "I would say that within the scientific and academic cancer community, IARC is recognized as the main arbiter of -- the prime arbiter of what constitutes a carcinogen or a cancer-causing agent…" 2550:12-17. IARC's preeminent role in identifying carcinogens is supported in a 2015 publication authored by 125 scientists including "very famous cancer epidemiologists who are highly respected in the world.". 2607:22-2609:21. The jury further considered the credible testimony of IARC working group members Dr. Matthew Ross and Dr. Aaron Blair who explained the IARC methodology noting that participants are free from conflicts of interest; and explained that IARC considers only peer-reviewed and public

[7]Dr. Foster multiple times acknowledged that the EPA failed to follow its own guidelines as detailed by the EPA's own Scientific Advisory Panel. 4607:23-4608:13; 4610:1-4; 4620:25- 4611:11 4613:1-3; 4629:15-20; 4631:23-4632:4

literature which is subject to scientific scrutiny. Ross Tr. at 104:7-123:16; Blair Tr. at 21:8-86:12

Defendant's own expert, Dr. Mucci, agreed that IARC was correct in its assessment of the epidemiology as "limited" evidence of an association, based on the data it reviewed. 4320:6-12. Dr. Mucci agreed that limited as used by IARC means that a "causal interpretation is considered by the Working Group to be credible." 4400:7-12. In fact, Dr. Mucci's textbook entitled "Cancer Epidemiology" states that IARC "can be used as a benchmark for the identification of human carcinogens." 4331:22-4336:14. IARC is the only organization listed as a reliable source by Dr. Mucci under the section "Causal Inference in Epidemiology, General Principles." *Id.* Finally, Dr. Mucci's textbook references IARC 475 times, whereas it references the EPA twice. *Id.*

This jury understood the importance of following established methodology and guideline and it cannot be said their verdict is "obviously and clearly wrong."

b. The AHS Study has Significant Flaws and Does Not Outweigh the Substantial Evidence Demonstrating that Glyphosate Causes NHL.

Monsanto's contention that one study (AHS) can wipe out the findings of hundreds of other studies supporting causation has no basis in science or law. The very scientist who designed and led the AHS investigations, Dr. Aaron Blair, agrees with Plaintiffs that glyphosate is a probable human carcinogen. Blair Tr.. at 264:23-265:25. Dr. Blair testified that there is a problem with lack of follow-up in the AHS study. *Id.* at 271:14-272:19. Dr. Blair weighed the totality of evidence from the positive case-control studies and the negative AHS study and concluded that there was an association between glyphosate and NHL. *Id.* Dr. De Roos, an author of the AHS publications, co-authored a paper with Plaintiff's expert Dr. Portier and 93 other scientists concluding that "[t]he most appropriate and scientifically based evaluation of the cancers reported in humans and laboratory animals as well as supportive mechanistic data is that glyphosate is a probable human carcinogen." 2016:6-2018:25

Defense counsel underestimated the intelligence of this jury in trying to make the false and misleading oversimplification that one can simply count the exposed cases to determine the quality of a study.[9] The number of cancer cases in a study is meaningless if an epidemiologist can't determine

[9] Dr. Neugut explained how Defense counsel does not understand the concept of power in epidemiology, testifying that "The size is really not that important after you've done the study and gotten the results. Statistical power is important before you do the study, not so much after." 2697:22-25. In light of Dr. Neugut's vast knowledge and experience with epidemiology, the jury could not be said to be "obviously

whether a subject was actually exposed to glyphosate. Dr. Neugut and Dr. Portier explained that the fact that glyphosate use exploded in the population in the years after the first AHS questionnaire was filled out; combined with a huge loss to follow created a large exposure misclassification problem, which would obscure any positive results. 1959:6-19; 2618:18-2623:13, 2635:8-2640:18; July 13 Tr. at 1954:3-1959:17 (Portier) ("very serious flaws associated" with the AHS study).

Dr. Blair pointedly stated that in the AHS "pesticide misclassification may diminish risk estimates to such an extent that no association is obvious which indicates false negative findings might be common." 2634:8-2636:9. Monsanto's own scientists concluded in 1997 that "exposure misclassification" in the AHS study "will most often obscure exposure disease relationships." 4428:3-11. Dr. Mucci, Defendants expert agreed that the AHS findings "could be a false negative." *Id.* The authors of the updated AHS concluded that "some misclassification of exposure undoubtedly occurred." 2443:24-2444:10. Dr. Neugut testified that the updated AHS study also produced false negative results for two other carcinogens, malathion and diazanon. 2641:1-21.

The case-control studies are not "tiny," IARC actually describes DeRoos (2003) and McDuffie (2001) as "large" studies. Ex. 784, p. 73. The compelling factor in the case control studies is the consistency; As IARC explained, "In summary, case–control studies in the USA, Canada, and Sweden reported increased risks for NHL associated with exposure to glyphosate. The increased risk persisted in the studies that adjusted for exposure to other pesticides." *Id.* Dr. Neugut explained "..the studies that were done in different context, different populations, different countries under different circumstances, ...But across all the studies, they were consistently positive -- or I say positive results... that's a very important criterion in causal associations." 2644:7-18. *Cooper,* 239 Cal. App. 4th at 562, ("Dr. Neugut stated …when, as here, most studies consistently reach a similar result, an epidemiologist can be confident that the consistent result is correct."). The case-control studies are also supported by the strong evidence that GBHs are genotoxic in humans and carcinogenic in animals. JNOV Opp. p. 7.

No reasonable person would rely exclusively on one study to prove or disprove causation, and certainly not one with considerable flaws such as the AHS. Considering that the authors of the AHS

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and clearly wrong." Defendant complains that Dr. Neugut did not know the numbers of exposed cases off the top of his head, but wouldn't allow him time to review the studies or his notes to confirm Defendant's representations.

study do not believe that it outweighs the other scientific evidence demonstrating causation; and the significant flaws of the AHS pointed out by Plaintiff's experts it cannot be said that the jury's verdict was "obviously and clearly wrong."

2. Monsanto's Experts Made Key Errors During their Testimony that Undermined Their Credibility.

Monsanto lies when it claims that "Dr. Mucci was the only expert on either side who considered all of the data." MPA, p. 8. Dr. Mucci, who has no medical or toxicology degree, explicitly states that she did not consider all of the data in this case; and she refused to consider the animal and toxicology data. 4317:22-4318:19. Dr. Mucci regularly disagreed with the conclusions of the independent occupational epidemiologists who authored the studies on glyphosate and NHL. For example, Dr. Mucci disagreed with the authors of the NAPP study who concluded:

> Our results are also aligned with findings from epidemiological studies of other populations that found an elevated risk of NHL for glyphosate exposure and with a greater number of days per year of glyphosate use. As well as a meta-analysis of glyphosate use and NHL risk. From an epidemiological perspective our results were supportive of the IARC evaluation of glyphosate as a probable Group 2A carcinogen for NHL.

4415:10-18. Dr. Mucci, never researched the issue of confounding in occupational epidemiology, and inappropriately ignored the univariate analyses, which the independent occupational epidemiologists actually determined were more important. 4350:1-12; 4382:7-4385:11. Dr. Mucci did not know that the logistical analysis in De Roos (2003) showing a statistically significant doubling of the risk of NHL for glyphosate users was adjusted for other pesticides; thereby inappropriately discarding that finding from her analysis. 4379:4-13.

In her litigation opinion Dr. Mucci refused to consider biological plausibility. In practice, however, Dr. Mucci emphasized the importance of looking at biological plausibility stating "Given the inconclusiveness of earlier epidemiological studies, we can turn to biological plausibility to assess the study findings." 4459:5-19. At trial, Dr. Mucci testified that "we would be very concerned about the quality or reliability of the data from the proxies. 4222:15-17. In practice, Dr. Mucci holds the opposite view even publishing a paper concluding that "This study supports the reliability of proxy responses for most categories of questions that are elicited in typical epidemiological studies" 4456:16-19. At trial, Dr. Mucci placed heavy emphasis on the importance of statistical significance. 4229:25-4230:7. In practice, Dr. Mucci relies on non-statistically significant results concluding that a non-statistically

significant relative risk of 1.25 does represent "a suggestion of a small excess risk." 4458:6-1.

Dr. Warren Foster was offered to rebut the testimony of Dr. Portier, yet Dr. Foster did not review the epidemiology or mechanistic studies. Dr. Foster was unable to answer questions on statistics in animal studies stating "A. You would have to ask a statistician on that. That's not something I'm familiar with." 4584:45-4585: The jury therefore properly gave more credit to Dr. Portier's testimony on statistics. Dr. Foster testified that he threw out the results of the multiple mouse studies showing an increased risk of lymphoma because the *average* historical control rate of lymphomas in mice was 12%. 4577:1-4581:20. Dr. Foster was forced to admit on cross that he was mistaken in his testimony about that rate. 4686:12-4687:1. This error did not escape the jury as they asked to review that testimony again during deliberations. 5303:3-10

Dr. Timothy Kuzel had no opinion as to whether or not GBHs cause NHL and states that determining whether glyphosate is a carcinogen is outside his expertise. 4792:4-4794:4. Dr. Kuzel conducted no literature searches in coming to his opinion, and the only study on GBHs that he reviewed was the updated AHS study provided to him by Monsanto. *Id.* Dr. Kuzel's standard of proof is "clear, absolute certainty"" and would not even tell a lung cancer patient that their smoking history was a cause of their cancer. 4790:9-18. Dr. Kuzel lost credibility when he lied about Johnson's health status and offered the opinion that Johnson was in remission. 4782:15-17, 4853:4-24.

C. THERE IS SUFFICIENT EVIDENCE TO SUPPORT EACH ELEMENT OF PLAINTIFF'S CASE

Sections I(A)-(D) of Defendant's Motion for New Trial is substantially the same as its Motion for JNOV. Plaintiff addresses Defendant's arguments and herein incorporates, Section III-VI from Plaintiff's Opposition to Defendant's Motion for JNOV.

D. A NEW TRIAL BASED ON "EXCESSIVE DAMAGES IS NOT WARRANTED.

There is a presumption that the amount of damages awarded by the jury is proper. "A new trial shall not be granted upon the ground of ... excessive...damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the ... jury clearly should have reached a different verdict or decision." Code Civ. Proc. § 657. "'The judge is not permitted to substitute [her] judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper." *Bigboy v. County of San Diego* (1984) 154

Cal.App.3d 397, 406. "A damages award is excessive only if the record, viewed most favorably to the judgment, indicates the award was rendered "as the result of passion and prejudice on the part of the jurors." *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 (quoting *Bertero v. Nat'l Gen. Corp.* 13 Cal.3d 43, 65, n. 12 (1974)).

1. Defendant Concedes the Plaintiff's Injuries Were Terrible And Does Not Present a Valid Basis for Reducing Noneconomic Damages.

The amount of compensatory damages is a fact question that is decided by the jury. *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078-80 The jury was properly instructed "[n]o fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense." CACI 3905A.

Monsanto does not and cannot argue that the jury in this case awarded damages as a result of "passion and prejudice." Monsanto simply argues that the future non-economic damages were impermissible as a matter of law because they may have been based on a shortened life span. Monsanto is wrong. Under California law, a "shortened life expectancy" is a compensable element of non-economic damages. *Bigler-Engler* , 7 Cal. App. 5th at 300, 302 *James v. United States* (N.D. Cal. 1980) 483 F. Supp. 581, 586 (Under California law "An individual may be compensated for any aggravation of his injury or shortening of his lifespan proximately caused by the defendant's negligence"). The jury was appropriately instructed that it could award Johnson damages for "loss of enjoyment of life" and other "similar damages." 5049:15-16.

a. Evidence of Johnson's Terrible Disease Warrants a Substantial Compensatory Award.

It is undisputed that Johnson is suffering from a terrible disease he was diagnosed with at the young age of 42 in August of 2014. Dr. Ofodile describes Johnson's cancer as one the "most severe" cases she treated. 3152:3. Johnson's wife Areceli, testified that Johnson was at his happiest "Before he had cancer. We had nothing to worry about. We had no worries…Life was beautiful. Simple. Just hanging out, having a great time." 3185:1-8. Areceli stated they would "Go out to dinner, go to the park so the kids can play basketball, sports, take a ride, go to the beach." 3169:10-11 3174:6-14. This all changed after cancer. Johnson's job "was everything to him" and it was "tremendously" difficult for him not to be able to work. 3174:6-14. Johnson's unemployment due to cancer means that he is deprived of time spent with Areceli because she now has to work two full-time jobs to support the family. 3177:18-23.

According to Areceli, Johnson always puts his kids first, therefore, he tries to cry only at night when he doesn't think his children can hear him. 3175:11-3176:1, 3184:5-9. There are time where Johnson, "couldn't sleep. He was, you know, in a lot of pain, just very depressed, upset for everything." 3177:8-11. Areceli remembers the day when Johnson was too sick to go to his uncle's funeral; he "just started crying and crying, and he said, "I just want to die," 3181:10-13

Johnson has a fighting spirit and a very good attitude about life which came out on the stand, but he knows "in reality, I am not better. And I'm not getting any better, that I keep going back and forth with this up and down of halfway getting clear skin and then back to the thing again full-fledged. So it's a -- it's a roller coaster, and it just -- just never stops." 3299:14-19

Johnson was exposed to GBHs at the job he loved. After taking care of his sick grandmother for several years, Johnson had a very difficult time getting into the workforce. When he finally secured a job he was incredibly happy and said to himself ""Man, when I get this thing, if I get it, I'm going to do the best I can. I'm winning this thing. You watch." 3212:24-3213:6. Johnson felt immense pride in his work and described how the school students where he worked once made him a poster saying "Mr. Lee, thanks for getting rid of the skunks from under our class." 3211:14-3212:20. Johnson's supervisor described him as having "one of the best work attitudes." 3218:12-13. Now, Johnson often feels defeated because "when you can't work, you can't provide for your family. I took a really big hard dip in finance and I can't really do what I want to do with my kids." 3288:11-14.

Johnson has gotten a brutal lesson in "pain since the last few years" 3285:6-18. He has open flesh wounds on his body, and at times a cotton t-shirt is too painful for him to wear. *Id.* He calls those wounds "stingers." 3194:1-4. Johnson described in detail the lesions that regularly appear over his body. 3285:19-3287:25, 3290:12-14. He gets no relief at night "[b]ecause when you lay down, it hurts more..." 3290:25. The chemotherapy can be worse than the cancer in terms of pain. There were times after chemotherapy that Johnson was in "a lot of pain and [] just couldn't function." 3289:22-24. Johnson "lost over a hundred pounds at one point while taking chemo." 3297:16-17. When Johnson could not attend his Uncle's funeral "it just kind of dawned on me, it sunk in, like you're really sick. You know what I mean. And I just broke down." 3290:15-17

Johnson can't do the things he used to. His memory has been severely affected, which his wife

describes as dementia. 3204:11-14. 3178:9-16. He gets embarrassed when he goes out in public because "[y]ou can see people, you know, looking and staring." 3182:7-14,3289:14-15. He is afraid to go swimming in the pool or ocean because he is afraid that people will think he is contagious. 3288:3-11. He can't spend time in the sun with his children at their sporting events. 3288:24-25. He can't be intimate with his wife because "[y]ou can't even suggest that somebody would be intimate with you when you're looking like that." 3298:2-4. Johnson misses taking his wife dancing and going with her to "parties, get-togethers." 3292:1-4

Johnson will continue fighting the cancer until his "time's written in the sky." I291:22-23. He has hope that he will someday qualify for a bone marrow transplant. 3293:9-10. If his life isn't extended by a transplant, Johnson faces a horrific death. Johnson has previously been in denial that he is dying from cancer, but with his latest relapse "it's pretty scary, because ...I'm going back to chemotherapy." 3299:8-12. Additionally, Johnson will have to face the pain of seeing his children suffer. His sons "hate cancer. They hate it like it's the 20-foot purple monster with fangs." 3291:16-27. At this point, however, his son still thinks he can save Johnson by "trying to come up with a cure." 3293:13.

Considering the immense physical and emotional pain that Johnson has suffered facing this terrible disease; as well as the prospect of quickly facing his mortality and leaving his children and wife without a father and husband, it cannot be said that the jury's verdict was "obviously and clearly wrong."

b. A Thirty-Three Million Dollar Future Non-Economic Award is Not Excessive.

Defendant does not claim that it would be excessive to compensate Johnson for the loss of thirty-one years of life. Defendant does not claim that the verdict was excessive if the jury accepted Dr. Kuzel's testimony that Johnson could live a normal life expectancy. Monsanto claims that it is legally impermissible for a jury to compensate Johnson for his loss of life. There is no basis in California law for this argument.

Defendant relies exclusively on one unpublished Court of Appeals case, *Kelemen v. John Crane, Inc*., 2011 WL 3913115, at *11 (Cal. App. Sept. 7, 2011). Defendant's citation to this case is inappropriate and it should be stricken from its brief.[12] The published case law stands for the exact

[12] *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co*. (1996) 45 Cal. App. 4th 1, 41, 700 ("...certain parties have cited and relied upon unpublished opinions, in violation of Rule 977 of the California Rules of Court. We emphasize that such citations are inappropriate, and we have paid them no heed."); *Legarra v. Federated Mut. Ins*. Co. (1995) 35 Cal. App. 4th 1472, 1483; *Hernandez v. Restoration Hardware,*

opposite of what Monsanto claims. *Bigler-Engler* explicitly states that "[n]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as...a shortened life expectancy." 7 Cal. App. 5th at 300. The verdict in *Bigler-Engler*, was reduced as excessive in part because there was "no suggestion" of a shortened life expectancy. *Id.* at 302. It would be against public policy to give Defendant a discount because its product killed rather than simply maimed its victim.

Dr. Nabhan has a grim prognosis for Johnson stating "I, unfortunately, don't believe he has longer than December 2019..." 2887:4-19. Dr. Kuzel, however, testified that Johnson could live for years and even have a normal life expectancy if he qualified for a stem cell transplant. 4854:8-10; 4784:6-4787:18. The jury was presented with both scenarios as a bases to award damages. 5110:10-18 ("he will live between 2 more to 33 years. A million dollars per year. For all that suffering, all that pain, it's a million dollars per year. And if he lives for only two years, then the remaining years that he doesn't get to live is also a million dollars") The jury could have awarded damages on the basis that Johnson would live for another thirty three years; or the jury could have compensated Johnson for a shortened life span and/or for the accompanying torment Johnson may suffer as he faces death; or there could have decided on a different basis. It is entirely proper for an attorney to make "per diem" arguments based on life expectancy table. *Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, (1998) ("Attorneys may, however, ask the jury to measure the plaintiff's pain and suffering on a "per diem" basis"). Monsanto's failure to object at trial waives any claim of impropriety. *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 509, (1961) (Defendant waived argument by not objecting to counsel argument "of a mathematical formula predicated upon a per diem allowance for this item of damages.").

c. Defendant's Cherry –Picking of Other Verdicts Does Not Support Reduction of the Verdict.

The primary focus on determining whether a verdict is excessive is whether or not the verdict is so "out of line with reason that it shocks the conscience." *Seffert* 56 Cal. 2d 498 (1961). A finding of an excessive verdict predicated on "what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Rufo v. Simpson* (2001) 86 Cal. App. 4th 573, 615–16 . In *Rufo,* the Court

Inc. (2018) 4 Cal. 5th 260, 269, ("With certain exceptions, not applicable here, the Rules of Court generally prohibit us from noticing unpublished opinions. (Cal. Rules of Court, rule 8.1115(a).)

explained, "[t]his method of attacking a verdict was disapproved by our Supreme Court… The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. *Id.* Defendant argues precisely what *Rufo* forbids by contending that Johnson's verdict is "out of line with similar verdicts." MPA at18. The 9th Circuit Court of Appeals in approving a $31 million verdict for a quadriplegic well aware of the "effect on her life span" has held "California courts emphasize that each case must ultimately be resolved on its own unique facts" *Gutierrez ex rel. Gutierrez v. United States*, (2009) 323 F. App'x 493, 494 (9th Cir.)

While the compensatory damages for Johnson are substantial they are not out of line with verdicts in other case. In addition to the 9th Circuit, The supreme courts of three different states have approved non-economic damages similar those awarded Johnson. *Reckis v. Johnson & Johnson* (2015) 471 Mass. 272, 301–03 ($50 Million); *Munn v. Hotchkiss Sch*., (2017) 326 Conn. 540, 578, ($31.5 million); *Meals ex rel. Meals v. Ford Motor Co.* (2013) 417 S.W.3d 414, 428 (Tenn.) ($39.5 million).

California juries have regularly awarded comparable non-economic damage awards. *Doi v Union Pacific R.R. Co*., No. KC051273, 2009 WL 6489917 (Cal.Super. Jan. 16, 2009) ($33.2 million") A search for California verdicts in the last few years shows Johnson's verdict for non-economic damages is not uncommon.[13]

2. $250 Million Punitive Damage Award is Not Excessive and is Not Unconstitutional

"'The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damages award." *Gagnon v. Cont'l Cas. Co.* (1989) 211 Cal. App. 3d. 1602 . CACI 3945 instruction specifically states: "There is no fixed formula for determining the amount of punitive damages." The Court properly instructed the jury on punitive damages using the standard jury instructions and Defendant does not argue that the jury failed to follow those instructions. 5053:1-25. Indeed, the jury awarded substantially less money for punitive damages than the $373 million requested.by Plaintiff's counsel. 5117:16.

The award is justified in this case particularly where there was such a direct connection between

[13]Exhibit 2 to Hoke Decl. ($45 million for a sexual abuse victim, at 1; $50 million for a couple where one spouse is in a vegetative state, at 6; $36 million for child hit by a bus, at 11; $42.5 million for adult hit by truck; $45 million for shooting victim, at 16; $31 million for couple hit by truck; $25 million for sexual abuse victim at 27; $30 million for relatives in wrongful death case, at 31; $15 million for loss of right leg beneath the knee, at 41; $23.5 million for wrongful death, at 53. $20 million in non-economic damages for wrongful death, at 57.)

Johnson's injury and Monsanto's recklessness. Johnson called Monsanto in November 2014, just "looking for answers" and then called again stating his "level of fear is rising over his continued use of RangerPro." Exs. 332, 334. There is no moral, legal or scientific justification for Monsanto not calling him back and at least tell him that some studies have found an association between glyphosate and NHL. No reasonable juror could or would find that behavior anything but reprehensible. In most product liability cases the plaintiff is just one of countless customers who the company failed to warn. Here, Johnson was not an abstraction, Monsanto had his name, had his number and knew that the man was suffering; yet they did nothing.[14]

Defendant's argument against punitive damages again boils down to the EPA preemption defense. However, California has explicitly addressed and rejected a claim that punitive damages were preempted by FIFRA. *Arnold v. Dow Chem.* Co. (2001) 91 Cal. App. 4th 698, 724; *Daniel v. Wyeth Pharm., Inc.* (2011) 2011 PA Super 23, ('a jury could reasonably find that Wyeth knew that additional studies were required to understand the possible association between its products and breast cancer in menopausal women. In this regard, we also find that the trial court's reliance on Wyeth's compliance with the FDA's testing and labeling requirements was misplaced.") Defendant also argues that its behavior is not reprehensible because its corporate representative say that Monsanto's behavior is not reprehensible. The decision of whether to believe Monsanto's corporate representative was within the jury's province as fact-finder.

It is not "obviously and clearly wrong" for the jury to find that Monsanto's employees weren't credible. Dr. Farmer's job function is to be a spokesperson for Monsanto and to "Defend and maintain the global glyphosate or Roundup business." Farmer Tr. at 15:01-24:21. Dr. Goldstein admits that

[14] There is evidence that Johnson's continued use of RangerPro worsened his cancer. GBHs have been shown to cause oxidative stress which can operate to promote tumors. 1990:10-1992. Oxidative Stress causes NHL in humans. 2820:4-2823:7. GBHs have been shown to promote skin tumors in mice. 1857:22-1860:13. Dr. Nabhan testified "If they're being exposed to an agent that may be causing the cancer, you would tell them not to be exposed to this particular agent because it could make the cancer worse..." 2812:21-24. Dr. Ofodile concurs stating for "me and my patient's health, it's not worth the risk." 3156:3-4. Dr. Nabhan explained that he would have told Johnson to "immediately stop" spraying glyphosate if he was in Dr. Goldstein's shoes. 2868:19-2689:25. Dr. Goldstein never called Johnson and Johnson kept spraying. In September 2015 (ten months after Johnson first called Monsanto), Johnson's cancer transformed from a manageable cancer to a fatal cancer. 2882:4-2884:15. It doesn't matter that Dr. Goldstein intended to call Johnson back because Dr. Goldstein testified that he intended to tell Johnson to keep spraying despite his cancer. Goldstein Dep. 56:18-24

Monsanto employees have limited credibility when talking about glyphosate. Goldstein Tr. at 75:17-75:25. While Dr. Goldstein testified that he doesn't believe GBHs cause cancer, he testified that he has known for years epidemiology studies show an increased risk of NHL with glyphosate. *Id. at* 40:14-41:12. Dr. Goldstein stated that reports of the genotoxicity of glyphosate, a mechanism that can contribute to cancer, were old news to him in 2007. *Id.* 96:04-99:24. On the basis of this knowledge, Dr. Goldstein testified that he "expected" IARC to classify glyphosate as a possible or probably human carcinogen. *Id.* at 43:06-44:01. Monsanto "scientists" also have enormous financial conflicts of interest that severely undermines their credibility. In a moment of candor, Donna Farmer explained Monsanto's refusal to make Dr. Parry's 1999 opinion that GBHs were genotoxic known to regulators and scientists, stating "we didn't agree with Dr. Parry's interpretation of all the data....[a]nd, sure, if we have someone who doesn't agree with the way we interpret the data, we're not going to obviously have them out there being spokespeople for us." Farmer Tr. at 170:8-170:21. Simply put, Monsanto will never allow any dissenting opinion within its ranks to become public. Those who dissent, such as Dr. Parry, are subject to "secrecy" agreements

a. The Amount of Punitive Damages Awarded Does Not Violate Due Process

i. Monsanto's Decision to Hide the Cancer Risk for Profit was Highly Reprehensible

When determining a defendant's reprehensibility, courts must consider whether: (1) "the harm caused was physical as opposed to economic;" (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) "the target of the conduct had financial vulnerability;" (4) "the conduct involved repeated actions or was an isolated incident;" and (5) "the harm was the result of intentional malice, trickery, or deceit, or mere accident." Id. Additionally, courts should consider whether the wrongdoing was "hard to detect" or profit-motivated, as these circumstances may justify more severe punitive-damage awards. *Exxon,* 554 U.S. at 494. A court may also consider harm to others in determining the reprehensibility of a Defendant's conduct. *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355, . Applying these factors, it is clear that Monsanto's egregious conduct was sufficiently reprehensible to justify the jury's punitive-damage awards.

In a recent case stating that a punitive damage award of $9 billion was not unreasonable for a single plaintiff under the reprehensibility prong a federal court held that:

> [T]he evidence supports that from the beginning of their commercial alliance, Takeda and Lilly were aware of the possibility that Actos® posed an increased risk of bladder cancer. ...Takeda and Lilly chose to move forward and acted to avoid full disclosure of that and other relevant information to the FDA; to refuse to include adequate warnings on the label, .. to carefully avoid creating or acknowledging any evidence that might draw attention to the bladder cancer risk; ….The facts support that Takeda's and Lilly's willingness to callously allow their customers to ignorantly increase their risk of dying prematurely or significantly negatively impacting their health and well-being

In re Actos (Pioglitazone) Prod. Liab. Litig., No. 6:11-MD-2299, 2014 WL 5461859, at *24 (W.D. La. Oct. 27, 2014) (the award was reduced based on the ratio prong of punitive damages to a ratio of 25:1). Here, Monsanto's conduct was even worse that the conduct by Takeda and the ratio is smaller.

Defendants' tortious conduct evinced a total indifference to, and a reckless disregard of, the health and safety of individuals using GBHs.

"If a company intentionally proceeds with conduct which will expose a person to a serious potential danger known to the company in order to advance the company's own pecuniary interest, punitive damages may be assessed based on a finding that the company has shown a conscious disregard for the person's safety." *Ford Motor Co. v. Home Ins. Co*. (1981) 116 Cal. App. 3d 374, 381–82, ; *Boeken v. Philip Morris Inc*., (2005)127 Cal.App.4th 1640, 1690 (intentionally marketing a defective product knowing that it might cause injury and death is highly reprehensible).

Monsanto clearly knew of the potential risk of cancer and NHL dating back to at least 1998 and were specifically told in 1999, by the renowned genotoxicity expert Dr. Parry, that its formulations were genotoxic and caused oxidative stress. Ex. 220. This expert advised Monsanto to conduct a battery of tests to further examine the genotoxicity of GBHs. *Id.* Monsanto refused to conduct these tests; Monsanto buried the Parry reports and instead ghostwrote an article that stated that GBHs were not genotoxic. Ex. 221, 362. Monsanto used this ghostwritten article as an "invaluable asset" to influence regulators to keep glyphosate on the market. Ex. 269, 373. Monsanto continues ghostwriting articles to present day proclaiming the safety of GBHs for such purposes as "product defense" and "litigation support." Ex. 391. Despite being well aware that epidemiology studies the early 2000s showed an increased risk of NHL for users of GBHs, Monsanto refused to conduct a carcinogenicity test of its formulations; and pushed McDuffie to take the glyphosate results out of the abstract. Ex. 309, 311, 312. Monsanto's "Product Safety Team" was tasked with protecting and increasing sales; there was no directive to protect human safety. Ex. 271.When scientists questioned the safety of GBHs, Monsanto attacked and combatted those scientists. Ex. 391, 513. Even before IARC reviewed

glyphosate, Monsanto was developing its plan to "orchestrate outcry" over its findings. Ex. 391. Most devastating for Johnson, Monsanto refused to tell Johnson, after he called, that there were studies linking his early stage, and not yet terminal cancer, to glyphosate. Goldstein Dep. 56:07-57:11.

With respect to the surfactants, Monsanto knew in 2002 that "[s]urfactants are biologically not 'inert', they can be toxic and this must be addressed." Ex. 209. Monsanto acknowledged in 2008, that the surfactants were "hazardous" yet decided to keep selling them; and acknowledged the surfactants played a role in the George (2010) tumor promoter study. Ex. 382, 366. Monsanto has never conducted carcinogenicity studies on surfactants nor warned of the dangers.

The targets of Monsanto's tortious conduct were both financially and physically vulnerable. Johnson loved his job and was proud to finally be able to offer financial stability to his family after struggling to find work during the great recession. As part of his job, Johnson was required to spray GBHs, if he simply refused than he risked being fired. This dilemma for Johnson was highlighted by the fact that he needed Dr. Ofodile to request the school make a reasonable accommodation to allow Johnson to stop spraying. Dr. Ofodile's letter did not work. 3236:1-16.

Monsanto's conduct was not an isolated incident; it involved repeated action over many years. Monsanto's conduct goes back decades. The evidence presented at trial demonstrates that Monsanto's conduct in obscuring the risk of cancer of GBHs dates back to a least 1985 when they first pushed back on the EPA's recommendation to put a cancer warning on the Roundup label. 3851:13-83. In the ensuing decades, Monsanto has engaged in a continued campaign to obscure the risks of GBHs .

Monsanto's conduct was the result of intentional malice, trickery, and deceit. Monsanto's entire marketing campaign for GBHs was based on deception, concealment, and outright falsehoods. Monsanto's stated goals is 1999 was to have people work "indirectly/behind-the-scenes" to "get 'people to get up and shout Glyphosate is Non-toxic[.]' Ex. 378. The scientists on the jury likely found Monsanto's disregard of the scientific process to be particularly egregious. The world relies on scientists to adhere strictly to rules, guidelines and ethics when reporting findings and conclusions relevant to the safety of the population. As one of Monsanto's own consultants pointed out when asked to take his name off a manuscript "We call that ghost writing and it is unethical;" and stated that such a practice was deceptive. Ex. 261; *Torkie-Tork v. Wyeth*, No. 1:04CV945, 2010 WL 11431846, at *2

(E.D. Va. Nov. 17, 2010) (ghostwriting evidence is relevant to corporations disregard of human safety). As Dr. Benbrook explained:

> ...it's very important for people reading the scientific literature to have knowledge of who conducted the research and interpreted the results and wrote the paper. That's considered very important in evaluating the quality of the research, the reliability of the research, the independence of the research, whether there was a conflict of interest of some sort. So it's truthfulness in authorship is a central feature of scientific publishing integrity. 3898:1-21

Monsanto was well aware of how authorship affects credibility. In fact, Monsanto explains that it substituted a Monsanto author for a third-party author on the Kier & Kirkland (2013) paper, which was written for "product defense" because "the story as written stretched the limits of credibility among less sophisticated audiences." Exs. 443, 445. In 2015, Monsanto scientists advised its legal department that Monsanto would draft a paper to be "authored" by third-party scientists to provide regulatory "air cover" and "litigation support" in light of IARC. Monsanto's legal department advised, "Appealing; best if use big names..." Ex. 391 In addition to ghostwriting article, Monsanto regularly ghostwrote op-eds in newspapers to attack IARC. Goldstein Dep. at 136:13-137:2. Behind the scenes, Monsanto hired the same organization that defended Tobacco companies, to attack IARC. Goldstein Dep. 124:18.

By these actions, Monsanto not only exacerbated Johnson's physical condition, but it also sought to damage Johnson economically by making it harder for him and others to succeed in litigation through the manufacturing of science to be used as evidence at trial.

Monsanto's conduct was "hard to detect." It took a major mass tort litigation with the consolidated resources of many law firms and millions of dollars to bring Monsanto's conduct to light.

Monsanto's conduct was profit-motivated. Monsanto's "Product Safety Team" was tasked with protecting and increasing sales; there was no directive to protect humans. Ex. 271. Monsanto has opposed a cancer warning since 1985 because of "negative economic repercussions." 3851:13-83.

Potential Harm to Others. Glyphosate is the most heavily used pesticide in history and millions of people are exposed to it, potentially leading to tens of thousands victims.

ii. The Single Digit Ratio Between Compensatory and Punitive Damages is Constitutional

The ratio of compensatory to punitive damages awarded by the jury in this case was approximately 6.4:1. Such a single-digit multiplier is well within the ratio limits which have consistently been upheld. The U.S. Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between" the amount of compensatory and punitive damages. CACI

3945 Sources and Authority (quoting *State Farm,* 538 U.S. 424). The California Supreme Court notes that the *State Farm* decision finds that only ratios "**significantly greater** than 9 or 10 to 1 are suspect." *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal. 4th 1159, 1182, (10:1 ratio is justified for purely economic injury); *Bullock v. Philip Morris USA, Inc*. (2011) 198 Cal. App. 4th 543, 566 (16:1 ratio appropriate); *Nickerson v. Stonebridge life Ins.* (2013) 219 Cal.App.4th 188, 194, 206-11 (10:1 ratio) *Boeken v. Philip Morris,* Inc., (2005) 127 Cal. App. 4th 1640, 1703, (10:1 appropriate).

Awards significantly greater than 10:1 have been upheld in cases with high reprehensibility. *Williams v. Philip Morris Inc.,* (2006 Or.) 127 P.3d 1165, 1182, vacated sub nom. *Philip Morris*, 549 U.S. 346, and adhered to on reconsideration 176 P.3d 1255, 1264 (Or. 2008) (upholding $79.5 million punitive-damage award which represented a ratio of 152:1); *Schwarz v. Philip Morris USA, Inc*. (Or. App. 2015) 355 P.3d 931, 940-44 , review denied, 364 P.3d 1001 (Or. 2015) and cert. denied, 136 S. Ct. 2012, 195 L. Ed. 2d 216 (2016) (148:1 ratio); *Burton v. R.J. Reynolds Tobacco Co*. (D. Kan. 2002) 205 F. Supp. 2d 1253, 1263-64, aff'd in part, rev'd in part on other grounds, 397 F.3d 906 (10th Cir. 2005103 (75:1 ratio)

The 1:1 ratio advocated by Monsanto is neither appropriate nor supported by the case law. This argument has been rejected in *Bullock:*

> Philip Morris argues that there is an emerging consensus that "six-figure damage awards are more than 'substantial' enough to trigger this 1:1 upper limit." We cannot discern any emerging consensus in this regard relevant to the extremely reprehensible conduct at issue in this case. Moreover, we do not regard the amount of compensatory damages as a fixed upper limit where damages are "substantial," as we have stated. Instead, the constitutional limit depends on the facts and circumstances of each case

(2011) 98 Cal. App. 4th at 569; *Id.* at 567 (distinguishing *Roby* because it involved "a generous amount for emotional distress arising from economic harm with no physical injury"*)*

b. Comparative Civil Fines are Not Applicable to this Case

The comparative civil fine guidepost requires only a comparison to civil fines imposed by state government (not to other verdicts). However, "The third guidepost is less useful in a case like this one, where plaintiff prevailed only on a cause of action involving common law tort duties that do not lend themselves to a comparison with statutory penalties" *Simon v. San Paolo U.S. Holding Co*. (2005) 35 Cal. 4th 1159, 1183–84, (quotations omitted). *Boeken*, 127 Cal. App. 4th at 1700 ("finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not

impossible, undertaking.")

Monsanto cites two statutes[15] providing for fines for the sale of misbranded products. However those statutes do not help Monsanto, because they allow for a fine for each violation, which means a fine for each Roundup bottle sold; a potential fine of billions. *See e.g. Boeken,* 127 Cal. App. 4th 1640.

iii. The Punitive Damage Award Comports with State Law.

This award is far below California's punitive damage cap of ten percent of a company's net worth. *Bigler-Engler*, 7 Cal. App. 5th at 308). The jury awarded Johnson only 4% of Monsanto's stipulated net worth. This award is still below the award in *Bigler-Engler*, cited by Monsanto, which found an award of 5% of net worth to be appropriate. *Id.* Defendant cites no case which would suggest that a punitive damage award must be reduced because of the potential for future punitive damage awards.[16] If Monsanto wanted the jury to consider this factor, then it could have tried to introduce evidence of other lawsuits. Monsanto chose not to and "..it is not within this Court's authority to disallow punitive damages claims overall as a matter of public policy due solely to the potential for repetitive punishment." *In re Asbestos Prod. Liab. Litig*. (No. VI), No. 02-MD-875, 2014 WL 3353044, at *13 (E.D. Pa. July 9, 2014).

E. There was No Prejudicial Misconduct by Plaintiff's Counsel that Warrants a New Trial

1. The Jury Adhered to the Court's Instructions

The unanimous verdict of such a sophisticated jury militates strict adherence to the principle that courts "credit jurors with intelligence and common sense and presume they generally understand and follow instructions." *People v. McKinnon* (2011) 52 Cal.4th 610, 670 ("defendant manifestly fails to show a reasonable likelihood the jury misinterpreted and misapplied the limiting instruction."). The Court's instructions to the jury, which, "absent some contrary indications in the record," must be

[15] Monsanto would also be liable under California's False Advertising Law ("FAL") prohibiting the false advertisement of products to California residents. *56 Cal. Bus. & Prof. Code § 17500.113 Violators of the FAL are subject to civil penalties not to exceed $2,500 for each violation. Id.; § 17536. Each false/deceptive advertisement disseminated by Defendants would constitute "'a minimum of one violation with as many additional violations as there are persons who read the advertisement or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning such product or service." *People v. JTH Tax, Inc*., 151 Cal. Rptr. 3d 728, 754–55 (2013). Therefore Monsanto would be subject to a $2,500.00 fine for every bottle, pamphlet, advertisement, or training material it distributes. Both FIFRA and Prop 65 use the same "each violation" language.

[16] *Johnson v. Ford Motor Co*., stands for the fact that punitive damages can't be based on disgorgement of profits from other transactions. 35 Cal. 4th 1191, 1212, (2005). Plaintiff made no such claim here.

presumed heeded by the jury.[17] *Cassim* 33 Cal.4th at 803. Here, the Court repeatedly instructed the jury on the definition of punitive damages and provided limiting instructions when requested by Monsanto. 5051:10-5053:25; 5054:4-7; 5267:15-22. With respect to the "change the world" comment the Court was quite clear with the jury, "you heard discussion from plaintiff's counsel about the purpose of punitive damages and a reference to changing the world...I want to remind you and tell you again, as I instructed you yesterday, as to the purpose of punitive damages...the purpose of punitive damages is only to punish Monsanto for any crime that was visited upon Johnson..." 5267:6-22.

Defendant did not object to the Court's curative instruction, instead stating "your Honor's proposal is also quite acceptable to us." 5265:11-12. It is only after receiving the curative instructions it requested (which must be presumed to have been heeded) and following a disappointing jury verdict that Monsanto takes issue with the Court's instructions. However, "a defendant who believes an instruction requires clarification or modification must request it." McKinnon 52 Cal.4th at 670 ("defendant manifestly fails to show a reasonable likelihood the jury misinterpreted and misapplied the limiting instruction."); People v. Garvin (2003) 110 Cal.App.4th 484, 489 ("It is axiomatic that [a] defendant who believes an instruction requires clarification must request it.") (internal quotations omitted). The Court should not permit such belated complaints to upset a unanimous verdict that was reached after a month of trial, hundreds of hours of evidence, competent expert testimony, and vigorous advocacy by counsel. Monsanto's request for a new trial on this record must fail.

2. Plaintiff's Counsel Argued Based on the Law and Evidence in the Record

Even if the Court didn't emphasize a curative instruction to the jury, Plaintiff's counsel's references to the jury's ability to "change the world" would be an appropriate under California law:

> The purpose of punitive damages…is a purely *public* one. The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers… the essential question therefore in every case must be whether the amount of damages awarded substantially ***serves the societal interest***. *Id*. (first italics in original, second italics added and bolded); *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 25 (holding same). With this principle in mind, it was well within the accepted bounds of persuasive argument for counsel to emphasize to the jury the intended function of punitive damages, notwithstanding counsel's emphatic manner in doing so. *See, e.g., People v. Harrison* (2005) 35 Cal.4th 208, 248 (permitting the invocation of dramatic biblical analogies

[17] Monsanto's reliance on *Bullock v. Philip Morris USA, Inc.* (2008)159 Cal.App.4th 655 is without merit. In *Bullock*, the appellate court found that defendant was prejudiced because the trial court refused to give the requisite jury instruction on punitive damages. *Id.* at 695. Here, the Court properly instructed the jury on the standard. 5051:3-6, 5053:23-25. .

when discussing the legal gravity of defendant's crime.)

Adams v. Murakami (1991) 54 Cal.3d 105, 110. Additionally, Defendant made no contemporaneous objection and its argument of misconduct should be deemed waived. *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal. 3d 285, 303 (Argument for misconduct waived where "during plaintiff's argument to the jury defense counsel did not object or request that the jury be admonished).

Plaintiff's counsel's statements to the media *after* deliberation and verdict offer no ground to conclude that attorney misconduct occurred.[19] In fact, the media statement cited by Monsanto in its brief merely reinforces the appropriateness of counsel's closing argument in so far as it sought to underscore the purpose of punitive damages: "'[the jury] saw that if they could make Monsanto pay a certain amount of money, that it actually ***might lead to future correct conduct***…'" Trial Brief at 24. (italics added and bolded). In a desperate attempt to shore up a meritless position, Monsanto asserts that Plaintiff's counsel's use of the "liberals and morons" email during closing argument "invited the jury to punish Monsanto for the political views of a non-Monsanto employee" which "amounts to dangerous misconduct…" *Id.* To the contrary, Plaintiff's counsel has an undisputed right to characterize admitted evidence in a light most favorable to Plaintiff. *Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 795, *as modified* ("[counsel] has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.") (citations and internal quotations omitted); *People v. Cash* (2002) 28 Cal.4th 703, 732 . Nothing in this record supports retrial on these bases.

a. Plaintiff's Counsel Properly Commented on Monsanto's Failure to Proffer Key Evidence

Next, Monsanto argues that misconduct occurred when Plaintiff's counsel in closing discussed an EPA report that could not be considered by the jury for the truth of the matter contained therein. Although Monsanto "singles out words and phrases, or at most a few sentences, to demonstrate misconduct, [the court] must view the statements in the context of the argument as a whole… Ultimately, the test for misconduct is whether the prosecutor has employed ***deceptive or reprehensible*** methods to persuade either the court or the jury." *People v. Dennis* (1998) 17 Cal.4th 468, 522. (italics

[19] The Court is confined to evidence in the record and must disregard such extraneous events when ruling on a motion for new trial. *People v. Price* (1992) 4 Cal.App.4th 1272, 1275.

added and bolded).[20] Plaintiff's counsel commented on Monsanto's failure to put on a sponsoring witness for an EPA document that Monsanto repeatedly asserted as key evidence in its defense. 5064:14- 5065:12 ("Monsanto didn't put anyone in this stand right here to talk to you about [the EPA report] intelligently.") The California Supreme Court has blessed "comments based upon the…failure of the defense to introduce material evidence or to call anticipated witnesses." *People v. Bradford* (1997) 15 Cal.4th 1229, 1339 ; *People v. Medina* , 11 Cal.4th 694, 755, *as modified* (Jan. 24, 1996) (approving "comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses."); *People v. Brady* (2010) 50 Cal.4th 547, 566 . Thus, Plaintiff's counsel's discussion of the EPA report and the significance of Monsanto's failure to produce a sponsoring witness fell within the ambit of permissible argument affirmed by our Supreme Court in *Bradford* and related authority. The dearth of case law in Monsanto's brief merely illustrates the vacuity of its arguments.[21] Monsanto had an EPA employee on its witness list, Jess Rowland, but chose not to play the video deposition at trial.

b. Plaintiff's Counsel's Use of Rhetorical Device to Comment on Evidence was Proper

Monsanto also requests a new trial because Plaintiff's counsel chose to use a rhetorical device

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[20] Most precedent addressing claims of attorney misconduct in closing arguments stems from criminal trials where prosecutors are held to a higher standard than civil litigators. Thus, argument which does not qualify as misconduct in a criminal forum cannot reasonably implicate counsel that makes similar arguments in a civil proceeding.

[21] Misconduct was found in *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283 (New Trial Brief at 26) because counsel proceeded to proffer evidence which had been excluded, in violation of both the court's orders and local rules as opposed to commenting on the state of the evidence or appellee's failure to offer key evidence. *Id*. at 304 (appellant "introduced a 'highly inflammatory photo' which was not admitted as evidence or presented to opposing counsel.") The questions then posed by the jury during deliberations cited the excluded evidence which demonstrated that panel members had been influenced by the improper arguments. *Id*. This is a far cry from Plaintiff's counsel commenting on Monsanto's failure to proffer a sponsoring witness for evidence which the company has relied upon in defense. Moreover, Monsanto has made no showing that any member of the unanimous jury was unduly influenced by the ostensible misconduct. The other case cited by Monsanto, *Hansen v. Warco Steel Corp*. (1965) 237 Cal.App.2d 870 , actually works to Monsanto's detriment. In *Hansen*, the appellate court held that any alleged misconduct could not form the basis of a retrial "when plaintiff neither asked that the jury be admonished nor demanded a mistrial…indicat[ing] that counsel did not at the time regard the argument as prejudicial. Since plaintiff elected not to demand remedial action ***before the case went to the jury***, he may not demand a retrial on that ground after hearing the disappointing verdict. *Id*. 878–879. (italics added and bolded). Like the plaintiff in *Hansen*, Monsanto failed to object to Plaintiff's counsel's discussion of the EPA document prior to the case being submitted to the jury, thereby forfeiting the right to invoke the argument for retrial now.

in closing argument to illustrate Monsanto's reaction to a large enough punitive damages award. Even if this argument was improper, and it was not, there was no prejudice to Monsanto as the Court admonished counsel in front of the jury. 5265:13-19 ("I did admonish Mr. Wisner and sustain the objection, so even though that statement should never have been made, I think that that's been addressed.")

Even if Plaintiff was not admonished. Plaintiff's argument was proper. Plaintiff's counsel explicitly referred to the deterring effect of punitive damages by asking the jury to come up a "number that tells [Monsanto executives] – they hear it, and they have to put the phone down, look at each other, and say, '***we have to change what we're doing***.' 5117:12-16 (italics added and bolded). The fact that counsel opted to describe the legal function of punitive damages with rhetorical language of a corporate board room celebrating a small award with champagne is a characterization of the impact of the jury's award on Monsanto's conduct – specifically the company's continuing business as usual or being deterred and engaging in safer conduct

Likewise, reference to Monsanto's capacity to pay or its wealth in this context was not improper. Monsanto stipulated to the company's net worth and assets. 4017:13-17. "[W]here liability and punitive damages are tried in a single proceeding, evidence of wealth is admissible." *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1243. In *La Palmas*, the following statements by plaintiff were deemed appropriate:

> Think about just how big this company is. When you talk about them beating up on people that are smaller than they are.... There is probably nothing, in my opinion, that is more sickening in our society than a company that will take as much money as they've got and use it to pound away on you legally.... There's one thing we can do about it. We can take away some of their money so they don't have that money at least anymore to grind people into the dirt.... ***You've got to send a message loud enough to them that they won't treat people this way*** ... That they wouldn't use their money to buy lawyers to try to legally nail your knees to the floor.

Id. (italics added and bolded). The closing in *Las Palmas Associates* was stated in stronger terms than Plaintiff's counsel's in the matter at bar. 5118:17-19 ("That's a number that makes people change their way. That's a number that sends a signal to Monsanto and everybody that works there.") The Second District in *Las Palmas Associates* held that "nothing said by [plaintiffs] in argument was inappropriate." 235 Cal.App.3d at 1244; *Roemer v. Retail Credit Co.* (1985) 44 Cal.App.3d 926, 941-942 (1975) ("…the general thrust of plaintiff's closing argument was that defendant is a large, snooping monopoly

which makes huge profits by specializing in destroying people's reputations… Having reviewed the entire record, we are of the opinion that the argument of plaintiff's counsel was entirely within the bounds of legitimate advocacy.") *Wayte v. Rollins International, Inc.* 169 Cal.App.3d 1, 20.

Monsanto is misguided when it invokes the proposition that "attorneys may not appeal to jurors' social or economic prejudices by referring to litigants' wealth or poverty." New Trial Brief at 26 (quoting *Brokopp v. Ford Motor Co.* (1977) 71 Cal. App. 3d 841, 860 (citing *Seimon v. Southern Pac. Transp. Co.*, 1977 67 Cal. App. 3d 600, 606). References to a litigant's wealth are forbidden only when "the asserted wealth…is not relevant to the issues of the case." *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 625.[22] There was thus nothing objectionable about Plaintiff's counsel depicting Monsanto's wealth with imaginative illustrations that were tied to evidence in the record. In any event, the jury were a group of highly educated, attentive individuals who were unlikely to simply be inflamed with rhetorical devices that were reasonably inferred from Monsanto's substantial wealth. *People v. Centeno* (2014) 60 Cal.4th 659, 667 ("we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.")

c. Plaintiff's Counsel Did not Refer to Excluded Evidence, But Elicited Scientific Testimony in the Same Vein as Monsanto's Expert's Direct Testimony

Defendant's assertion that "Plaintiff's counsel…elicited extensive comparisons between tobacco companies and Monsanto via the testimony of Dr. Neugut" is factually inaccurate. New Trial Brief at 27. Dr. Neugut referenced tobacco for the purpose of illustrating epidemiological principles.[23] Monsanto's own epidemiologist, Dr. Lorelei Mucci, repeatedly referenced tobacco for the same reasons Dr. Neugut mentioned tobacco: to explain complex scientific theories by drawing from real-world examples familiar to a lay jury.[24] Furthermore, Defendant cannot complain that Plaintiff's counsel in closing cited Dr. Mucci's testimony (which was evidence heard by the jury) regarding the role of confounding in hiding the risk between tobacco smoking and lung cancer. All Plaintiff's counsel did was remind the jury that he had asked Dr. Mucci: "' [Q.] And isn't it true that when that fight was

[22] The two cases cited by Monsanto – *Brokopp v. Ford Motor Co.* (1977) 71 Cal. App. 3d 841 and *Seimon v. Southern Pac. Transp. Co.*, (1977) 67 Cal. App. 3d 600– did not involve trials where the jury considered liability and punitive damages jointly.

[23] Tr. 2553:11-256:13, 2580:15-21, 2585:9-17 2608:22-15, 2623:4-9

[24] Tr. at 4198:7-11, 4201:24-4202:1, 4208:11-4209:8, 4211:11-4213:20, 436:17-22.

happening in the epidemiology world, the tobacco companies kept saying its confounders? [A.] Maybe. I'm sure they did, yes.'" Aug 7. Trial Trns. at 5073:5-20.[25] Plaintiff's counsel then proceeded to summarize his view on what the testimony of Dr. Mucci showed: "[confounding is] a classic way of hiding a risk." *Id*. 5073:20; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1342 (counsel permitted to "state his own views on what the evidence shows and urge whatever conclusions he deems proper.") .

It was through the testimony of Monsanto's Dr. Goldstein that the jury learned of Monsanto funds groups such as the ACSH, which had been advocates for the tobacco industry, to attack IARC. Goldstein Depo. at 124:4-18. During closing, Plaintiff's counsel directed the jury to the testimony of Plaintiff's expert, Dr. Charles Benbrook, regarding the significance of Monsanto's support for an organization such as the ACSH. 5074:1-24.[26] Plaintiff's counsel then stated his view as to what this admitted evidence showed by concluding: "That Monsanto is now raising confounders on this data, that they seek the allegiance of ACSH should tell you a lot." 5074:25-5075:2. Again, such comments on *admitted evidence* do not rise anywhere near the level of misconduct. *People v. Panah* (2005) 35 Cal.4th 395, 463 (prosecutor "has a wide-ranging right to discuss the case in closing argument...and urge whatever conclusions he deems proper."). Monsanto made no contemporaneous objections to any of the above referenced evidence.

d. Monsanto's Failure to Object Cannot Serve as Basis for New Trial

In an effort to excuse its own failure to object to any ostensible misconduct, Monsanto argues that repeated objections would be futile and "only bring further attention to the prejudicial arguments." New Trial Brief at 28. This argument is contrary to California law which provide, "The mere concern of highlighting alleged misconduct by objecting, without more, cannot serve as an exception to the general rule requiring an objection and request for an admonition. We conclude defendant's reliance on the futility exception must be rejected. *People v. Boyette* (2002) 29 Cal.4th 381, 432, *as modified* (Feb. 11, 2003); *People v. Valencia* (2008) 43 Cal.4th 268, 282 ("This process is not inherently prejudicial")

Nothing in Plaintiff's counsel's effective advocacy rises to the level of prejudice that would

[25] The Court noted that Monsanto failed to raise an objection to Dr. Mucci's cross examination regarding smoking and held "if the testimony was actually given during the course of the trial and it's in evidence and there was no objection, then at this point any objection to this testimony is waived." 5030:9-18

[26] Monsanto never objected to this portion of Dr. Benbrook's direct examination. 3903:2-3903:19.

warrant a new trial. The California Constitution allows for a new trial only if there is a "***miscarriage of justice***." Cal. Const., Art. VI, § 13. A miscarriage of justice cannot be said to have occurred merely because the complaining party isolates portions of the trial record that it reckons are so prejudicial "that a different result would have been probable" in the absence of the complained-of conduct. Code Civ. Pro. § 475 ("There shall be no presumption that error is prejudicial, or that injury was done if error is shown."); *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 ("No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party.")

As discussed above, each of Plaintiffs' counsel's closing statements that Monsanto speculates would have altered a *unanimous* jury verdict had they not occurred, were within what is generally allowed during argument. Even in a criminal trial implicating the 5th amendment an, "indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." *Boyette* 29 Cal.4th at 455–456. Here, Plaintiff's comments on Monsanto's failure to proffer witnesses or introduce key evidence are permissible. *Bradford* 15 Cal.4th at 1339; *Medina* 11 Cal.4th at 755 (approving comments "on the failure of the defense to introduce material evidence or to call logical witnesses.").[27]

3. The Verdict Was Reached Based on Properly Admitted Evidence

a. Plaintiff's Experts Presented Admissible Evidence to the Jury

Monsanto makes no new arguments on the exclusion of Plaintiff's experts. These arguments have been repeatedly denied and Plaintiff addresses them in its opposition to JNOV.

b. Monsanto Suffered No Prejudice With the Admission of Other Evidence

i. EPA and Foreign Regulatory Documents Were Properly Excluded and/or Limited

Monsanto complains that it was prejudicial for the Court to admit the IARC Monograph but exclude documents from EFSA, ECHA, JMPR, the EPA's 1993 and 1997 glyphosate reviews and only

[27] Plaintiff's counsel's comments on the state of the evidence – such as discussing the EPA report and Monsanto's failure to put on sponsoring witnesses – did not involve inappropriate allusions to excluded evidence, but it should be that noted that even direct references to excluded evidence have not been held sufficiently prejudicial to trigger a miscarriage of justice. *People v. Price* 1 Cal.4th 324, 451(1991) (defendant was not prejudiced by prosecutor's direct reference to excluded evidence where court sustained objection).

admit the 1993 and 2016 EPA conclusions for the limited purpose of demonstrating Monsanto's state of mind with respect to the available science. However, these documents are pure hearsay and do not fall under any applicable exceptions. The EPA documents that Monsanto sought to offer into evidence (some of which – the 2015 CARC Report and 2017 Glyphosate Issue Paper – are incomplete interim analyses) are based entirely on hearsay documents submitted to the EPA for review. *See, e.g.*, 2016 Glyphosate Issue Paper at 13. I"'[A] public employee's writing, which is based upon ***information obtained from persons who are not public employees***, is generally excluded because the 'sources of information' are not 'such as to indicate its trustworthiness.'" *People v. Baeske* (1976) 58 Cal.App.3d 775, 780–781; *People v. Ayers* (2005)125 Cal.App.4th 988, 996 (information from non-public employees in officials reports constitutes inadmissible multiple hearsay); *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1205 (holding same). Given that the EPA does not directly test glyphosate (or Roundup for that matter), but conducts reviews of existing literature and data submitted by the manufacturer, 7 U.S.C.A. § 136a, any information contained in the EPA reports is itself inadmissible and the documents do not satisfy the Section 1280 exception.

Monsanto's sole citation to a California case admitting regulatory reports under Section 1280 concerned an instance where the admitted report "was introduced during the ***testimony of one of the experts who had helped write it***." *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 138 .[28] The § 1280 official records exception has traditionally been employed for the admission of police reports of crime scenes, laboratory blood tests, and DMV records, where the public officials directly observed the acts or events made subject of the reports. *See, e.g*., *Burge v. Department of Motor Vehicles* (1992) 5 CA4th 384, 388-389 ; *People v. Clark* (1992) 3 C4th 41, 158-159. Monsanto failed to produce a single witness at trial to provide competent testimony to overcome the hearsay bar for the admission of the EPA documents, even though they could have played the videotaped testimony of Jess Rowland, or sought to depose another witness.

Defendant cannot leverage its failure to object to Plaintiff's proffer of the IARC Monograph during trial to retry the case. Defendant had an opportunity to object when Plaintiff sought introduction of the Monograph, but did not raise an issue. "Failure to object to the reception of a matter

[28] The rest of Monsanto' citations are to inapplicable federal precedent addressing the admission of documents under the Federal Rules of Evidence. *See* New Trial Brief at 32-33.

into evidence constitutes an admission that it is competent evidence." *People v. Close* (1957) 154 Cal.App.2d 545, 552 ; *People v. Wheeler* (1992)4 Cal.4th 284, 300. Had Defendant objected, Plaintiff would have been able to introduce the IARC monograph through the testimony of Dr. Blair, an author.

Finally, there is no prejudice where Defendant repeatedly read the contents of the regulatory reports during expert testimony; and where the Plaintiff was prohibited from introducing the regulatory findings of the government officials of the State of California. *Stephen v. Ford Motor* Co., 134 Cal. App. 4th 1363, 1376 (exclusion of government report not prejudicial where trial permitted expert to testify that he had based his opinion on it.")

ii. Azevedo Testimony

Mr. Azevedo's testimony was a piece of evidence which went directly to the issue of punitive intent. As Judge Karnow held, "conduct that did not harm Johnson may be considered in deciding whether Monsanto is liable for punitive damages to the extent that it bears on Monsanto's mental state.'" May 17 Order Re Jury Instructions at 13. However, the Court held that the vice-presidents referenced in Mr. Azevedo's deposition were not managing agents.[30] The Defendant requested that "there should be no reference to that testimony in closing in support of punitive damages as is laid out." 4922:20-4923:6. The Court granted and Plaintiff complied with that request. Defendant received what they asked for. Defendant did not ask for an instruction for the jury to disregard that evidence. There is no prejudice, and any claim of prejudice is waived due to the Defendant's failure to ask for an instruction.

iii. **Liberals and Morons Email**

The statement was adopted by Monsanto's National Accounts Manager for the Western United States, Mr. Steven Gould, when he "liked" the liberals, morons, and zombies analogy offered by an employee of Monsanto's distributor, Wilbur-Ellis, to describe the impact of the IARC classification upon California. Ex. 290. The fact that Mr. Gould adopted Wilbur-Ellis description of people who want to warn about the NHL risk of glyphosate evidences Monsanto's reckless disregard for human health after a world-renowned health agency classified its product as probably carcinogenic. This email

[30] Plaintiff disagrees with the Court's ruling to strike Mr. Azevedo's testimony after the close of evidence. *See In re Estate of Horman*, 265 Cal. App. 2d 796, 805, (Ct. App. 1968). Had the Court struck the video testimony before trial, Plaintiff could have called Mr. Azevedo live to further clarify his testimony as to who instructed him that Monsanto was "about making money."

was also properly admitted as relevant to failure to warn and causation. It involved a direct communication from Monsanto to the distributor charged with training Johnson on the safety of RangerPro, representing that RangerPro does not cause cancer and approving of the distributors comments that those who think otherwise are liberals and morons. Had Monsanto and Wilbur-Ellis appropriately informed the Benicia School District of the IARC findings, then Benicia School District, like others in the bay area, would have stopped using glyphosate. *See e.g.* Ex. 291.

4. The Verdict Was Reached Based on Proper Jury Instructions

Consumer Expectation Instruction: For all of the reasons stated in Section IV of Plaintiff's Opposition to JNOV and including the reasoning of Judge Karnow in the May 17 Order, there was sufficient evidence to support the consumer-expectation test for Plaintiff's design defect claim and therefore the instruction was properly given.

Thirty-Three Year Life Expectancy was a Proper Metric**:** For all of the reasons stated in Section XX, the average thirty-three year life expectancy was a proper metric.

The Punitive Damages Instruction was Proper**:** The Court properly gave the standard CACI instruction on punitive damages that allowed for the jury to consider mitigating evidence. Because CACI 3945 "lists several factors that should be considered…any evidence that weighs against one of the factors could be considered mitigating evidence." May 17 Order Re Jury Instructions at 16. *State Farm,* 538 U.S. at 419 (no discussion of mitigating factors).

IV. Conclusion:

The trial court ensured that Monsanto received a fair trial from a fair and impartial jury. The jury was "excellent," paid careful attention, sifted through the evidence carefully and came to an appropriate verdict. Monsanto's motion for a new trial should be denied. "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". *Coombs v. Hibberd* 43 Cal. 452, 453 (1872). It is time to end this litigation and respect the jury's judgment.

Dated: October 1, 2018

Respectfully submitted,

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