

**A155940 & A156706**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION ONE**

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**DEWAYNE JOHNSON,**  
*Plaintiff and Appellant,*

*v.*

**MONSANTO COMPANY,**  
*Defendant and Appellant.*

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APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT  
SUZANNE R. BOLANOS, JUDGE • CASE No. CGC-16-550128

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**MOTION FOR JUDICIAL NOTICE;  
DECLARATION OF K. LEE MARSHALL;  
[PROPOSED] ORDER**

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**MONSANTO COMPANY**

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**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION ONE**

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**DEWAYNE JOHNSON,**  
*Plaintiff and Appellant,*

*v.*

**MONSANTO COMPANY,**  
*Defendant and Appellant.*

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**MOTION FOR JUDICIAL NOTICE**

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Pursuant to Evidence Code sections 452 and 459, and California Rules of Court, rule 8.252, defendant and appellant Monsanto Company requests that this court take judicial notice of several posttrial communications (primarily emails) from jurors to the trial court, two local newspaper articles, and a paid full-page newspaper advertisement entitled, “Dear Judge Suzanne Ramos Bolanos, What is a Life Worth?”—all of which were intended to pressure the trial court to reject its tentative ruling on the posttrial motions and uphold the jury’s \$289 million verdict. Each of these documents postdate the verdict, the judgment, and the filing of the posttrial motions, so the trial court was not asked to take judicial notice of these documents in the first instance.

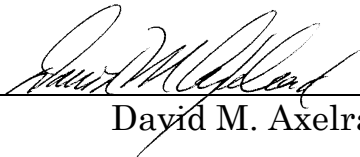
This motion is based upon the attached memorandum of points and authorities, the attached Declaration of K. Lee

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Marshall and exhibits, the attached proposed order, the concurrently filed appellant's opening brief, and the record on appeal.

April 23, 2019

**HORVITZ & LEVY LLP**  
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K. LEE MARSHALL

By:   
David M. Axelrad

Attorneys for Defendant and Appellant  
**MONSANTO COMPANY**

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## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

In this lawsuit, Plaintiff Dewayne Lee Johnson alleges that his exposure to glyphosate-based herbicides manufactured by Monsanto caused him to develop non-Hodgkin's lymphoma. The jury awarded Plaintiff approximately \$39 million in compensatory damages and \$250 million in punitive damages. After judgment was entered, Monsanto filed motions for new trial and for judgment notwithstanding the verdict.

On October 10, 2018, the trial court heard Monsanto's posttrial motions. (1B RT 5-97.) Before the hearing, the court issued a written tentative ruling that concluded Plaintiff had failed to present clear and convincing evidence of malice or oppression to support an award of punitive damages. (6 AA 6140-6143.) The tentative ruling also raised serious questions about liability and damages. (6 AA 6142-6143.) After the hearing, the court took the matter under submission.

Over the next few days, five jurors sent correspondence to the trial judge (primarily by email) imploring her to uphold their verdict on punitive damages. (See, e.g., Declaration of K. Lee Marshall, exh. A [Juror Robert Howard: "I urge you to reconsider your tentative ruling and to not completely overturn the punitive damages"]; exh. B [Juror Margaret Cleland: "It would be very disappointing to find that our time, energy, and emotions were spent in vain"]; exh. D [Juror Gary Kitihata: "I was dismayed to

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learn . . . of your tentative ruling. I urge you to respect and honor our verdict”].)

During the same period of time, the San Francisco Chronicle published an article reporting on these juror communications to the trial judge. (See Marshall Decl., exh. F.) The Chronicle also published an opinion article arguing that the trial judge should not overturn the verdict. (See Marshall Decl., exh. G.) In addition, the Chronicle published a full-page advertisement from the “Periscope Group” entitled, “Dear Judge Suzanne Ramos Bolanos, What Is a Life Worth?” (See Marshall Decl., exh. H [stating, among other things, “You are a consumer’s advocate we all admire. Please uphold Dwayne Johnson’s verdict.”].)

On October 22, 2018, the trial court issued a final order on the posttrial motions. (6 AA 6145-6154.) In that order, the trial court abandoned its tentative ruling. Instead of vacating the punitive damages award, the court denied the posttrial motions and reduced the punitive damages from \$250 million to roughly \$39 million. (6 AA 6152-6153.)

None of these juror communications or newspaper articles were filed in the superior court, even though many of them were addressed and sent directly to the court. Accordingly, these materials are currently not part of the record on appeal. As we discuss below, this court should judicially notice these materials because they are subject to judicial notice under the Evidence Code and because they are relevant to the procedural history of this case.

## LEGAL ARGUMENT

**This court should take judicial notice of email communications and newspaper articles and advertisements that attempted to influence the trial court’s ruling on the posttrial motions.**

**A. The court may take judicial notice of facts and propositions not reasonably subject to dispute and capable of immediate determination, even if judicial notice was not sought in the trial court.**

A reviewing court may take judicial notice of any matter noticeable by the trial court. (Evid. Code, § 459, subd. (a); *Martin v. General Finance Co.* (1966) 239 Cal.App.2d 438, 442 [“The power of this court to take judicial notice is the same as that of the trial court”].) This court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).) Under this provision and Evidence Code section 459, which governs judicial notice in reviewing courts, this court may take judicial notice of jurors’ communications to the trial judge and newspaper articles and advertisements relating to this lawsuit. (See Marshall Decl., exhs. A-H.)

“‘A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. [Citation.] Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its *proper*

*interpretation are not subject to judicial notice if those matters are reasonably disputable.’ ” (Unruh-Haxton v. Regents of University of California (2008) 162 Cal.App.4th 343, 364.)*

Appellate courts generally do not take judicial notice of documents not presented to the trial court (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3), but a reviewing court may exercise its discretion to do so (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325). Courts should take judicial notice of documents if they are relevant to an issue raised on appeal. (See Cal. Rules of Court, rule 8.252(a)(2)(A); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1.) A request for judicial notice must state why the matter is relevant to the appeal, whether the matter was presented to the trial court, if the trial court took judicial notice of the matter, and whether the matter relates to proceedings that occurred after entry of judgment. (See Cal. Rules of Court, rule 8.252.)

**B. The court should take judicial notice of juror communications that attempted to persuade the trial court to repudiate its tentative ruling on the posttrial motions.**

This court should take judicial notice of correspondence from five jurors to the trial court that was intended to convince the trial court to abandon its tentative ruling and uphold the verdict. (See Marshall Decl., exhs. A-E.) In *Theta Chi Fraternity, Inc. v. Leland Stanford Junior University* (N.D.Cal. 2016) 212 F.Supp.3d 816, 822-823, the court took judicial notice of email communications

between counsel because the information in those emails was included in the complaint and the parties did “not dispute the emails’ authenticity.” The court noted, “While the court takes judicial notice of the fact that counsel made particular statements in these emails, the court does not take judicial notice of the truth of counsel’s factual assertions in the emails to the extent that the emails are inconsistent with the allegations in the complaint.” (*Id.* at p. 823.)

Likewise, here, the court should take judicial notice of written communications from five jurors to the trial court because those communications are not reasonably subject to dispute and are easily authenticated. (See Evid. Code, § 452, subd. (h); *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [“The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute.*”].) There is no dispute that the jurors sent these communications to the superior court: the correspondence was sent to the court clerk, the trial judge, and/or department 504, and both sides’ attorneys were copied on each one. (See Marshall Decl., exhs. A-E.) Moreover, Monsanto does not seek judicial notice of the *truth* of the contents of these communications; Monsanto merely seeks judicial notice of the fact that five jurors contacted the trial court to ask the trial judge to reverse her tentative ruling.

The communications are relevant to this appeal because they are part of the procedural history of the case. All of the jurors’ communications were sent between the date the trial court issued



its tentative ruling (October 10, 2018) and its final order (October 22, 2018) on the posttrial motions. Because the court's final order does not disavow many of the statements the court made in its tentative ruling, the emails provide background and context for, and may explain the trial court's ultimate decision on the punitive damages issues presented in the posttrial motions.

**C. The court should take judicial notice of two newspaper articles and an advertisement that also attempted to persuade the trial court to reject its tentative ruling.**

The court should also take judicial notice of two articles published in the San Francisco Chronicle: (1) an October 15, 2018 article that documented the jurors' communications with the trial court (Marshall Decl., exh. F); and (2) an October 14, 2018 article by musician Neil Young and actress Daryl Hannah entitled, "Let \$289 million jury award stand in Monsanto case" (Marshall Decl., exh. G). In addition, the court should take judicial notice of a full-page advertisement published in the San Francisco Chronicle entitled, "Dear Judge Suzanne Ramos Bolanos, What Is A Life Worth?" (Marshall Decl., exh. H.)

Newspaper articles are verifiable sources under Evidence Code section 452, subdivision (h). (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408 [taking judicial notice of controversy about the drug Halcion that had arisen in the press]; *People v. Hardy* (1992) 2 Cal.4th 86, 175 & fn. 24 [granting judicial notice of newspaper articles that were not judicially noticed in trial court].)

Indeed, in a case involving the television show “So You Want to Marry a Multimillionaire,” the defendants asked the appellate court to take judicial notice of news articles discussing the show before and after it aired on network television. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807, fn. 5 (*Seelig*.) The news articles were provided to the trial court, but the trial court never explicitly ruled on the requests for judicial notice. (*Ibid.*) The Court of Appeal took judicial notice of the articles, “exercising [its] discretion to judicially notice matters that were subject to discretionary judicial notice by the trial court.” (*Ibid.*) The appellate court explained, “Without assuming the truth of the assertions contained in the news articles, the fact that news articles discussing topics provoked by the Show were published is not reasonably subject to dispute.” (*Ibid.*)

The same is true here. The fact that the San Francisco Chronicle published two articles and a full-page advertisement reacting to the trial court’s tentative ruling on the posttrial motions is not reasonably subject to dispute. And, as in *Seelig*, the fact that the trial court did not take judicial notice of these materials does not bar this court from exercising its discretion to do so in the first instance. Again, Monsanto does not ask the court to take judicial notice of the *truth* of statements asserted in these materials, only the fact that these materials were published in the local press shortly after the trial court issued its tentative ruling. (See *Von Saher v. Norton Simon Museum of Art at Pasadena* (9th Cir. 2010) 592 F.3d 954, 960 [“Courts may take judicial notice of publications introduced to ‘indicate what was in the public realm

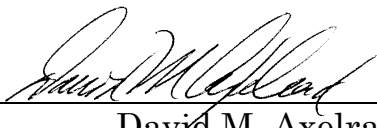
at the time, not whether the contents of those articles were in fact true’ ”].) Like the jurors’ correspondence to the court, the newspaper articles and advertisement are relevant because they provide this court with a more thorough understanding of the context in which the trial court resolved the punitive damages issues in this case.

### CONCLUSION

For the foregoing reasons, this court should take judicial notice of the jurors’ communications to the trial court, two newspaper articles, and a full-page newspaper advertisement, all of which are attached as exhibits A through H to the Declaration of K. Lee Marshall.

April 23, 2019

**HORVITZ & LEVY LLP**  
DAVID M. AXELRAD  
JASON R. LITT  
DEAN A. BOCHNER  
**BRYAN CAVE LEIGHTON**  
**PAISNER LLP**  
K. LEE MARSHALL

By:   
David M. Axelrad

Attorneys for Defendant and Appellant  
**MONSANTO COMPANY**

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## DECLARATION OF K. LEE MARSHALL

I, K. Lee Marshall, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner at Bryan Cave Leighton Paisner LLP, attorneys of record for defendant and appellant Monsanto Company. I have personal knowledge of the facts set forth herein. If called as a witness, I could and would competently testify to the matters stated herein.

2. Attached hereto as exhibit A is a true and correct copy of an email, dated October 12, 2018, sent from Juror Robert Howard to Linda Fong, clerk to Judge Suzanne Ramos Bolanos, and Department 504 of the San Francisco Superior Court, with copies to Plaintiff's counsel Michael Baum and defense counsel George Lombardi.

3. Attached hereto as exhibit B is a true and correct copy of an email, dated October 13, 2018, sent from Juror Margaret Cleland to Linda Fong, clerk to Judge Suzanne Ramos Bolanos, and Department 504 of the San Francisco Superior Court, with copies to Plaintiff's counsel R. Brent Wisner and defense counsel George Lombardi.

4. Attached hereto as exhibit C is a true and correct copy of an email, dated October 13, 2018, sent from Juror Edwin Pang to Linda Fong, clerk to Judge Suzanne Ramos Bolanos, Department 504 of the San Francisco Superior Court, Plaintiff's

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counsel Michael Baum and R. Brent Wisner, and defense counsel George Lombardi.

5. Attached hereto as exhibit D is a true and correct copy of a letter, dated October 14, 2018, sent by email from Juror Gary Kitahata to Linda Fong, clerk to Judge Suzanne Ramos Bolanos, and Department 504 of the San Francisco Superior Court, with copies to Plaintiff's counsel Michael Baum and defense counsel George Lombardi.

6. Attached hereto as exhibit E is a true and correct copy of a letter, dated October 16, 2018, sent from Juror Charles Kaupp to Judge Suzanne Ramos Bolanos with copies to Plaintiff's counsel Michael Baum, defense counsel George Lombardi, Robert Egelko of the San Francisco Chronicle, and "[f]ellow jurors."

7. Attached hereto as exhibit F is a true and correct copy of an article written by Bob Egelko and published in the San Francisco Chronicle on October 15, 2018, entitled "Monsanto case: Jurors urge judge not to overturn \$289 million award."

8. Attached hereto as exhibit G is a true and correct copy of an "opinion" written by Neil Young and Daryl Hannah, entitled, "Let \$289 million jury award stand in Monsanto case." This "opinion" was published in the San Francisco Chronicle on October 14, 2018.

9. Attached hereto as exhibit H is a true and correct copy of a paid advertisement printed in the San Francisco

Chronicle, entitled "Dear Judge Suzanne Ramos Bolanos, What Is A Life Worth?"

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed April 22, 2019, at Oakland, California.



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K. Lee Marshall

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**A155940 & A156706**

**IN THE COURT OF APPEAL  
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APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT  
SUZANNE R. BOLANOS, JUDGE • CASE No. CGC-16-550128

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**[PROPOSED] ORDER**

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FOR GOOD CAUSE SHOWN, the court grants Monsanto's motion to take judicial notice of the documents attached as exhibits A through H to the Declaration of K. Lee Marshall.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Presiding Justice

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# EXHIBIT A



From: Robert Howard <[roberthowardartist@gmail.com](mailto:roberthowardartist@gmail.com)<<mailto:roberthowardartist@gmail.com>>>  
Date: October 12, 2018 at 6:12:29 PM CDT  
To: [Department504@sftc.org](mailto:Department504@sftc.org)<<mailto:Department504@sftc.org>>,  
[lfong@sftc.org](mailto:lfong@sftc.org)<<mailto:lfong@sftc.org>>  
Cc: [glombardi@winston.com](mailto:glombardi@winston.com)<<mailto:glombardi@winston.com>>,  
[MBaum@BaumHedlundLaw.com](mailto:MBaum@BaumHedlundLaw.com)<<mailto:MBaum@BaumHedlundLaw.com>>  
Subject: Case No. CGC-16-550128 Dewayne Johnson Vs. Monsanto Company

October 11, 2018

Hon. Suzanne Ramos Bolanos  
Judge of the Superior Court  
400 McAllister Street  
San Francisco, CA 94102

Re: Dewayne Johnson Vs. Monsanto Company Case No. CGC-16-550128

Dear Judge Bolanos,

First of all, thank you for your public service. And thank you for your letter asking me for any comments about the trial of Dwayne Johnson v. Monsanto. I was impressed with the manner in which you conducted the trial prior to the hearing on October 10 regarding the JNOV and request for retrial motions. (Ten jurors attended that hearing.)

It is with all due respect that I have to say that what transpired at that hearing was astonishing for several reasons. I feel it is my civic duty to address these reasons with her Honor.

First, on the differential analysis of Dr. Nabham. The fact of the idiopathy of NHL was made abundantly clear by more than one witness, as I recall. As Dr. Neugat testified, your Honor, there is a point where a scientist (and a juror I presume) has to use one's head to assess the facts at hand. In other words, use common sense. Early onset NHL MF, with a relatively short latency, and a rare transformation: there certainly was an elephant in your courtroom room during the differential analysis and is called the "formulated product" that leached through Mr. Johnson's skin during two soakings in the stuff.

Secondly, all parties agreed that the epidemiological leg of the tripod of causation was weaker than the other two, but a tripod with one weak leg stands nonetheless. Again, common sense.

Third, the whole discussion of non-economic damages was an embarrassment to the humanity of anybody who was there, except perhaps Monsanto. Any reasonable person in that courtroom, for the hearing or trial, would know that the \$33 million in non-economic damages was awarded for the 33 years that Mr. Johnson is not going to enjoy. "Loss of enjoyment of life" was in your instruction to us, twice, as examples of non-economic damages claimed by Mr. Johnson. To alter this award on a technical issue would be a travesty. Common sense and decency.

Fourth, your instructions to the jury were crystal clear. You repeated many of the instructions numerous times. We had them in writing and referred to them often. You explained that failure to follow your instructions could result in "sanctions." Your Honor, we did follow your instructions. Meticulously. Just one example: On the matter of Mr. Wisner's opening and closing, they were colorful, but I had already

disregarded what he said by the time I got to the jury deliberation room, as I had Mr. Lombardi's opening and closing. Simply following your instructions.

Finally, we were presented with witnesses who were clearly managing agents, and not very credible ones indeed. (It seems to me their discussions of strategy, FTO, etc. put them solidly in the "corporate policy" category of your instructions.) You instructed that we could assess the credibility of witnesses and discount their testimony in whole or in part. This is the unwritten and unseen part of this trial. The court stenographer cannot transcribe the physical demeanor or tone of voice of witnesses, hence, your Honor, and we the jurors, are the eyes and ears of the court. To say that Monsanto employees, and at least one expert witness, were clearly uncomfortable would, in my opinion, be a vast understatement.

I can't over-emphasize the importance of a juror's judgement of the credibility of a witness. It is a gut feeling based on the very thing that makes us human, which is the ability to empathize, to feel, for better or worse, what another human, or witness, is feeling. It is a language without words that reveals the truth or lack of the truth of spoken words. (There is an injustice here if the JNOV occurs because an appeals justice will not have any record of our judgment on the credibility of witnesses that might assist her in making her judgement.)

All parties agree that we were an exceptional jury. We were, in fact, praised by Monsanto, and you, your Honor, for our attention, intelligent questions, etc. Yet our integrity, intelligence, and common sense has been cleverly and openly attacked by inference. The idiopathy issue, the science, the non-economic damages issue, what is and what is not evidence, the higher bar for punitive damages, credibility of witnesses: I got it. I believe my fellow jurors got it. With all due respect, your Honor, I don't see how this can go both ways. Monsanto can't ask for a jury, state that we intelligently, and with diligence considered only the testimony and evidence, and methodically weighed that evidence— and then turn around and infer that we must have ignored your instructions and did not comprehend the evidence! It just doesn't add up.

The possibility that, after our studious attention to the presentation of evidence, our adherence to your instructions, and several days of careful deliberations, our unanimous verdict could be summarily overturned demeans our system of justice and shakes my confidence in that system.

I urge you to reconsider your tentative ruling and to not completely overturn the punitive damages and I also urge you to leave the liability intact.

Respectfully,

Robert Howard, Juror #4

CC: Monsanto and Dwayne Johnson (by email), Judge Bolanos by US Mail

# **EXHIBIT B**

October 13, 2018

The Honorable Suzanne Ramos Bolanos  
Judge of the Superior Court  
Superior Court of California  
County of San Francisco  
400 McAllister Street  
San Francisco, CA 94102

Sent Via Email: [lfong@sftc.org](mailto:lfong@sftc.org), [department504@sftc.org](mailto:department504@sftc.org),  
Cc Via Email: [glombardi@winston.com](mailto:glombardi@winston.com), [rbwisner@baumhedlundlaw.com](mailto:rbwisner@baumhedlundlaw.com)

RE: Dewayne Johnson vs. Monsanto Company  
Case No. CGC-16-550128

Dear Judge Bolanos:

I was among the ten (10) members of the Jury who attended the October 10, 2018 JNOV hearing regarding the verdict in the Dwayne Johnson vs. Monsanto Company trial. I was shocked and saddened to learn that you are considering ordering a new trial and/or changing the verdict findings and awards. I was unsure if it was appropriate to reach out to you, but the gravity of your decision has compelled me to do so. I urge you to uphold the trial and verdict.

It appears there is concern that Mr. Wisner's closing argument comments regarding "champagne in the board room" and "changing the world" may be viewed as prejudicial to the Jury and so much so that it may be grounds for a new trial. I understand your upset with Mr. Wisner disobeying your instructions and perhaps a monetary fine to his firm might be appropriate, but these comments were not evidence and therefore had no relevance or impact. The Jury was extremely conscientious in paying attention and adhering to all of your instructions throughout the trial including your clear instructions both at the start and end of the trial that the opening and closing arguments from both sides was merely the attorney's opinions/arguments, was not evidence and should not be considered as such. To believe that they did have any kind of affect, you would have to assume that the Jury ignored your instructions and held Monsanto in disregard because it was a corporation. This was not the case. I believe that the prevailing party, whichever side they were on, would have celebrated and it wouldn't make a difference if the toasts were made in a boardroom or the local bar around the corner. For the objection made to Mr. Wisner's comment about "changing the world" to be taken seriously, you would have to ascribe motives to this Jury that just were not there. I believe the Jury was impartial and followed the evidence as presented. They were trying Mr. Johnson's case only, not others. I did not have any preconceived ideas about Monsanto and learned only after you released me from Jury Service that there were other lawsuits pending.

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Your deliberation instructions and questions were very exacting and provided a framework for the various elements of the verdict. I was an Alternate (Juror #13) and was not present in the deliberation room and therefore cannot speak to the discussions that took place, but knowing the Jury members as I do, I believe they took their role very seriously, followed your instructions, and completely relied on the evidence and witnesses presented to them to make their decision. I feel that the fact that their verdict was unanimous was very telling as to the strength of the evidence.

You told us many times that Jury Service is important and that we would learn about our Judicial System by serving. Each of us spent a good part of our summer in the jury room and were happy to do it. I am retired and so it was much easier for me to find the time than others who had jobs and small children. It would be very disappointing to find that our time, energy, and emotions were spent in vain. As you are making your decisions regarding the fate of the trial and verdict, I urge you to keep in mind what a hard working diligent jury you had and trust that they did their job.

Respectfully,

Margaret Cleland  
163 Flood Avenue  
San Francisco, CA 94131

# EXHIBIT C

From: edwin pang <[petiepangster@msn.com](mailto:petiepangster@msn.com)<<mailto:petiepangster@msn.com>>>  
Date: October 13, 2018 at 6:07:39 PM CDT  
To: "[Department504@sftc.org](mailto:Department504@sftc.org)<<mailto:Department504@sftc.org>>"  
<[Department504@sftc.org](mailto:Department504@sftc.org)<<mailto:Department504@sftc.org>>>,  
"[lfong@sftc.org](mailto:lfong@sftc.org)<<mailto:lfong@sftc.org>>" <[lfong@sftc.org](mailto:lfong@sftc.org)<<mailto:lfong@sftc.org>>>,  
"[glombardi@winston.com](mailto:glombardi@winston.com)<<mailto:glombardi@winston.com>>"  
<[glombardi@winston.com](mailto:glombardi@winston.com)<<mailto:glombardi@winston.com>>>,  
"[MBaum@BaumHedlundLaw.com](mailto:MBaum@BaumHedlundLaw.com)<<mailto:MBaum@BaumHedlundLaw.com>>"  
<[MBaum@BaumHedlundLaw.com](mailto:MBaum@BaumHedlundLaw.com)<<mailto:MBaum@BaumHedlundLaw.com>>>,  
"[rbwisner@baumhedlundlaw.com](mailto:rbwisner@baumhedlundlaw.com)<<mailto:rbwisner@baumhedlundlaw.com>>"  
<[rbwisner@baumhedlundlaw.com](mailto:rbwisner@baumhedlundlaw.com)<<mailto:rbwisner@baumhedlundlaw.com>>>  
Subject: Dewayne Johnson vs. Monsanto Case No. CGC-16-550128

Below is text of a brief message to my fellow juror from Ed Pang (Juror #2):

Hi folks, just wanted to chime in a bit and express support. I'm out of town/out of state but I'm following the chain of emails. It's very frustrating and disappointing if our hard work and efforts are compromised. I'm a little lost and unable to articulate specifics not having been present at the JNOV hearing but I'm happy to be included and identified to legal counsel as unhappy and concerned if there's any questions regarding the ability or integrity of this jury. It's ridiculous for the defense to assume or claim that any theatrics in plaintiff's closing arguments had any effect on our jury while it was clear that Monsanto's conduct was (in my opinion) "malicious".

Sorry if I'm rambling but just my quick two bits and not wanting to be silent.

Sent from my iPhone

# EXHIBIT D





137 Joost Avenue  
San Francisco, CA 94131  
415-337-1950 office

548 Hinano Street  
Hilo, HI 96720  
808-934-7547 office

[gkitahata@gmail.com](mailto:gkitahata@gmail.com)  
415-710-1251 mobile

**SENT BY E-MAIL**

October 14, 2018

Hon. Suzanne Ramos Bolanos  
Judge of the Superior Court  
[Department504@sftc.org](mailto:Department504@sftc.org)  
[lfong@sftc.org](mailto:lfong@sftc.org)

**Re: Dewayne Johnson Vs. Monsanto Company**  
**Case No. CGC-16-550128**

Dear Judge Bolanos:

As one of the 12 jurors in the above-referenced case, I urge you uphold the original verdict on both punitive damages and future non-economic damages. Monsanto's attorneys have asked you to serve as the "13th juror" and vacate a "flawed judgment" where the size of the award "demonstrates the significant prejudicial misconduct that inflamed this jury." I see absolutely no basis or credibility behind the arguments used by Monsanto's attorneys.

Our verdict was not flawed or inflamed by either passion or prejudice. If you had been the 13th juror in the room when we reviewed all of the witnesses and evidence submitted for this trial, I believe that you would have been as impressed as I was by the level of due diligence and rational discussion. We followed your instructions carefully and took our responsibilities seriously. We decided to assess punitive damages only after determining there was clear and convincing evidence that Monsanto had acted with "malice or oppression" and that such conduct was authorized by "one or more officers, directors or managing agents of Monsanto." The amount of such damages was the result of careful consideration and discussion, based on the court's instructions and definitions.

If you had been the 13th juror in deliberations, your negative vote would have meant at best a final tally of 12-1. Your vote would not have changed the verdict as the 13th juror, given that there were at least 9 votes for every count, but as the trial court judge if you grant Monsanto's motions for JNOV and a new trial with regard to punitive damages then you will single-handedly nullify a large part of the jury's verdict. I thought that such an extraordinary exercise of judicial power to quash a jury verdict was appropriate only in the case of jury misconduct or malfeasance. You may not have been convinced by the evidence, but we were. You and Monsanto's attorneys may have been upset by some of Mr. Wisner's more colorful closing comments, but we took them in stride and they played no part in our deliberations.

With regard to future non-economic damages, we certainly did assume a normal life expectancy of 33 years for a man of Mr. Johnson's age in determining the amount of compensation. To assume otherwise would be horribly cruel, discounting future damages because of a life shortened to less than two years because of cancer. This would seem to be stacking the deck in Monsanto's favor and in a sense rewarding it for shortening Mr. Johnson's life expectancy and therefore the future non-economic damages due to him. And wasn't the time for you to pose questions about life expectancy calculations *during* the trial, not afterwards?

This letter is my opinion alone and not a statement on behalf of other jurors. The jury as a whole delivered its collective opinion to you clearly and unequivocally on our last day of service on August 10. We have kept in touch since then and at the hearing last week I was one of 10 former jurors in the audience (including two alternates). I was dismayed to learn that day of your tentative ruling. I urge you to respect and honor our verdict and the six weeks of our lives that we dedicated to this trial.

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Letter to Judge Bolanos  
Page 2 • October 14, 2018

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Kitahata". The signature is fluid and cursive, with the first name "Gary" and last name "Kitahata" clearly distinguishable.

Gary Kitahata  
Juror no. 1

cc: Fellow jurors  
Plaintiff counsel: [MBaum@BaumHedlundLaw.com](mailto:MBaum@BaumHedlundLaw.com)  
Defense counsel: [glombardi@winston.com](mailto:glombardi@winston.com)

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# EXHIBIT E

# Charles Kaupp

415-699-7225   ckaupp@gmail.com   179 Seville Street, San Francisco, California 94112

October 16, 2018

Hon. Suzanne Ramos Bolanos  
Judge of the Superior Court  
Civic Center Courthouse  
400 McAllister Street  
San Francisco, California 94102

RE: DeWayne Johnson v. Monsanto Company (Case No. CGC-16-550128)

Dear Judge Bolanos,

When I was called for jury duty over the summer, I figured it would be like every other time: spend a day or two in court, go home, and forget about the case immediately. Even after four days of jury selection process, and my eventual selection as juror #11, I didn't know what the summer had in store for me. I had no idea I would learn so much about cancer, glyphosate, and the trial end of the legal system. I honestly felt that the trial was conducted very smoothly by Your Honor, and that both sides presented evidence that they felt would sway us their way.

In the jury's opinion though, the plaintiff's case was simply more compelling, and that is why after three days of very thorough and intense deliberation, we issued the verdict that we did.

When I found out through communications with the other jurors that you had tentatively overturned some portions of our verdict as part of the JNOV, I was floored. I have never worked with a group of people as diligent, rational, and intelligent as my eleven (plus four alternate) fellow jurors on this case. Both sides have pointed out that we were attentive and inquisitive throughout the trial, yet now the defendant is claiming we were inflamed by prejudice? It just doesn't make sense to me.

While I am not an attorney, I have worked in the legal field for the last twelve years, and I have picked up a little peripheral knowledge. One piece of information that always stuck with me was the notion of "reasonableness" in the presentation and interpretation of evidence.

I know, for instance, that when Mr. Wisner used colorful language and theatrics during his opening and closing arguments, as a reasonable member of society and as a reasonable juror, I interpreted those as just his style of practicing law, and quickly set it aside as not relevant to the case. On the flip side, Mr. Lombardi also used his own personal style in both opening and closing arguments.

Another argument of the defense was that plaintiff's witness Dr. Nabhan didn't include idiopathic causes in his differential analysis. I believe most reasonable doctors and patients, the jurors among them, are capable of making the assumption that "unknown cause" is always a possible cause, especially when the carcinogen is not a 100% "known" carcinogen.

Finally, while your instructions regarding punitive damages were more strict (clear and convincing evidence rather than a "likelier than not" scenario, paired with the behavior being executed by a

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managing agent of Monsanto), we approached the questions using a very measured process based on the evidence we were presented. We found that certain evidence showed behavior that any reasonable member of our society would deem malicious and with the outcome of harming Mr. Johnson. I found the argument about what constitutes a "managing agent" at Monsanto to be unnecessary. Any reasonable professional with any experience in the workforce would be able to identify the "managing agents" within any workplace. It's simple clues - titles like "director," or responsibilities like managing toxicology for an entire portfolio of products - that made this obvious for us.

While the jurors have been in contact with each other, this letter is my own. That said, on August 10th, the jury spoke unanimously on every one of your verdict questions except the one about the amount of punitive damages (and that one was eleven-to-one). Monsanto requested a jury trial, as is their right. The fact that sixteen San Francisco citizens gave up six weeks to participate in the justice system with honor and integrity, only to have our verdict overruled, is an insult to our intelligence and disrespectful of our time, not to mention disrespectful to the process and institution of trial by jury.

I respect your decision, as this is how the rules of civil procedure dictate the process should go, however if you do not reconsider your tentative ruling, I respectfully, and very reasonably, disagree with you.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'Charles Kaupp', with a long, sweeping horizontal line extending to the right.

Charles Kaupp  
Juror #11

cc:

Fellow jurors

Michael L. Baum, Plaintiff counsel ([MBaum@BaumHedlundLaw.com](mailto:MBaum@BaumHedlundLaw.com))

George C. Lombardi, Defendant counsel ([glombard@winston.com](mailto:glombard@winston.com))

Robert Egelko, San Francisco Chronicle ([BEgelko@sfchronicle.com](mailto:BEgelko@sfchronicle.com))

Kelly Wardwell Ryerson (via web form)

# EXHIBIT F

LOCAL // BAY AREA &amp; STATE

# Monsanto case: Jurors urge judge not to overturn \$289 million award

**Bob Egelko**

Oct. 15, 2018 | Updated: Oct. 15, 2018 7:48 p.m.



In this July 9, 2018, file photo, plaintiff DeWayne Johnson looks up during a brief break as the Monsanto trial in San Francisco. Monsanto is being accused of hiding the dangers of its popular Roundup products. A San Francisco jury on Friday, Aug. 10, 2018, ordered agribusiness giant Monsanto to pay \$289 million to a former school ...

Photo: Josh Edelson / Associated Press

Jurors who awarded \$289 million to a former school groundskeeper who is dying of cancer are imploring a San Francisco judge to reconsider her tentative decision to overturn most of the damages against Monsanto Co., manufacturer of the weed killer that they found to be the cause of the man's illness.

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“You may not have been convinced by the evidence but we were,” juror Gary Kitahata said in a letter to Superior Court Judge Suzanne Bolanos, who is considering Monsanto’s requests to reduce the damages or overturn the entire verdict. “I urge you to respect and honor our verdict and the six weeks of our lives that we dedicated to this trial.”

Another juror, Robert Howard, said in his letter to the judge that the jury had paid “studious attention” to the evidence, closely followed Bolanos’ instruction and deliberated for several days. The possibility that “our unanimous verdict could be summarily overturned demeans our system of justice and shakes my confidence in that system,” Howard wrote.

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The two were among eight jurors and two alternates who attended a public hearing Wednesday at which Bolanos indicated she was likely to overturn the \$250 million in punitive damages that the jury had awarded to Dewayne “Lee” Johnson, and possibly another \$31 million in damages for his shortened life expectancy, reducing the award to just over \$8 million.

Kitahata, owner of a financial consulting company, said Monday that the jurors attended the hearing “to support the verdict,” and had been in touch with fellow jurors who all appeared to share their view. Howard, an artist and residential contractor, said two more jurors had written letters to Bolanos endorsing their verdict.

Asked for comment, Bayer AG, which owns Monsanto, said its challenges to the verdict “raise issues of law that are properly addressed by Judge Bolanos.”

Judges have the authority to overturn jury verdicts or modify them by reducing damages. They are not empowered, however, to overturn a jury’s factual findings if there is any evidence to support them.

Johnson, 46, of Vallejo, was a groundskeeper and pest-control manager for the Benicia Unified School District from 2012 until May 2016. His job included spraying Monsanto’s herbicide, glyphosate, in a high-concentration brand called Ranger Pro, from 50-gallon drums 20 to 30 times a year for two to three hours a day.



Johnson testified during the trial that he was exposed to windblown spray, despite protective clothing, and was drenched twice with the liquid when the equipment he was using broke. He was diagnosed with non-Hodgkin's lymphoma in October 2014 and with a more aggressive form of the cancer in March 2015.

One of his doctors testified that Johnson is unlikely to survive to 2020. His case was the first to go to trial among about 4,000 suits against Monsanto nationwide by people who claim they developed cancer or other serious illnesses from exposure to Roundup, the company's widely used glyphosate product.

The International Agency for Research on Cancer, an arm of the World Health Organization, classified glyphosate as a probable human carcinogen in 2015. But the U.S. Environmental Protection Agency has found it to be a safe product, and it remains legal in the United States and Europe.

After a trial that included testimony by medical experts on both sides, the jury found unanimously in August that Monsanto was responsible for his illness and should have known of the product's dangers. Jurors awarded damages for Johnson's financial losses, pain and suffering, and loss of life expectancy. And in awarding \$250 million in punitive damages, jurors found that Monsanto had acted maliciously by supplying the herbicide to the school district without disclosing its life-threatening effects, and by failing to return Johnson's phone calls after he became ill.

In a tentative ruling last week, however, Bolanos said Johnson's lawyers presented no evidence that any Monsanto employee had known or believed that its products could cause cancer. She also questioned whether California law authorized the jury's award of \$1 million for each year of his life expectancy before the cancer diagnosis.

Her final ruling is due by next Monday and could be appealed.

Both Howard and Kitihata said the judge had allowed the jury to decide Monsanto's responsibility for Johnson's illness, based on the evidence they heard, and now appeared to be backtracking from her own decision while second-guessing their conclusions.

Testimony about scientific studies of the product, and about Monsanto's possible influence on the U.S. agency that allowed its continued sale, showed "there were serious questions about the safety of glyphosate and Roundup" when the company supplied it to Johnson's employer, Howard said Monday. He said Monsanto's expert witnesses, whose

sworn depositions were viewed by the jury, were “not credible — they’re nervous, shift-eyed, used linguistic gymnastics not to answer questions.”

In his letter to Bolanos, Howard said the damages for each year of Johnson’s reduced life expectancy were based squarely on the judge’s instruction that jurors could award him compensation for “loss of enjoyment of life” due to his illness.

Kitihata told Bolanos that when evidence was presented about Johnson’s life expectancy before his cancer diagnosis, she had never raised questions about the jury’s use of that evidence to award damages. To do so now, he said, would be “rewarding (the company) for shortening Mr. Johnson’s life expectancy.”

“She had a chance to raise these questions during trial and even during jury deliberations,” Kitihata said Monday. “I thought it was the jury’s role to be the judge of evidence.”

*Bob Egelko is a San Francisco Chronicle staff writer. Email: [begelko@sfchronicle.com](mailto:begelko@sfchronicle.com)*

*Twitter: [@BobEgelko](https://twitter.com/BobEgelko)*

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# EXHIBIT G

OPINION // OPEN FORUM

# Let \$289 million jury award stand in Monsanto case

By Neil Young and Daryl Hannah

Oct. 14, 2018 | Updated: Oct. 14, 2018 11:12 a.m.



Plaintiff Dewayne Johnson reacts after hearing the verdict to his case against Monsanto at the Superior Court Of California in San Francisco, California, on August 10, 2018. - A California jury on Friday, August 10, 2018 ordered agrochemical giant Monsanto to pay nearly \$290 million for failing to warn a dying

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We were among the millions of citizens who felt a surge of optimism that justice might actually prevail on Aug. 10 when a San Francisco Superior Court jury awarded a historic \$289 million verdict against the agrochemical conglomerate Monsanto.

On Wednesday, we learned that a California judge is considering taking away that jury award for punitive damages.

When we learned that Dewayne “Lee” Johnson had taken Monsanto to court saying he got his terminal non-Hodgkin’s lymphoma from on-the-job exposure to Monsanto’s ubiquitous weed killer, Roundup, we were so captured by Johnson’s battle that we traveled to San Francisco to watch the trial. Would democracy finally prevail? Or would Monsanto again find a way to subvert the justice system?

Johnson’s was the first of some 4,000 similar claims headed for courts across America.

Initially, we were discouraged because the judge appeared to be bending over backward to help Monsanto. California Superior Court Judge Suzanne Bolanos carefully screened the jury pool to exclude all individuals who had been exposed to negative articles about Monsanto, or who had shown the least disapproval of the company. She unseated 35 jurors in all, including many who said that they could be fair and impartial. The 12 who issued the verdict were those who showed no predisposition against Monsanto.

During trial, Judge Bolanos consistently sided with Monsanto on the company’s evidentiary objections. At Monsanto’s request, Judge Bolanos deemed any mention of Monsanto’s genetically modified crops off-limits during the trial. Judge Bolanos forbade Johnson’s lawyer from showing the jury Monsanto’s internal studies showing that Roundup caused kidney tumors in mice; that the chemical easily penetrates the body through the skin; and that Monsanto had a flimflam system in place for killing unfavorable scientific studies by independent and government scientists. Judge Bolanos even gave a “curative instruction” telling the jury that Monsanto had never manufactured Agent Orange. That statement was simply not true — however the judge deemed the instruction necessary to neutralize potential

bias from statements made about Agent Orange by dismissed jurors in front of their fellow jurymen.

Despite those restrictions, Johnson's jury heard evidence that, for four decades, Monsanto maneuvered to conceal Roundup's carcinogenicity by capturing regulatory agencies, corrupting public officials, bribing scientists, ghostwriting science and engaging in scientific fraud. The jury found that these activities constituted "malice, fraud and oppression" warranting \$250 million in punitive damages.

We were among the many who applauded the verdict as a triumph for democracy.

However, California judges have the power to reduce, or even eliminate, a jury award under a rule intended to restrain runaway juries who arrive at verdicts driven by passion or prejudice.

Judge Bolanos purposefully selected the Monsanto jurors because of their lack of prejudice. At the trial, we saw a jury that seemed curious, intensely attentive and calmly deliberative. The jury was highly educated and took copious notes. Michael Baum, an attorney for the plaintiff, "I've never seen a jury so diligent." The jurors would be shocked to know that the product of their weeks of careful consideration, and three days of deliberation, could be thrown out at the whim of a judge who disagrees with the verdict.

These hard-working Americans, gave up their jobs, businesses and families for two months to perform their civic duty as jurors. If a judge intervenes to alter their verdict, then what, after all, is the point of having jurors?

The task of disrupting a 50,000-year-old agricultural industry — transferring it from labor intensive and organic to chemical intensive — has required Monsanto to subvert democracy, and the company has a reputation for somehow manipulating public officials, regulators and courts — and an uncanny record of winning lawsuits.

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All of us should be concerned. At this time in history when our democratic institutions are under assault by corporate power, such an action will send a signal to Americans that their service on a jury is meaningless and that corporations like Monsanto are above the law.

*Neil Young, the Grammy-winning singer, songwriter and musician, and actress Daryl Hannah, who married in July, have both long advocated for environmental causes.*

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# EXHIBIT H



# Dear Judge Suzanne Ramos Bolanos, What Is A Life Worth?

When the jury awarded \$289M to dying Dwayne Johnson for his exposure to Roundup, you could hear cheering around the world for how you handled the case. It was the first trial that was allowed to move forward in the United States. You, Judge Bolanos, bravely allowed that to happen.

You, Judge Bolanos, admitted crucial evidence Dwayne needed to prove that **Monsanto intentionally suppressed information from the public, and even hired ghost writers to water down the truth: "a key chemical in Roundup causes cancer."**

Dwayne is a father and a husband who has spent years working to provide for his family as a public-school groundskeeper; a profession that on average in the Bay Area pays around \$45,000 a year.

Dwayne has found himself fighting for his life against a multibillion-dollar corporation with the most expensive and largest defense firms on retainer, not only in every state within the United States, but also across the globe, and with more resources at their disposal than Dwayne could ever imagine.

## Monsanto intentionally suppressed information from the public

The legal fees alone that Monsanto has paid over the years in defending Roundup have likely exceeded the verdict Dwayne was awarded. **But, unlike Dwayne, those white shoe defense attorneys have already collected their money from Monsanto.**

After listening to weeks of testimony, the jury came back with a verdict they felt fairly compensated Dwayne for the damages he has suffered and a terminal cancer diagnosis that may have been avoided altogether if he had just been properly warned.

**So, what is a life worth?**

As you ponder this Wednesday, know that some of the finest minds in the country are working on that. Lawyers for behemoth corporations are holed up with their accountants trying to figure out how they can get away with paying victims like Dwayne Johnson and their families as little as possible. All of this despite the fact that in Monsanto's case, **"[in] 2015, the company made nearly \$4.76 billion in sales and \$1.9 billion in gross profits from herbicide products, mostly Roundup."**

**I'll bet their investors know what a life is worth.**

## Consumers are punished daily by corporations with little regard for safety—leaving us for road kill.

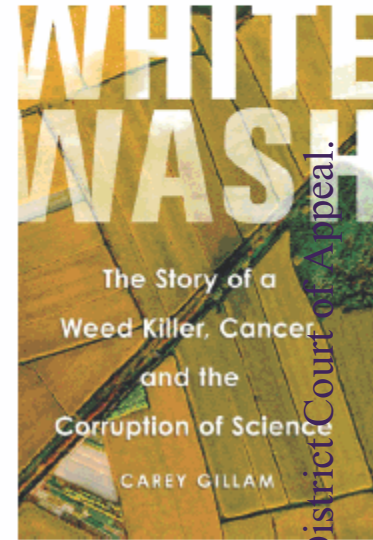
News reports cited you are inclined to cut the verdict based on the comment the plaintiff lawyer made about Monsanto having champagne on ice if the verdict wasn't big enough, and because they also told the jury they could "change the world" with their verdict. **Well, the verdict did change the world because the verdict was a referendum on why consumers are fed up with corporate greed over the health of the very people making them their profits.**

Are you going to negate the jury's ability to determine after weeks of testimony from experts who were placed before them, whether or not glyphosate caused Dwayne's cancer? In fact, that's exactly what they did.

Why now over 60 days after you let this case go to verdict and allowed Dwayne and his family to feel validation for the first time in years?

Consumers are punished daily by pesticide, drug, and medical device companies who have no or little regard for our safety and health, leaving the very consumers they sell to for road kill.

If you want to punish the firm for the statements they made after you instructed them not to, then please punish the lawyers in form of fines, sanctions, or otherwise. But don't punish Dwayne Johnson and his family. They need to be there for each other right now. Dwayne's time on this earth is limited, and he should not have to spend his last months fighting with the court system and going through the emotional and extremely stressful time of a new trial.



If Monsanto/Bayer wants litigation to stop, they can re-label their products and reach a global settlement for people who have been genuinely affected by Roundup.

OR Monsanto/Bayer can just keep whining about how unfairly they were treated for "having a board member" or for "being a big company." How out of touch (and let's face it, billionaires who whine are candy asses).

**You and the jury have changed the world and become a positive part of history. Greedy corporations don't necessarily change the world when they are focused on just changing their net worth.**

**You are a consumer's advocate we all admire. Please uphold Dwayne Johnson's verdict.**

**PROOF OF SERVICE**

**Johnson v. Monsanto Company  
Case No. A155940 & A156706**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On April 24, 2019, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE; DECLARATION OF K. LEE MARSHALL; [PROPOSED] ORDER** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2019, at Burbank, California.



\_\_\_\_\_  
Connie Christopher

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**SERVICE LIST**  
**Johnson v. Monsanto Company**  
**Case No. A155940 & A156706**

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K. Lee Marshall Bryan Cave Leighton Paisner LLP Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4070 klmarshall@bclplaw.com	Attorneys for Defendant and Appellant  Monsanto Company
Hon. Suzanne R. Bolanos Civic Center Courthouse 400 McAllister St, Department 504 San Francisco, CA 94102	Trial Judge [Case No. CGC16550128 ]  <b><i>Via U.S. Mail</i></b>

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Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102 (415) 865-7000	Electronic Copy (CRC, Rule 8.212(c)(2)(A)(i))  <b><i>Via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (Truefiling)</i></b>
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