

A155940 & A156706

In The California Court of Appeal

First Appellate District

Division One

Dewayne Lee Johnson,

Plaintiff and Respondent/Cross-Appellant,

v.

Monsanto Company

Defendant and Appellant/Cross-Respondent

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, COUNTY OF SAN FRANCISCO
HONORABLE SUZANNE R. BOLANOS

Respondent/Cross-Appellant's Motion for Judicial Notice

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**In The California Court of Appeal
First Appellate District, Division One**

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v.

Monsanto Company
Defendant and Appellant/Cross-Respondent

MOTION FOR JUDICIAL NOTICE

Pursuant to Rules 8.252, 8.54 of the California Rules of Court, and Evidence Code Sections 452 (d), 459, Dewayne Johnson moves for judicial notice of Judge Winifred Smith's July 26, 2019 Amended Order (1) Denying Motions of Defendant for JNOV and (2) Conditionally Granting Motions of Defendant for New Trial, issued in *Pilliod, et al. v. Monsanto*, Case No. RG17-862702 (Super. Ct. Alameda). This Order occurred after the trial in *Johnson v. Monsanto* and therefore no request for judicial notice was filed in the trial court.

Pursuant to Section 452(d), judicial notice may be taken of the records of any court of this state. Reviewing courts may take judicial notice of the superior court decisions in related cases. *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 483, fn. 3.

This opinion is relevant to the instant appeal for the following reasons:

1) The opinion is based on a similar set of facts presented to a jury with respect to Monsanto's conduct in its marketing of Roundup® which resulted in Plaintiffs developing NHL.

2) The jury in *Pilliod* found that Roundup causes NHL and that punitive damages were warranted based on substantially similar evidence presented at the *Johnson* trial and Judge Smith affirmed these findings. *See e.g.*, Exhibit A, p. 17 (Attacks on IARC, Parry Report, and Ghostwriting). Where three juries who have reviewed the evidence of Monsanto's conduct unanimously agree that Roundup causes NHL and that Monsanto's conduct was reprehensible, there is little support for Monsanto's continued argument that the *Johnson* jury was irrational and that the *Johnson* verdict occurred only because "virtually everything in th[e] trial went wrong." ARB-XRB 20.

3) Judge Smith allowed Monsanto to submit to the jury hundreds of pages of documents from the evaluations of U.S. and foreign regulatory agencies in addition to Monsanto's repeated references to these agencies during testimony (the latter was permitted in *Johnson*). Ex. A at pp. 7-8. The admission of regulatory documents in *Pilliod* had no effect on the jury's verdict; this is probative of the fact that the admission of the same documents in *Johnson* would not have altered the verdict of the *Johnson* jury.

4) Judge Smith was able to consider the applicability of *Johnson & Johnson Talcum Powder Cases* (July 9, 2019, B286283) ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *25-*27]. Judge Smith determined that the opinion did not preclude punitive damages in the Roundup cases due to the starkly different conduct between Monsanto and Johnson & Johnson. Ex. A at 18-21.

5) Whereas Judge Bolanos did not engage in an analysis of the reprehensibility of Monsanto's conduct with respect to the constitutionality of the punitive damages award, Judge Smith did. Judge Smith considered

that the appropriate ratio of punitive damages to compensatory damages was 4:1 even with substantial non-economic damages. Ex. A. at 21-25. Johnson contends that this ratio is still too low, particularly in his case where he attempted to contact Monsanto directly to enquire about the potential effects of Roundup on his health and was more economically vulnerable due to the fact that his job required that he spray Roundup.

For the aforementioned reasons, Johnson requests that the Court take judicial notice of Judge Smith's Order from *Pilliod v. Monsanto*.

Dated: July 31, 2019

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DECLARATION OF JEFFREY TRAVERS

I, Jeffrey A Travers, declare as follows:

1. I am an attorney licensed to practice law in the Commonwealth of Virginia and am an associate in the law firm of The Miller Firm, LLC, counsel for Respondent and Cross-Appellant in the appeal now pending before this Court. I have personal knowledge of the facts set forth in this declaration and, if called up to do so, could and would competently testify as to each of them.

2. Attached as Exhibit A is a true and correct copy of Judge Winifred Smith's Amended Order (1) Denying Motions of Defendant for JNOV and (2) Conditionally Granting Motions of Defendant for New Trial, issued in *Pilliod, et al. v. Monsanto*, Case No. RG17-862702 (Super. Ct. Alameda)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31st day of July, 2019 in Orange, VA.



Jeffrey A. Travers

Exhibit A



FILED
ALAMEDA COUNTY

JUL 26 2019

CLERK OF THE SUPERIOR COURT
By C.W. [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

ALVA AND ALBERTA PILLIOD,

Plaintiffs,

v.

MONSANTO COMPANY; WILBUR-ELLIS
COMPANY, LLC; and WILBUR-ELLIS FEED,
LLC,

Defendants.

Case No. RG17-862702

AMENDED ORDER (1) DENYING
MOTIONS OF DEFENDANT FOR JNOV
AND (2) CONDITIONALLY GRANTING
MOTIONS OF DEFENDANT FOR NEW
TRIAL.¹

DATE 7/19/19
TIME 9:00 AM
DEPT 21

The motions of Monsanto JNOV and for new trial came on for hearing on Friday 7/19/19, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Good cause appearing, IT IS HEREBY ORDERED: The motion of Monsanto for JNOV is DENIED. (CCP 629.) The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of \$30,736,480. The

¹ The Amended Order expands on and clarifies some of the court's thinking regarding the interaction between common law and regulatory issues. The Amended Order does not change the result.

1 motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY GRANTED
2 unless Mr. Pilliod consents to entry of judgment in the amount of \$56,005,830. (CCP
3 662.6(a)(2).)

4
5 MOTION FOR JNOV

6 The motions of Monsanto for JNOV under CCP 629 are DENIED.

7
8 STANDARD

9 The court may enter judgment notwithstanding the verdict and enter a directed verdict.
10 (CCP 629.) “A directed verdict may be granted only when, disregarding conflicting evidence,
11 giving the evidence of the party against whom the motion is directed all the value to which it is
12 legally entitled, and indulging every legitimate inference from such evidence in favor of that
13 party, the court nonetheless determines there is no evidence of sufficient substantiality to support
14 the claim or defense of the party opposing the motion, or a verdict in favor of that party.”

15 (*Magic Kitchen LLC v. Good Things Int’l, Ltd.* (2007) 153 Cal. App. 4th 1144, 1154 (2007.)

16 (CCP 629.)
17
18

19 CAUSATION

20 All claims required plaintiffs to prove that Roundup caused the Pilliods to get NHL.

21 The court finds the evidence can support a finding that Roundup caused the Pilliods to get
22 NHL. The evidence was disputed regarding general causation. For example, NHL can be
23 idiopathic. The evidence was disputed regarding specific causation. For example, in addition to
24 being potentially idiopathic, there was evidence that each Pilliod had one or more risk factors
25 that suggest other causes of the NHL.
26

1 Causation is, however, a fact issue. The court found that plaintiff's experts could present
2 evidence under *Sargon* and that it was the responsibility of the jury to consider and weigh that
3 evidence. The evidence supports a finding of causation. (*Johnson & Johnson Talcum Powder*
4 *Cases* (2019) 2019 WL 3001626 at *20-25.) .
5

6
7 WARNINGS CLAIMS.

8 The claim for failure to warn required plaintiffs to demonstrate that Roundup's alleged
9 risk of NHL was "known or knowable in light of the generally recognized and prevailing best
10 scientific and medical knowledge" at the time that Monsanto distributed the Roundup that
11 allegedly caused their injuries. The evidence supports the verdict on the warning claims.
12

13
14 DESIGN DEFECT CLAIMS

15 The claims for strict liability and negligent design required Plaintiffs to prove that there
16 was a defect in the design of Roundup and that the defect caused their harm. (*Trejo v. Johnson &*
17 *Johnson* (2017) 13 Cal. App. 5th 110, 142. The evidence supports the verdict on the design
18 defect claims.
19

20
21 PUNITIVE DAMAGES

22 The claim for punitive damages required plaintiffs to prove by clear and convincing
23 evidence that Monsanto committed malice, oppression, or fraud. (Civ. Code § 3294.)
24

25 The court finds the evidence can support a finding by clear and convincing evidence that
26 Monsanto committed malice, oppression, or fraud. The court addresses punitive damages in the
motion for new trial.

1
2 MRS. PILLIOD’S FUTURE ECONOMIC DAMAGES

3 “Where the fact of damages is certain, the amount of damages need not be calculated with
4 absolute certainty. ... The law requires only that some reasonable basis of computation of
5 damages be used, and the damages may be computed even if the result reached is an
6 approximation.” (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.)
7

8 As a matter of law, the court cannot enter JNOV on the amount of Ms. Pilliod’s economic
9 damages unless it determines that the only correct amount of economic damages is no damages.
10 The court may grant JNOV “only when it can be said as a matter of law that no other reasonable
11 conclusion is legally deducible from the evidence and that any other holding would be so lacking
12 in evidentiary support.” (*Spillman v. City and County of San Francisco* (1967) 252 Cal.App.2d
13 782, 786.) Even if the court were to determine that the evidence did not support the award of
14 \$2,957,710 as Ms. Pilliod’s economic damages, the court could not state that some amount of
15 economic damages was correct as a matter of law and that no other reasonable conclusion was
16 legally deducible.
17

18 In *Hozz v. Felder* (1959) 167 Cal.App.2d 197, 200, the court stated, “Applying such rule
19 to the evidence presented in the present case, it is quite apparent that the jury could have returned
20 various verdicts, all supported by substantial evidence. Necessarily, therefore, under such
21 circumstances, the court was without power to grant plaintiffs' motion for a directed verdict and
22 thus was equally without power to order a judgment n. o. v.” (See also *Teitel v. First Los*
23 *Angeles Bank* (1991) 231 Cal.App.3d 1593, 1606 fn 6 (reversing grant of JNOV on damages and
24 stating, “Quite obviously, there is no specific amount of such damages to which she was entitled
25 as a matter of law.”)
26

1 The evidence supported the award of some damages and that amount cannot be
2 determined with specificity based on undisputed evidence. Therefore, the court cannot enter
3 JNOV on the amount of Mrs. Pilliod's economic damages.
4

5 FIFRA PREEMPTION
6

7 The motion for JNOV based on FIFRA preemption is DENIED.

8 The court addressed FIFRA preemption in the order of 3/18/19 at 17-19. The court's
9 order of 3/18/19 at 18-19, stated that there were triable issues of fact because there was no
10 evidence that Monsanto applied to change the label, so the trier of fact would need to decide
11 whether there was "clear evidence" that the EPA would have not approved a label change if
12 Monsanto had applied for a label change. (*In re Fosamax (Alendronate Sodium) Products*
13 *Liability Litigation* (3rd Cir., 2017) 852 F.3d 268, 299 [impossibility is a fact issue for the trier of
14 fact].)"
15

16 The court recalls that in pre-trial proceedings, Monsanto asked for a jury instruction and
17 finding on the impossibility defense. The court denied the instruction and did not direct the jury
18 to make a finding on the impossibility defense. During the course of the trial Monsanto did not
19 ask the court to hear evidence and decide the impossibility defense.
20

21 The jury returned its verdict in this case on 5/13/19. One week later, on 5/20/19, the
22 court entered judgment in this case. Also on 5/20/19, the United States Supreme Court issued
23 *Merck v. Albrecht* (2019) 139 S.Ct. 1668, which held that the question of whether FDA would
24 have approved of a change to a drug's label is a question of law for the court to decide, rather
25 than a question of fact for a jury to decide.
26

1 The evidence in the case has closed, the jury has returned its verdict, and the court has
2 entered its judgment. The court will not reopen the trial to permit Monsanto to present its
3 impossibility defense to the court.
4

5
6 MOTION FOR NEW TRIAL

7 The motions of Monsanto for a new trial as to Alva and Alberta Pilliod are
8 CONDITIONALLY GRANTED.
9

10 IRREGULARITIES IN THE PROCEEDING

11 Misconduct during Closing Statement and Misconduct throughout Trial. The motion on
12 this ground is DENIED.

13 Monsanto has identified incidents of misconduct. Counsel for plaintiff did on occasion
14 overstate matters and violate the court's orders. The court directs counsel for plaintiff to the
15 following statement: "Stern's conduct was improper. Such conduct not only falls below
16 professional standards, it unnecessarily places the client at risk. " "[P]unishment of counsel to the
17 detriment of his client is not the function of the court. [Citation.] Intemperate and unprofessional
18 conduct by counsel ... runs a grave and unjustifiable risk of sacrificing an otherwise sound case
19 for recovery, and as such is a disservice to a litigant.' " ... We expect more from our attorneys."
20 (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 298.)
21

22 Monsanto has not demonstrated that the misconduct resulted in a miscarriage of justice.
23 The court can find a "miscarriage of justice" only when the court, after an examination of the
24 entire cause, including the evidence, is of the opinion that it is reasonably probable that a result
25 more favorable to the appealing party would have been reached in the absence of the error. A
26

1 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*,
2 more than an *abstract possibility*. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

3 The court does not find that the misconduct resulted in a miscarriage of justice. The
4 court issued curative instructions to the jury. The facts are similar to those in *Cassim v. Allstate*
5 *Ins. Co.* (2004) 33 Cal.4th 780, 800, and *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276,
6 295-298, where in both cases the court observed that there were several incidents of misconduct
7 during trial but that there were also corrective instructions.

8
9 Joining Plaintiffs' Separate Claims in a Single Trial. The motion on this ground is
10 DENIED. The court addressed the concerns in the order of 1/25/19. The proceedings during
11 trial do not persuade the court that it erred in permitting the claims of the Pilliods to be tried in a
12 single case. As noted in the prior order, the evidence that both spouses used Roundup and both
13 developed NHL would almost certainly have been presented to each jury had the claims been
14 tried separately.

15
16 Local pretrial publicity. The motion on this ground is DENIED.

17 Admission of expert evidence. The motion on this ground is DENIED. The court
18 addressed the concerns in the *Sargon* order of 3/18/19.

19 Admission or exclusion of evidence.

20 Proposition 65. The motion on this ground is DENIED. The court admitted EPA
21 information because it was directly relevant. The court initially excluded Proposition 65
22 information because it concerned a different scientific standard. The court later reasoned that if
23 information regarding non-EPA entities were to be admitted, that it be admitted evenhandedly.
24 For that reason, the court put the parties to an election (1) whether the jury should hear a broad
25 range of information including California's Proposition 65 and also information from various
26

1 countries or (2) whether the jury should hear a narrow range of information limited to EPA
2 information. The court admitted the broader range of information.

3 Industrial Bio-Test (IBT). The motion on this ground is DENIED. The court admitted
4 information about the scientific fraud at IBT because it was relevant to Monsanto's initial efforts
5 to obtain information about the safety of glyphosate. Monsanto had the opportunity to present
6 evidence about its subsequent studies.
7

8 EPA's 2019 Proposed Interim Registration Decision. The motion on this ground is
9 DENIED. After plaintiffs had rested their case, on 4/23/19, the EPA released a document
10 captioned "Proposed Interim Registration Review Decision." (Brown Dec., Exh U.) The
11 document was a "proposed" decision and not a final decision on the interim review, so it did not
12 reflect an EPA decision. The document stated that the EPA had considered comments and that
13 the proposed decision was that the EPA would not change its position. The proposed decision
14 was therefore entitled to little, if any, weight and was also cumulative information. (Evid Code
15 352.) In addition, the EPA released the document after plaintiffs had rested their case. The
16 science regarding glyphosate is still developing. Therefore, the court must balance the
17 procedural goal of trial (which is to reach a conclusion) and the substantive goal of trial (which to
18 ascertain the truth). The court reasoned that admitting the new EPA document would add
19 cumulative information and unduly consume additional time. (Evid Code 352.)
20

21 Trace Contaminants and Impurities. The motion on this ground is DENIED. The
22 occasional information about trace contaminants and impurities was not material. Monsanto had
23 the opportunity to explain that they were not at issue in this case.
24

25 POEA (surfactant). The motion on this ground is DENIED. The information about
26 POEA was material because it was an ingredient in Roundup. Monsanto had the opportunity to

1 explain its choice to use POEA and how POEA did or did not affect exposure to and absorption
2 of glyphosate.

3 “List Price” of Revlimid. The motion on this ground is GRANTED. The court discusses
4 this in the context of the constitutionality of the damages award.
5

6 INSTRUCTIONAL ERRORS 7

8 Consumer Expectation Instruction. The court finds no error in giving this instruction.

9 Punitive Damages Instruction. The court finds no error in giving this instruction. The
10 court gave CACI 3940. There were two plaintiffs, so the jury had the opportunity to consider
11 punitive damages separately for each.
12

13 THE WEIGHT OF THE EVIDENCE - MERITS 14

15 The court finds that there was substantial evidence to support the jury’s findings that (1)
16 Roundup was a substantial factor in causing Alva Pilliod’s DLBCL, (2) Roundup was a
17 substantial factor in causing Alberta Pilliod’s PCNSL, and (3) Roundup was defectively
18 designed. The evidence was disputed, but there is substantial evidence to support the jury’s
19 findings that glyphosate can cause NHL and did cause each of the plaintiffs to develop NHL.

20 The court finds that there was substantial evidence to support the jury’s findings on the
21 failure to warn claims. There is evidence that Monsanto was in possession of evidence that
22 glyphosate might be hazardous well before the Pilliods were diagnosed and well before they
23 stopped using Roundup. The phrase “known or knowable in light of the generally recognized
24 and prevailing best scientific and medical knowledge” is central to the issue.
25
26

1 The legal standard is designed to address the situation where there are a variety of
2 scientific opinions. A plaintiff cannot rely on a minority or outlier theory to support a failure to
3 warn claim. A defendant is permitted to rely on “the generally recognized and prevailing best
4 scientific and medical knowledge” in making its decisions about warnings.

5 In this case, there was evidence that Monsanto continuously sought to influence the
6 scientific literature to prevent its internal concerns from reaching the public. If the jury finds that
7 a defendant has intentionally and successfully sought to influence the generally recognized and
8 prevailing best scientific and medical knowledge to minimize scientific discovery or recognition
9 of a risk, then the jury can reasonably infer that the scientific information would probably have
10 been adverse to the defendant. (CACI 203, 204.) From that inference, the jury can reasonably
11 infer that the generally recognized and prevailing best scientific and medical knowledge would
12 have supported a duty to warn if the defendant had not interfered with the development of
13 scientific and medical knowledge.

14 Regarding knowledge, there is evidence that Monsanto had information that was not
15 available to the scientific or medical community and that it sought to impede, discourage, or
16 distort scientific inquiry and the resulting science. There is evidence that for some period of time
17 Monsanto’s efforts affected what was “known or knowable in light of the generally recognized
18 and prevailing best scientific and medical knowledge.” As a result, the questions of what
19 Monsanto knew and when did it know it for purposes of the duty to warn are not limited to what
20 was generally recognized. The court finds that there was substantial evidence to support verdict
21 on the duty to warn claim.

22 ///

1 CONSTITUTIONALITY OF THE DAMAGE AWARDS

2 ECONOMIC LOSS - MRS. PILLIOD'S ECONOMIC DAMAGE

3 "Where the *fact* of damages is certain, the amount of damages need not be calculated with
4 absolute certainty." (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.)

5 Mrs. Pilliod's entire future economic damage case was based on her need for a lifetime
6 supply of Revlimid. Mrs. Pilliod presented evidence that would support the finding that her
7 future cost of medication is likely to be approximately \$15,000 per month, approximately
8 \$200,000 per year, and a total of \$2,957,710. This finding required the jury to make implicit
9 findings both about the cost of the medication and that she would be required to pay for
10 medication in the future.

11
12 Monsanto argues that the court erred in admitting evidence of the retail cost of the
13 Revlimid as stated on a document from drugs.com. The proper way to think about the reasonable
14 value of medical services is the market or exchange value, which is what the plaintiff paid or an
15 insurance company paid on her behalf. (*Howell v. Hamilton Meats and Provisions, Inc.* (2011)
16 52 Ca.4th 541, 556, and *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050-51, state "Therefore,
17 for insured plaintiffs, the reasonable market or exchange value of medical services will not be the
18 amount *billed* by a medical provider or hospital, but the amount *paid* pursuant to the reduced rate
19 negotiated by the plaintiff's insurance company.

20
21 Mrs. Pilliod presented evidence of the retail cost of the Revlimid as stated on a document
22 from drugs.com. Mrs. Pilliod did not present evidence of what she or her insurance company
23 actually paid for the Revlimid. Applying *Howell* to this case, the court erred in permitting Mrs.
24 Pilliod to present evidence of the retail cost of Revlimid.
25
26

1 Monsanto argues that the court erred in preventing Monsanto from presenting evidence
2 about that a third party was paying for Mrs. Pilliod's medicine. In *Cuevas v. Contra Costa*
3 *County* (2017) 11 Cal.App.5th 163, 180-181, the court of appeal held that the trial court should
4 have permitted the defendant to present evidence that the Affordable Care Act. The common
5 thread in this case and in *Cuevas* was how to address the uncertainty of whether the third party
6 payments would continue in the future. In *Cuevas*, the court held that the trial court erred in
7 excluding evidence of future insurance benefits that might be available under the ACA on the
8 basis that the ACA was unlikely to continue was an abuse of discretion. *Cuevas* noted that at the
9 time of trial there was evidence that ACA was "reasonably certain to continue well into the
10 future." Applying *Cuevas* to this case, the trial court erred in not permitting Monsanto to present
11 evidence regarding whether a third party was likely to pay for Mrs. Pilliod's Revlimid in the
12 future.
13

14 The court finds that the only evidence regarding Mrs. Pilliod's economic damages was
15 indirect evidence that might arguably permit a jury to estimate Mrs. Pilliod's economic damages,
16 but that any such estimate would have been very close to speculation. The court finds that Mrs.
17 Pilliod's reasonably supportable future economic damages are \$50,000.
18

19
20 NONECONOMIC LOSS – PAIN AND SUFFERING.

21 "One of the most difficult tasks imposed upon a jury in deciding a case involving
22 personal injuries is to determine the amount of money the plaintiff is to be awarded as
23 compensation for pain and suffering. No method is available to the jury by which it can
24 objectively evaluate such damages, and no witness may express his subjective opinion on the
25 matter. ... In a very real sense, the jury is asked to evaluate in terms of money a detriment for
26

1 which monetary compensation cannot be ascertained with any demonstrable accuracy. ...
2 Moreover, [n]oneconomic damages do not consist of only emotional distress and pain and
3 suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact
4 of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future
5 harm or injury, and a shortened life expectancy.” (*Bigler-Engler v. Breg, Inc.* (2017) 7
6 Cal.App.5th 276, 295-300.)

7
8 Mr. Pilliod is 77 years old and Mrs. Pilliod is a few years younger. The Pilliods
9 emphasize that they lead the active lives before their diagnoses. The measure of damages is not,
10 however, to compare a plaintiff's current combination of age, unrelated ailments, and injury with
11 the plaintiff's younger former self without the injury. The measure of damages is to compare a
12 plaintiff's current combination of age, unrelated ailments, and injury with the plaintiff's
13 hypothetical current combination of age and unrelated ailments without the injury.

14
15 In the preference statute, there is a legislatively acknowledged increased risk of death or
16 incapacity due to being over the age of 70. (*Kline v. Superior Court* (1991) 227 Cal.App.3d 512,
17 515.) The legislatively acknowledged risks that come with age that support a different, and
18 lower, standard for trial preference logically must also be a factor in evaluating whether the
19 effects of aging were and are the proximate cause of the any injury, disability, impaired
20 enjoyment of life, or increased susceptibility to future harm or injury.

21 The court has considered *Izell v. Union Carbide* (2014) 231 Cal.App.4th 962. In that case
22 the plaintiff was an 86 year old man with a 2-3 year life expectancy. The jury awarded \$10
23 million in future noneconomic damages. The trial judge decreased the future damages to \$2
24 million. The Court of Appeal affirmed applying the abuse of discretion standard, stating
25 “Though we recognize the remitted amount remains on the high end of noneconomic damages
26

1 awards discussed in reported mesothelioma decisions—particularly for plaintiffs of the Izells'
2 advanced age—this alone is not sufficient to second-guess the trial judge, who presided over the
3 four-week trial and personally observed “the injury and the impairment that has resulted.”” (231
4 Cal.App.4th at 981.) *Izell* is authority for the proposition that \$1 million per year was not an
5 abuse of discretion on the facts of that case, but it is not authority that \$1 million per year is
6 appropriate or required in this case.
7

8 The jury awarded Mr. Pilliod \$8 million for past noneconomic loss and \$10 million for
9 future noneconomic loss. The record reflects that Mr. Pilliod went through a one-year period of
10 intense medical care related to his NHL, but that his situation has stabilized. Although Mr.
11 Pilliod’s health is impaired, his situation is due not only to the NHL but also to his history of
12 epilepsy, skin cancer, and other ailments. The court finds that the past noneconomic loss is not
13 supportable by the evidence. The court finds that reasonable noneconomic damages supported
14 by the evidence are \$1,000,000 per year for the one past year period of intense medical care
15 (\$1,000,000), \$300,000 per year for each of the other seven past years (\$2,100,000), and
16 \$300,000 per year for each of the future 10 years (\$3,000,000), for a total of \$6,100,000.
17

18 The jury awarded Mrs. Pilliod \$8 million for past noneconomic loss and \$26 million for
19 future noneconomic loss. The evidence reflects that Mrs. Pilliod went through a longer period of
20 intense medical care and that her health has been more impaired by the NHL. Mrs. Pilliod has
21 been relatively healthy other than the NHL. The court finds that the noneconomic loss is not
22 supportable by the evidence. The court finds that reasonable noneconomic damages supported by
23 the evidence are \$1,000,000 per year for the two past year period of intense medical care
24 (\$2,000,000), \$600,000 per year for each of the other two past years (\$1,200,000), and \$600,000
25 per year for each of the future 13 years (\$7,800,000), for a total of \$11,000,000.
26

1
2 PUNITIVE DAMAGES

3 The award of punitive damages requires plaintiffs to prove by clear and convincing
4 evidence that Monsanto committed malice, oppression, or fraud. (Civ. Code § 3294.) The court
5 finds the evidence can support a finding by clear and convincing evidence that Monsanto
6 committed malice, oppression, or fraud. A jury can award punitive damages based on a
7 conscious disregard of consumer health and safety. (*Potter v. Firestone Tire & Rubber* (1993) 6
8 Cal.4th 965, 997-1000; *Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1690-1695.)

10 The amount of punitive damages are limited by constitutional considerations. The court
11 must consider three “guideposts” to determine whether a punitive award comports with due
12 process: (1) the degree of reprehensibility of the defendant’s actions; (2) the ratio between the
13 compensatory award and the punitive award; and (3) a comparison between the punitive damages
14 awarded and the civil penalties authorized or imposed in comparable cases. (*Roby v. McKesson*
15 *Corp.* (2009) 47 Cal. 4th 686, 712 (2009); *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35
16 Cal.4th 1159, 1172.)

18 The court finds that there was clear and convincing evidence that Monsanto’s actions
19 were reprehensible. The “clear and convincing” standard requires evidence “so clear as to leave
20 no substantial doubt [and] sufficiently strong to command the unhesitating assent of every
21 reasonable mind.” (*Pacific Gas & Electric v. Superior Court* (2018) 24 Cal.App.5th 1150, 1158.)
22 Clear and convincing evidence requires more than a preponderance of the evidence, but it does
23 not require proof beyond a reasonable doubt. (Evid Code 115; *People v. Buford* (2016) 4
24 Cal.App.5th 885, 895-896.)
25
26

1 The jury could have found that plaintiffs proved by clear and convincing evidence that
2 Monsanto's actions were reprehensible. The bulk of the evidence that supports punitive evidence
3 was about Monsanto's research on glyphosate and efforts to influence research on glyphosate. In
4 reviewing the evidence, the court draws a distinction between efforts to influence scientific
5 research, which concerns the discovery and recognition of facts, and efforts to influence
6 regulation, which concerns policy choices based on the known facts.
7

8 A defendant's efforts to impede, discourage, or distort scientific inquiry into facts could
9 support an award of punitive damages. Such efforts would show a conscious disregard for the
10 health of persons exposed to glyphosate by interfering with the creation and publication of
11 scientific information that is directly relevant to public health. In contrast, a defendant's efforts
12 to influence or persuade agencies regarding policy decisions cannot support punitive damages. A
13 defendant has a right to petition the government and government agencies regarding policy
14 choices.
15

16 Absent preemption, each person has common law duties that are independent of any
17 obligations based on formal regulation.¹ Although a person's right to petition the government
18 regarding policy choices and formal regulation is protected activity and cannot be reprehensible
19 as a matter of law, the person's related action or inaction can still be reprehensible if it
20 demonstrates a conscious disregard for the health and safety of others. The existence of some
21 relationship between a person's actions as part of the political and regulatory process and the
22 person's actions as they affect others outside that process does not immunize the actions from
23 findings that they are reprehensible and warrant punitive damages.
24

25
26 ¹ This paragraph expands on the analysis in the order of 7/25/19.

1 The courts recognize a similar distinction between evidence and argument. The Evidence
2 Code ensures that evidence is reliable by requiring foundation, prohibiting hearsay, and so forth.
3 In contrast, counsel are given wide latitude during argument. “The argument may be vigorous as
4 long as it amounts to fair comment on the evidence, which can include reasonable inferences, or
5 deductions to be drawn therefrom.” (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) (See also
6 *Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 147-148.)
7

8 In this case there was clear and convincing evidence that Monsanto made efforts to
9 impede, discourage, or distort scientific inquiry and the resulting science. Monsanto conducted
10 initial studies about glyphosate but decided to not look further when there were indications that
11 glyphosate might cause cancers. Monsanto retained Dr. Parry as a consultant to investigate
12 glyphosate, but then engaged in a campaign to discredit him when it disagreed with what his
13 research indicated. Monsanto worked to publish articles that it had ghostwritten. Monsanto
14 made an aggressive attempt to discredit the IARC decision.
15

16 In a pretrial motion on a case with similar evidence and claims Judge Karnow stated:
17

18 The internal correspondence noted by Johnson could support a jury finding that
19 Monsanto has long been aware of the risk that its glyphosate-based herbicides are
20 carcinogenic, and more dangerous than glyphosate in isolation, but has
21 continuously sought to influence the scientific literature to prevent its internal
22 concerns from reaching the public sphere and to bolster its defenses in products
23 liability actions.
24
25
26

1 (*Johnson v. Monsanto* (Cal. Superior Court, 2018) 2018 WL 2324413.) There was evidence in
2 this case that would permit a jury to make those findings based on clear and convincing evidence.

3 This case is distinguishable from *Johnson & Johnson Talcum Powder Cases* (2019) 2019
4 WL 3001626 at *26. *J&J* suggests that the defendant mounted a policy debate. In *J&J*, the
5 defendant presented the science that supported its products and mounted a defense in public.

6 *J&J* states:
7

8 JJCI was aware of studies showing an association between talc and ovarian
9 cancer, studies showing talc could migrate from the vagina to the ovaries, and the
10 theory and corresponding research suggesting talc caused inflammation,
11 eventually leading to ovarian cancer. ... JJCI's response to these studies was to
12 mount a defense against them. In attempts to influence or persuade agencies such
13 as the NTP and IARC, and in response to media or governmental inquiry, JJCI's
14 strategy was to describe the flaws of these studies, point out inconclusive results,
15 and highlight the absence of any established causal link. ...
16

17
18 There was no evidence JJCI had any information about the dangers or risks of
19 perineal talc use that was unavailable to the scientific or medical community. The
20 company's critiques of available evidence were largely consistent with third party
21 entities' evaluations of the same studies, including nontrade groups such as the
22 IARC and the FDA.
23

24
25 (*J&J*, 2019 WL 3001626 at *26.) In contrast to actions of the defendant in *J&J* to question the
26 science in public and to influence or persuade public agencies on regulatory decisions, in this

1 case there is evidence that Monsanto made efforts to impede, discourage, or distort the
2 underlying scientific inquiry. Resorting again to the trial analogy, a party that suppresses
3 evidence can earn an Evidence Code 413 and CACI 204 suppression of evidence instruction, but
4 in argument an attorney can pick and choose what evidence she chooses to emphasize.

5 Monsanto's efforts to influence the scientific inquiry have a ripple effect because they
6 affect several other issues.¹

7
8 Regarding liability on the common law claim for failure to warn, Monsanto presented
9 evidence that it relied on the publicly known and generally accepted science about glyphosate.
10 Dr. Nabhan testified that reasonable people can disagree on whether glyphosate causes NHL.
11 Monsanto presented evidence that it was following a complex and developing area of science.
12 Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate
13 support a jury finding that could not reasonably rely on what was "known or knowable in light of
14 the generally recognized and prevailing best scientific and medical knowledge."

15
16 Regarding liability on the common law claim for failure to warn and for design defect,
17 Monsanto also presented Monsanto presented evidence that it relied on the EPA's regulatory
18 decisions. Regulatory "action or inaction, though not dispositive, may be considered to show
19 whether a product is safe or not safe." (*O'Neill v. Novartis Consumer Health, Inc.* (2007) 147
20 Cal.App.4th 1388, 1393-1396.) Monsanto's efforts to impede, discourage, or distort the scientific
21 inquiry about glyphosate, support a jury finding that it could not reasonably rely on the EPA's
22 regulatory action or inaction that was based on that science.
23
24
25

26 ¹ The following paragraphs expand on the analysis in the order of 7/25/19.

1 Regarding the defense of impossibility based on preemption, Monsanto did not apply to
2 the EPA to change the label on Roundup but argued at summary judgment that if it had applied
3 for approval to change the label on Roundup, then there was clear evidence that the EPA would
4 have denied the application. At summary judgment, Monsanto presented evidence that the EPA
5 had consistently opined that glyphosate was not carcinogenic. (Order of 3/18/19 at 17-19.)
6
7 Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate raise
8 the issue of whether there could have been clear evidence that the EPA would have denied the
9 hypothetical application if Monsanto had not made efforts to impede the scientific inquiry.

10 Again, this case is distinguishable from *Johnson & Johnson Talcum Powder Cases*
11 (2019) 2019 WL 3001626 at *27. In *J&J* the court stated, "The evidence established that JJCI
12 has refused to draw a causal connection between perineal talc use and ovarian cancer before
13 experts in the relevant fields have done so. The jury could reasonably conclude this was
14 unreasonable and negligent. But it is not clear and convincing evidence of "despicable conduct.""
15

16 In *J&J*, the defendant looked at the public science and drew a conclusion from that
17 science. The public science permitted different conclusions, so it was not reprehensible or
18 despicable to draw the conclusion that there was no causal connection between the product and
19 cancer. In this case, however, Monsanto made efforts to interfere with the underlying public
20 scientific inquiry and as a result cannot have in good faith relied on the available public science
21 in making its decisions about the danger of glyphosate.

22 At argument on 7/18/19, Monsanto argued that there was no evidence that it hid evidence
23 from the EPA, captured the EPA, or that its efforts rendered the EPA's scientific evaluation and
24 regulatory decisions invalid. Monsanto pointed to the decision of federal judge Chhabria in
25 *Hardeman v. Monsanto*. (Pltf's response to Supp authority, Exh B, page 6.) This conflates three
26

1 issues. First, Monsanto's efforts to impede, discourage, or distort the scientific inquiry about
2 glyphosate were reprehensible and showed a conscious disregard for public health. Even if
3 Monsanto did not hide evidence from the EPA, it nevertheless engaged in other efforts to
4 impede, discourage, or distort the scientific inquiry. Second, Monsanto's success in those efforts
5 is not relevant to whether the efforts were reprehensible. By analogy, an attempted crime is still
6 be a crime even if it was unsuccessful. Monsanto's success in its efforts goes to causation for
7 purposes of liability and damages. Third, Monsanto's efforts to affect policy decisions based on
8 the science is protected lobbying activity and cannot as a matter of law be reprehensible even if
9 Monsanto as a private entity was seeking to protect its profits while the public regulatory
10 agencies were focused on the concerns of public health and agricultural productivity.

12 In conclusion, there was clear and convincing evidence that Monsanto undertook
13 continuous efforts to impede, discourage, or distort the scientific inquiry about glyphosate and
14 those actions were reprehensible and showed a conscious disregard for health.

16 The ratio between the compensatory award and the punitive awards were excessive. The
17 United State Supreme Court has held that "an award of more than four times the amount of
18 compensatory damages might be close to the line of constitutional impropriety." The United
19 State Supreme Court also stated that where "compensatory damages are substantial, then a lesser
20 ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due
21 process guarantee." (*Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1690-1696.) In
22 *BMW of North America v. Gore* (1996) 517 US 559, 580-581, the Court referenced early statutes
23 permitting double, treble, or quadruple damages as a benchmark for ratios. California has several
24 statutes that provide for treble damages. (Bus & Prof 17082; Civil Code 1738.15; Civil Code
25
26

1 1780(c); Civil Code 3345(b); Civil Code 3346(a).) Treble damages are the equivalent of
2 punitive damages at a 2-1 ratio.

3 The verdict for Mr. Pilliod was \$18,047,296.01 in compensatory damages and
4 \$1,000,000,000 in punitive damages, which was a ratio of 54-1. The verdict for Mrs. Pilliod was
5 \$37,158,876 in compensatory damages and \$1,000,000,000 in punitive damages, which was a
6 ratio of 27-1. These are unconstitutionally large ratios given the compensatory damages awarded
7 by the jury.
8

9 The court would reduce the compensatory damages to \$6,100,000 and \$11,251,166.
10 These are substantial awards, but as reduced by the court would not contain a punitive element.
11 The inclusion or exclusion of a punitive element in a compensatory award is relevant because
12 *Roby*, 47 Cal.4th at 718, recognized that the United States Supreme Court noted, “When
13 compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory
14 damages, can reach the outermost limit of the due process guarantee.”
15

16 The court considers the civil penalties that might be authorized or imposed based on
17 Monsanto’s conduct. Under FIFRA the EPA can fine a person up to \$19,936 per offense for
18 selling a product that does not contain a warning or caution statement adequate to protect public
19 health. (7 USC 136(q) [misbranded]; 7 USC 136j(a)(1)(E) [unlawful to sell misbranded
20 product]; 7 USC 136l [penalty for registrants for each offense]; 40 CFR 19.4 [\$19,936 penalty
21 per offense].) California can assess a penalty of \$2,500 for each offense (H&S 25249.7.)
22

23 The word “offense” is not defined in FIFRA, so it is unclear whether Monsanto would
24 have been liable for a penalty once for each plaintiffs’ ongoing use of Roundup, once for each
25 time each plaintiff purchased Roundup, once for each time each plaintiff applied Roundup, or
26 once for each day that Roundup was in each plaintiffs’ possession. Under federal law “if

1 Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt
2 will be resolved against turning a single transaction into multiple offenses” (*Bell v. United*
3 *States* (1955) 349 U.S. 81, 75 S.Ct. 620, 622.) (*U.S. v. Corbin Farm Service* (E.E. Cal., 1978)
4 444 F.Supp.510, 526-532 [discussing multiplicity of offences in context of FIFRA and Migratory
5 Bird Treaty].)

6
7 The FIFRA penalties suggest that the FIFRA penalty would be only \$19,936 for each
8 plaintiff. Assuming a penalty of \$19,936 for each application of Roundup and one application
9 per plaintiff per week for 10 years, then the penalties would result in a penalty of \$10,366,720
10 per plaintiff.

11 The court can consider the punitive damages that Judge Bolanos in *Johnson v. Monsanto*
12 (San Francisco Superior Court) found to be appropriate. In *Johnson*, the compensatory award
13 was for \$39,253,209, which the court found to be “extremely high for a single plaintiff and
14 consists largely of non-economic damages which the due process case law recognizes has a
15 punitive element.” In light of the high compensatory damage award, the court found that a ratio
16 of 1-1 was appropriate and awarded \$39,253,209 in punitive damages. (*Johnson v. Monsanto*
17 (Superior Court of California 2018) 2018 WL 5246323; Pltf’s response to Supp authority, Exh B,
18 page 7-8.)

19
20 The court can consider the punitive damages that Judge Chhabria in *Hardeman v.*
21 *Monsanto* (N.D. Cal) found to be appropriate. In *Hardeman*, the compensatory award was for
22 \$5,066,667. The court found “It is easy to uphold the award of past noneconomic damages”
23 which was \$3,066,667, and that it was a “close question” to uphold the award of \$2,000,000 in
24 future noneconomic damages. The court found that a ratio of 4-1 was appropriate and awarded
25
26

1 \$20,000,000 in punitive damages. (*Hardeman v. Monsanto*, (N.D. Cal. 2018) Case 16-md-
2 02741-VC (Order dated 7/15/19 at pages 6-8); Pltf's response to Supp authority, Exh B.)

3 A different order in *Hardeman* noted that the court excluded evidence after the summer
4 of 2012, which is when the plaintiff in that case stopped using Roundup. The court noted that if
5 such evidence had been presented then the jury would have been presented with evidence of
6 Monsanto's attempts to discredit the IARC decision. (Pltf's response to Supp authority, Exh A.)
7 (*Hardeman v. Monsanto*, (N.D. Cal. 2018) Case 16-md-02741-VC (Order dated 7/12/19 at pages
8 6-7.) The differences in the evidence presented to the juries in the various cases is also a factor
9 in determining what punitive damages are appropriate based on the evidence in any given case.
10

11 The trier of fact can consider the net worth of the defendant. *Simon*, 35 Cal.4th at 1185-
12 1186, states that wealth cannot replace reprehensibility as a constraining principle but that the
13 trier of fact can give some consideration to the defendant's financial condition. *Bigler-Engler*, 7
14 Cal.App.5th at 308, suggest that the defendant's net worth is a factor in ensuring that punitive
15 damages are to deter, but not to destroy, the defendant. CACI 3940 states: "In view of [*name of*
16 *defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage
17 future wrongful conduct? You may not increase the punitive award above an amount that is
18 otherwise appropriate merely because [*name of defendant*] has substantial financial resources.
19 [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]" Monsanto has
20 substantial financial resources.
21

22 The court has considered all of the above factors and gives the most weight to the
23 evidence that Monsanto made an ongoing effort to impede, discourage, or distort scientific
24 inquiry and the resulting science about glyphosate and thereby showed a conscious disregard for
25
26

1 public health. Consistent with the purpose of punitive damages, this is reprehensible conduct
2 that affects the public and therefore warrants punitive damages.

3 For Mr. Pilliod, the court finds that the constitutionally permissible punitive damages are
4 \$24,589,184.04. This is four times his combined economic and non-economic compensatory
5 damages. (\$6,147,296.01 x 4.)

6
7 For Mrs. Pilliod, the court finds that the constitutionally permissible punitive damages are
8 \$44,804,664. This is an amount four times her combined economic (\$201,166) and
9 noneconomic compensatory damages (\$11,000,000), but excludes the \$2,957,710 attributable to
10 the future cost of Revlimid. The court excludes the cost of the Revlimid from the punitive
11 damage calculation because although there is evidence to support the cost of the drug as
12 compensatory damages, the evidence is well short of clear and convincing and therefore the court
13 determines that it is not a proper on the facts of this case to include it in the baseline for the
14 punitive damages ratio test. (\$11,201,166 x 4.)
15

16
17 ORDER

18 The motion of Monsanto for JNOV is DENIED.

19 The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY
20 GRANTED unless Mr. Pilliod consents to entry of judgment in the total amount of
21 \$30,736,480.04. This represents \$47,296.01 in past economic loss, \$3,100,000 for past
22 noneconomic loss, \$3,000,000 for future noneconomic loss, and \$24,589,184.04 in punitive
23 damages for a total of \$30,736,480.04. (CCP 662.6(a)(2).)
24

25 The motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY
26 GRANTED unless Mrs. Pilliod consents to entry of judgment in the total amount of

1 \$56,005,830. This represents \$201,166.76 in past economic loss, \$50,000 in future economic
2 losses, \$3,200,000 for past noneconomic loss, \$7,800,000 for future noneconomic loss, and
3 \$44,804,664 in punitive damages for a total of \$56,005,830. (CCP 662.6(a)(2).)
4

5 July 26, 2019
6 Date

7 Winifred Y. Smith
8 Winifred Y. Smith
9 Judge of the Superior Court
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A155940 & A156706

**In The California Court of Appeal
First Appellate District, Division One**

Dewayne Lee Johnson,
Plaintiff and Respondent/Cross-Appellant,

v.

Monsanto Company
Defendant and Appellant/Cross-Respondent

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SAN FRANCISCO
HONORABLE SUZANNE R. BOLANOS

[PROPOSED] ORDER

FOR GOOD CAUSE SHOWN, the Court grants Mr. Johnson's
motion to take judicial notice of the document attached as exhibit A to the
declaration of Jeffrey Travers.

Dated: _____

Presiding Justice

PROOF OF SERVICE

I am employed in the County of Orange, Commonwealth of Virginia. I am over the age of 18 years and not a party to the within action. My business address is 108 Railroad Avenue, Orange, VA 22960.

On July 31 2019, I served the foregoing documents described as Motion for Judicial Notice and Proposed Order on all interested parties in this action as follows:

Sandra A. Edwards (State Bar No. 154578) Joshua W. Malone (State Bar No. 301836) Farella Braun + Martel LLP 235 Montgomery Street, 17th Floor San Francisco, CA 94104 Telephone: (415) 954-4400 Fax: (415) 954-4480 sedwards@fbm.com jmalone@fbm.com	K. Lee Marshall (State Bar No. 277092) Bryan Cave Leighton Paisner LLP Three Embarcadero Center, 7th Floor San Francisco, California 94111-4070 Telephone: 415-675-3400 Fax: 415-675-3434
David M. Axelrad (bar no. 75731) Jason R. Litt (bar no. 163743) Dean A. Bochner (bar no. 172133) Horvitz & Levy LLP 3601 West Olive Avenue, 8th Floor Burbank, California 91505-4681 (818) 995-0800 • FAX: (844) 497-6592 daxelrad@horvitzlevy.com jlitt@horvitzlevy.com dbochner@horvitzlevy.com	

Via the Court's TrueFiling Electronic Filing System.

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

Executed on July 31, 2019, at Orange, VA.

A handwritten signature in blue ink, appearing to read "Jeffrey A. Travers", is positioned above a horizontal line.

Jeffrey A. Travers