

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE ROUNDUP PRODUCTS	)	
LIABILITY LITIGATION.	)	
	)	<b>NO. 16-md-02741 VC</b>
	)	
	)	
<hr/> EMANUEL RICHARD GIGLIO,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	<b>NO. C 16-05658 VC</b>
	)	
MONSANTO COMPANY,	)	
	)	
Defendant.	)	
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San Francisco, California  
Wednesday, December 5, 2018

TRANSCRIPT OF PROCEEDINGS

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1 Wednesday - December 5, 2018

1:36 p.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Case Numbers 16-md-2741, In Re  
5 Roundup Products Liability Litigation and 16-cv-5658, Giglio  
6 versus Monsanto Company.

7 Counsel, please step forward and state your appearances  
8 for the record.

9 **MS. WAGSTAFF:** Good afternoon, Your Honor.  
10 Aimee Wagstaff on behalf of MDL plaintiffs and plaintiff  
11 Giglio.

12 **THE COURT:** Good afternoon.

13 **MS. GREENWALD:** Good afternoon, Your Honor. Robin  
14 Greenwald for the plaintiffs.

15 **MR. MILLER:** Good afternoon, Your Honor. Michael  
16 Miller on behalf of the plaintiffs.

17 **THE COURT:** Mr. Miller.

18 If somebody wants to introduce everyone, they're perfectly  
19 welcome to.

20 **MR. BRAKE:** Good afternoon. Brian Brake for the  
21 plaintiffs. Pleasure to be here.

22 **MR. WOOL:** Good afternoon, Your Honor. David Wool on  
23 behalf of plaintiffs and Mr. Giglio.

24 **THE COURT:** Hello.

25 **MR. GOMEZ:** Good afternoon, Your Honor. John Gomez

1 for Mr.Giglio.

2 **MR. BURTON:** Good afternoon, Your Honor. Mark Burton,  
3 liaison counsel for the plaintiffs. Brent Wisner is also here.  
4 And I'll let -- sorry. I tried to --

5 **MR. SOILEAU:** I don't know that it's necessary, but I  
6 suddenly feel like the odd man out. Rudie Soileau appearing on  
7 behalf of the MDL plaintiffs as well, Your Honor. Thank you  
8 very much.

9 **MR. GRIFFIS:** Good afternoon, Your Honor. For  
10 Monsanto Kirby Griffis, Eric Lasker, Brian Stekloff, Pamela  
11 Yates, and Andrew Solow.

12 **THE COURT:** Hello.

13 **MR. STEKLOFF:** Good afternoon.

14 **MS. YATES:** Good afternoon, Your Honor.

15 **THE COURT:** Okay. So some fun stuff to talk about  
16 today.

17 On my list of things to talk about in no particular order  
18 is we have potentially a bunch of discovery disputes, or  
19 perhaps you've resolved them all this morning and I don't know,  
20 but I'm happy to help you with any discovery issues; this issue  
21 of live testimony at the *Daubert* hearings; the motion for trial  
22 preference; and then a discussion about jury selection.

23 Is there anything that I'm missing of those? Are there  
24 any other topics we need to discuss today?

25 **MS. WAGSTAFF:** I don't think so, Your Honor.

1           **THE COURT:** Okay. Why don't we start with a couple  
2 that hopefully will be short. Let's talk about the motion for  
3 trial preference and I want to hear, I think, probably only  
4 from the plaintiffs on this one I'm guessing.

5           And my main question for you is: I mean, has there ever  
6 been a case in a federal MDL where the transferee court has  
7 granted a motion for trial preference and sent a case back  
8 because somebody was dying?

9           Even if the answer is no, it may be that, you know, the  
10 MDL courts have been doing it wrong for all these years and  
11 there may be a reason to reconsider that, but has it ever  
12 happened before in the history of federal multidistrict  
13 litigation?

14           **MR. WOOL:** To the best of my knowledge, there's no  
15 such case that I'm aware of, Your Honor.

16           **THE COURT:** Okay. So the standard operating procedure  
17 with federal MDLs is that -- and, of course, we have many  
18 products liability cases where people are dying; right? The  
19 standard mode of operation is that we may do something within  
20 the MDL to move that person's case along more quickly, but we  
21 don't transfer that person out for trial ahead of everybody  
22 else. We don't have them jump the line, so to speak.

23           **MR. WOOL:** Right. That's understood, Your Honor. And  
24 in this case I think there are a couple of reasons why it makes  
25 sense to do so here. First, I think that the Court provided

1 some guidance where I believe Your Honor -- at least we  
2 interpreted it as suggesting that plaintiffs who were  
3 terminally ill might have an opportunity to have their cases  
4 remanded.

5 **THE COURT:** What I suggested or what I recall  
6 suggesting is that I'd be happy to do whatever makes sense to  
7 help ensure those cases move along the fastest, not send them  
8 back for trial -- not have them jump ahead and send them back  
9 for trial.

10 I mean, I would -- you know, it's not that I'm dead-set  
11 against it. I just -- I want to sort of figure out the playing  
12 field we're on right now, and the playing field we're on right  
13 now is that it never happens in federal MDLs; right?

14 It's just people have decided -- the people involved in  
15 MDLs have decided that's not the way it's going to work; and if  
16 you allow one person to jump the line and go back for trial,  
17 then there's going to be a big fight among who's going to  
18 die -- among the plaintiffs about who's going to die first and  
19 who gets to go have their trial first; right?

20 **MR. WOOL:** Your Honor, here I don't think that -- at  
21 least to the best of my knowledge, there are not a number of  
22 other plaintiffs who are fighting for this. This is only  
23 Mr. Giglio, who is the second case, to my knowledge, who has  
24 ever filed.

25 And with respect to how this kind of impacts MDLs overall,

1 the charge that the panel gave your court was to facilitate the  
2 just and efficient resolution of these actions.

3 Mr. Hardeman's case is a residential case. I know that  
4 the Johnson trial involved an ITNO case, but I think there is  
5 an efficiency to be gained here because Mr. Giglio was an ITNO  
6 user, he had diffuse large B-cell lymphoma, and he was  
7 diagnosed with that disease when he was in his early 60s. So  
8 he's representative of a fairly large swath of the plaintiffs  
9 in these cases.

10 So I understand that there might not be --

11 **THE COURT:** Mr. Hardeman is too; right?

12 **MR. WOOL:** Is in his 60s?

13 **THE COURT:** Is fairly representative of a large swath  
14 of these cases --

15 **MR. WOOL:** Yes, but he's --

16 **THE COURT:** -- and residential exposure; right?

17 **MR. WOOL:** Right, with residential exposure and  
18 Mr. Giglio is ITNO exposure. He used it --

19 **THE COURT:** Oh, I'm sorry. I thought you said  
20 Mr. Giglio was a residential user.

21 **MR. WOOL:** No, no. He was predominantly landscaping  
22 use. So I think that that would provide a data point for all  
23 of the parties that would teach us a lot about the case that we  
24 wouldn't learn from Hardeman alone.

25 **THE COURT:** Okay. I understand your argument. The



1 motion is denied --

2 **MR. WOOL:** Okay.

3 **THE COURT:** -- but I'm perfectly happy, as Monsanto  
4 proposed, to adopt procedures to ensure that this case moves  
5 along particularly quickly. I think a preservation deposition  
6 is, of course, a good idea. It sounds like Monsanto will agree  
7 to that. If you have any problems getting that to happen, you  
8 know, you can let me know.

9 **MR. WOOL:** Okay. Thank you, Your Honor.

10 **THE COURT:** Okay. Thank you.

11 Now, the question came up about live testimony at the  
12 *Daubert* hearing. The answer is if Monsanto wants to  
13 cross-examine one of the plaintiffs' experts as part of its  
14 effort to get the plaintiffs' expert's testimony excluded, it  
15 can. So those witnesses need to be available.

16 Similarly, if Monsanto has any experts that it is using to  
17 rebut the plaintiffs' experts' testimony, and these are sort of  
18 priority experts for Monsanto -- I mean, Monsanto called some  
19 of its experts in during Phase I and it didn't call some of its  
20 experts in. Call your best experts in. You don't have to call  
21 all of them in; but if you want to attack the plaintiffs'  
22 expert testimony on the issue of specific causation, you know,  
23 you want to make sure to get your best testimony -- you want  
24 the best expert testimony to be presented to me live.

25 However, I do want to make one thing clear in terms of

1 ground rules for the *Daubert* hearings on specific causation.  
2 Now, I assume that at trial, assuming we go to trial, there  
3 will be experts who will be testifying that "I believe  
4 Mr. Hardeman's non-Hodgkin's lymphoma was caused by  
5 glyphosate," and part of that opinion will be the general  
6 causation stuff that we spent so much time talking about before  
7 and part of that opinion will be information that's specific to  
8 Mr. Hardeman; right?

9 It's not like you're going to be putting up separate  
10 general causation experts and specific causation experts, I  
11 assume, or are you? Is that the plan? What are you planning  
12 on presenting at trial by way of expert testimony?

13 **MS. WAGSTAFF:** Yeah. So we were actually scheduled to  
14 discuss that this morning with Monsanto's counsel, and we  
15 haven't really come to a consensus on that because we have our  
16 general causation experts that have passed through *Daubert* that  
17 you've just talked about. We'll just say Dr. Weisenburger is  
18 one example. We have proffered him as general causation and as  
19 specific causation.

20 If you remember, Dr. Nabhan, who did not pass through the  
21 general causation phase but your order suggested that he would  
22 be able to provide specific --

23 **THE COURT:** I said he may be able to.

24 **MS. WAGSTAFF:** Exactly.

25 -- he may be able to provide specific causation testimony,

1 we have proffered him for specific causation testimony.

2 And then to complicate it, we have a third category that  
3 is a new expert, Dr. Shustov, that is offering what we believe  
4 just to be specific causation testimony.

5 Monsanto has a version that's similar with their own  
6 experts of what they had passed as well.

7 So me and Mrs. Yates were just talking about this moments  
8 ago, and we haven't really come to a consensus on how we handle  
9 the general causation portion of a new expert.

10 What we thought Your Honor wanted, but we would love more  
11 guidance from you, is that we were not allowed to proffer new  
12 general causation opinions from any expert. So, for example,  
13 Dr. Weisenburger would be able to testify obviously about  
14 general causation pursuant to Your Honor's order. We will  
15 proffer him for specific causation. However, the new expert,  
16 Dr. Shustov, it's our opinion would not be able to proffer  
17 general causation opinions, would rely on the general causation  
18 opinions subject to Your Honor's order. That's what we have  
19 been operating on.

20 **THE COURT:** In other words, when that expert comes and  
21 testifies -- what's their name again?

22 **MS. WAGSTAFF:** Dr. Shustov.

23 **THE COURT:** Dr. Shustoff?

24 **MS. WAGSTAFF:** Stov with a V.

25 **THE COURT:** Stov?

1           **MS. WAGSTAFF:** Uh-huh.

2           **THE COURT:** Shustov.

3           So they will get up on the stand and they will say, "I'm  
4           adopting the assumption that glyphosate is capable of causing  
5           cancer in human -- in doses that we would expect humans to  
6           experience" --

7           **MS. WAGSTAFF:** Uh-huh.

8           **THE COURT:** -- "and adopting that assumption, I  
9           conclude that Mr. Hardeman's NHL was caused by glyphosate --  
10          it's far more likely that glyphosate caused his NHL than any  
11          other potential factor out there." Something along those  
12          lines?

13          **MS. WAGSTAFF:** Yeah, something along those lines.

14          And just to be clear on sort of our opinion and what we're  
15          planning on doing, you know, Weisenburger is sort of a  
16          different base because he passed through your order; but with  
17          Dr. Shustov, we aren't proffering him to say that exposure to  
18          glyphosate and Roundup can cause it, but we will proffer  
19          opinions that Mr. Hardeman is within the relevant epidemiology  
20          that he is assuming has proved general causation, if that makes  
21          sense.

22          **THE COURT:** That makes sense, yeah.

23          **MS. WAGSTAFF:** So the way that we understand  
24          Your Honor to want this procedure to go is that we will not get  
25          up here and have Dr. Shustov go through the testimony that Ritz

1 and Dr. Jameson and Dr. Weisenburger all went through. It will  
2 be much shorter, much tighter: This is the exposure. This is  
3 what happened. We're going to go through the diagnosis just  
4 like you said. That's how we believe you want it, and so  
5 that's how we've tailored our expert reports.

6 **THE COURT:** And so, then, give me an overall list of  
7 the experts you plan to have testify.

8 **MS. WAGSTAFF:** Okay. So the experts that we have  
9 designated, and this is just in Hardeman, we have designated  
10 Dr. Ritz. We have designated Dr. Weisenburger. We have  
11 designated Dr. Shustov. We've designated Dr. Nabhan,  
12 Dr. Portier.

13 **THE COURT:** Doctor who?

14 **MS. WAGSTAFF:** Portier.

15 **THE COURT:** Oh, okay.

16 **MS. WAGSTAFF:** Dr. Sawyer and Dr. Benbrook.

17 **THE COURT:** Ben?

18 (Conferring with co-counsel.)

19 **MS. WAGSTAFF:** And then Dr. Mills is an economist.

20 **THE COURT:** Dr., you said, Benbrook?

21 **MS. WAGSTAFF:** Benbrook, yeah.

22 **THE COURT:** And Mills?

23 **MS. WAGSTAFF:** And Mills, yep.

24 **THE COURT:** Okay. So Ritz would testify only about  
25 general causation?

1           **MS. WAGSTAFF:** Yeah.

2           **THE COURT:** And Weisenburger would testify about both?

3           **MS. WAGSTAFF:** That's correct.

4           **THE COURT:** And Weisenburger, am I remembering  
5 correctly, was he the one whose testimony was the subject of a  
6 very recent Ninth Circuit opinion where his testimony was  
7 excluded and then the Ninth Circuit --

8           **MS. WAGSTAFF:** That's correct, Your Honor.

9           **THE COURT:** -- reversed?

10           Okay. I remember that case.

11           **MS. WAGSTAFF:** And Dr. Shustov was actually in that  
12 opinion as well.

13           **THE COURT:** Oh, yeah? And so Shustov is going to --  
14 it's just going to be specific?

15           **MS. WAGSTAFF:** That's correct.

16           **THE COURT:** And then Nabhan specific?

17           **MS. WAGSTAFF:** Correct.

18           **THE COURT:** And Portier both?

19           **MS. WAGSTAFF:** Portier is just general causation.

20           **THE COURT:** Okay. And Sawyer and Benbrook and Mills  
21 are specific?

22           **MS. WAGSTAFF:** Correct.

23           And did we designate --

24                            (Conferring with co-counsel.)

25           **MS. WAGSTAFF:** Mills is on punitive damages, company

1 warnings --

2 **MR. MILLER:** Worth.

3 **MS. WAGSTAFF:** -- worth, company worth.

4 **THE COURT:** Oh. Mills is not on the science?

5 **MS. WAGSTAFF:** Correct.

6 **THE COURT:** Okay.

7 (Conferring with co-counsel.)

8 **MS. WAGSTAFF:** Benbrook is not science either.

9 **THE COURT:** He's damages?

10 **MS. WAGSTAFF:** He is more liability.

11 **MR. MILLER:** Liability, Your Honor.

12 **MS. WAGSTAFF:** Yeah. Regulatory liability, yeah. And

13 Sawyer is exposure.

14 **THE COURT:** What does "regulatory liability" mean?

15 **MS. WAGSTAFF:** Mr. Wisner is going to talk about

16 Dr. Benbrook.

17 **THE COURT:** I mean, obviously we're not adjudicating  
18 anything now, but I'm just curious.

19 **MR. WISNER:** Sure. His testimony is primarily  
20 historical. He talks about the history of glyphosate, its  
21 regulatory history in the United States, the science and the  
22 approvals and what those approvals actually mean.

23 A lot of his testimony will be subject to a lot of  
24 *motions in limine* so we'll see what actually comes in and what  
25 doesn't, but he has a lot of expertise in that area.

1           **THE COURT:** Well, I'm glad you brought that up because  
2 I wanted to bring up a topic that is closely related to that,  
3 but I will -- let's hold off on it just a second.

4           Okay. And then Sawyer you said is on exposure?

5           **MS. WAGSTAFF:** Yeah. Sawyer is on exposure, yeah.

6           **THE COURT:** So which is related -- you mean on  
7 Mr. Hardeman's exposure?

8           **MS. WAGSTAFF:** Yeah. And then he also was designated  
9 as a rebuttal expert just on exposure in general.

10          **THE COURT:** Okay.

11          All right. And so the main thing, I guess, that I wanted  
12 to say about the expert testimony regarding specific causation  
13 is that, as I said, I assume that at trial there's going to  
14 be -- you know, at least with Dr. Weisenburger, there's going  
15 to be -- you know, you're not going to be able to tell when --  
16 you're not always going to be able to tell when he's talking  
17 about general versus specific causation. There's some overlap  
18 there.

19          But the point is that for purposes of the *Daubert*  
20 hearings, obviously we're not going to have any relitigation of  
21 whether glyphosate is capable of causing NHL in human relevant  
22 doses; right?

23          And so to the extent that Monsanto's experts are attacking  
24 the plaintiffs' experts, Monsanto's experts need to adopt for  
25 the purposes of the testimony that they're giving at the



1 *Daubert* hearings, of course they don't have to do this at  
2 trial, but for the purposes of the *Daubert* hearings, they need  
3 to buy into the assumption that glyphosate is capable of  
4 causing non-Hodgkin's lymphoma at human relevant doses.

5 And to the extent that they are pushing back against that  
6 in their attempt to -- in Monsanto's attempt to get the  
7 plaintiffs' specific causation experts excluded, that's going  
8 to be a waste of time. So I just wanted to make sure everybody  
9 gets that. Are we kind of on the same page on that?

10 **MS. WAGSTAFF:** (Nods head.)

11 **THE COURT:** I see nodding heads from the plaintiffs'  
12 side. I see some sort of blank stares from Monsanto's side.

13 **MS. YATES:** Ms. Yates approaching the podium,  
14 Your Honor.

15 **THE COURT:** And Ms. Yates approaching the podium. So  
16 what have you got?

17 **MS. YATES:** So, yes, in part, and I just wanted to  
18 clarify.

19 We understand that this *Daubert* hearing is to attack the  
20 specific causation methodology; right?

21 **THE COURT:** Right.

22 **MS. YATES:** The prior hearing -- we're going to do  
23 battle over the general at trial so everybody understands that,  
24 but we understand that the *Daubert* hearing will be on their  
25 methodology for how it caused it in Mr. Hardeman, et cetera,

1 et cetera.

2 **THE COURT:** Yeah. And any testimony that questions  
3 the assumption that glyphosate is capable of causing NHL will  
4 be useless.

5 **MS. YATES:** I hear you loud and clear, Your Honor.

6 **THE COURT:** Okay.

7 **MS. YATES:** I do want to clarify a couple of points,  
8 though. We do have some slightly different scenarios involving  
9 case-specific experts, and I want to make sure that we are all  
10 on the same page.

11 As you know from -- heard from Ms. Wagstaff,  
12 Dr. Weisenburger crosses general and case specific.  
13 Dr. Nabhan, who did not pass muster on the general, will be  
14 addressing case specific.

15 Our experts at Phase I, our goal was not to have our  
16 general causation experts necessarily be our case-specific  
17 experts. We went and found clinicians; right? But as part of  
18 their opinions, they have a foundation of the science in  
19 general; right? So they're going to fulfill sort of the  
20 Weisenburger role addressing both. Obviously the focus is  
21 their methodology.

22 **THE COURT:** Who is "they"?

23 **MS. YATES:** So, for example, Dr. Alexandra Levine,  
24 who's an oncologist. We have several, but they are not -- the  
25 only reason there's general opinion is it's foundation for them

1 to then offer their case specific. They're not new.

2           **THE COURT:** Yeah, and I just -- I don't like -- it's  
3 hard to discuss this in the abstract and say anything  
4 definitive in the abstract, but my gut is that that is not --  
5 that we do not really want them building that kind of  
6 foundation that you're talking about; that we want them to get  
7 on the stand and just say "I'm relying on the foundation built  
8 by Dr. Mucci, and explain -- that's the general, and now I'm  
9 going to explain to you why even if it did -- you know, even  
10 if -- you know, that's part of my opinion for why it can't be  
11 that Mr. Hardeman's NHL was caused by glyphosate; but even if  
12 you reject Mucci, here are some specific reasons. Even if you  
13 adopt the assumption that it can cause NHL, here are some  
14 reasons why it didn't happen with Hardeman." That's what I was  
15 assuming it would be.

16           **MS. YATES:** I'm going to refer to the Court's  
17 distinction; right? We understand that for the *Daubert*  
18 hearing, but at trial our experts, just picking on Dr. Levine,  
19 an oncologist who's case specific for Dr. Hardeman, in  
20 concluding no causation specific to him, she also relied -- she  
21 has to have some general foundation and general science.

22           **THE COURT:** Right.

23           **MS. YATES:** I understand that's not coming in at the  
24 *Daubert* hearing.

25           **THE COURT:** No, but, I mean, even at trial, I mean you

1 didn't offer Levine -- is it Levine?

2 **MS. YATES:** Yes.

3 **THE COURT:** -- you didn't offer Levine as a general  
4 causation expert; right?

5 **MS. YATES:** Correct. And it was never our intention.  
6 Now, I'm relatively new to this but, as I understand, our goal  
7 was never to have our general causation experts be our  
8 case-specific experts. For example, Dr. Mucci, an  
9 epidemiologist, I want a clinician testifying as to medical  
10 cause, not an epidemiologist.

11 So --

12 **THE COURT:** So you weren't planning on having  
13 Dr. Mucci testify?

14 **MS. YATES:** By the way, I'm not sure that I will --

15 **THE COURT:** Okay.

16 **MS. YATES:** -- which is why we gave enough foundation  
17 in these reports. They're not stand-alone general cause, and I  
18 can highlight a difference, Your Honor.

19 With Dr. Sawyer, the plaintiffs' toxicologist, not  
20 designated as a general expert in the MDL, case-specific in the  
21 Stevick case only but designated generally in Hardeman and  
22 Gebeyehou, that, I think, is an apples and orange situation.

23 **THE COURT:** I'm sorry. I lost you.

24 **MS. YATES:** Okay. So Dr. Sawyer, who is a  
25 toxicologist, has been designated and was identified here today

1 as case specific. He is case specific in the Stevick case. He  
2 has dose latency and some other opinions. But there's a  
3 general part of his report, and plaintiffs say he will also  
4 offer those opinions in the two other cases, Hardeman and  
5 Gebeyehou. We think that crosses the line of a new general  
6 causation expert, and we're not going to object to Sawyer  
7 talking specifically about Stevick.

8 That seems to be -- it's not the foundation for Stevick.  
9 It's offering general opinions. It's a new general expert two  
10 years after in two cases where he's not designated as case  
11 specific.

12 **THE COURT:** I think the reason I'm having trouble  
13 following you is because I don't have any idea what Sawyer is  
14 going to testify about.

15 **MS. YATES:** Okay.

16 **THE COURT:** I don't have any familiarity with his  
17 expert report or his deposition testimony. I don't even know  
18 if it's a he.

19 **MS. YATES:** It is.

20 **THE COURT:** So I'm having trouble following you, but  
21 why don't we focus on your expert, Levine, who we were talking  
22 about just a second ago.

23 **MS. YATES:** Sure.

24 **THE COURT:** Okay. And what you're saying is, "We want  
25 to call Levine to testify on both general causation and

1 specific causation"?

2 **MS. YATES:** Yes, as it relates to Mr. Hardeman, the  
3 foundation for her case-specific opinions at trial.

4 **THE COURT:** But why wouldn't the foundation for her  
5 case-specific opinions be given by the general causation  
6 experts who you put up at Phase I?

7 **MS. YATES:** Because, candidly, I'm not sure I'd like  
8 to call an epidemiologist unless I want my jurors sleeping.  
9 That's as honest as I can be, Your Honor.

10 **THE COURT:** But the point of Phase I was for the  
11 parties to put up their experts on general causation --

12 **MS. YATES:** Right.

13 **THE COURT:** -- and give them an opportunity to have at  
14 each other to determine if any of them would be excluded.

15 **MS. YATES:** Right.

16 **THE COURT:** And there was a motion to exclude their  
17 experts and there was a motion to exclude your experts, and we  
18 adjudicated those motions and we decided whose experts general  
19 causation testimony would be allowed at trial and whose expert  
20 causation testimony would not be allowed at trial -- whose  
21 general causation testimony would not be allowed at trial.

22 And now you're telling me that you have somebody else who  
23 you want to come in and testify on general causation who was  
24 not put to the test at Phase I, and that's I guess what I'm not  
25 understanding.

1 I thought we all understood that the purpose of Phase I is  
2 to figure out who would be able to testify about general  
3 causation. So that's the assumption I was operating under.

4 **MS. YATES:** And I think that's correct within certain  
5 parameters.

6 I don't believe we ever intended for our general experts  
7 to then carry that forward at trial. We understand a *Daubert*  
8 hearing, Your Honor. We understand that we have to -- if we're  
9 going to put our experts on, "Dr. Levine, you understand this  
10 Court has found, now explain your methodology as to why that's  
11 not correct in Mr. Hardeman," but how much general causation  
12 evidence and which witnesses I put on at trial is a vastly  
13 different decision.

14 **THE COURT:** So who are the experts that you've  
15 designated for the Hardeman trial?

16 **MS. YATES:** So there's Dr. Alexandra Levine.

17 Hold on a second, Your Honor, because we have three cases  
18 and somewhat different experts.

19 So we have Dr. Levine, Dr. Arbor.

20 **THE COURT:** Arbor?

21 **MS. YATES:** Yes.

22 **THE COURT:** Okay.

23 **MS. YATES:** We have Dr. Grossbard.

24 **THE COURT:** Gross what?

25 **MS. YATES:** Bard, B-A-R-D.

1           We have -- and, I'm sorry, this is for all cases. I don't  
2 have them designated by case name. If you give me a moment,  
3 Your Honor, I'll find my specifics.

4           **THE COURT:** Sure.

5           **MS. YATES:** Because there are different types of NHL.  
6 So, for example, Dr. Bello is case-specific in the Stevick  
7 case. So let me know if you would like that detail. I'll  
8 go --

9           **THE COURT:** Sure, I would.

10          **MS. WAGSTAFF:** And, Your Honor, while she's looking  
11 for that, I would just like to take a moment to respond to  
12 that.

13          And, of course, plaintiffs completely oppose new general  
14 causation experts --

15          I'm sorry about that. That was my fault.

16          **THE COURT:** I think you've just got to avoid getting  
17 too close. The microphones are terrible in here, but you've  
18 just got to avoid getting too close or too far from them.

19          **MS. WAGSTAFF:** Okay. So, you know, as you recall,  
20 Monsanto asked for this bifurcation and here we are two years  
21 later; and if Dr. Levine is to give general causation opinions,  
22 we're going to have to put her through a full *Daubert* and do  
23 this whole thing all over again. And I ask the Court: What  
24 was the purpose of the last two years?

25          And you're absolutely right that all the parties were



1 operating under the assumption that no general causation  
2 testimony would be given anew, and that's what we decided again  
3 at the last hearing.

4 So I think that what Ms. Yates is trying to do is  
5 circumvent what we've been doing for the last couple years, and  
6 she's trying to get in new general causation testimony because  
7 she doesn't like the testimony that her experts currently are  
8 giving.

9 **MS. YATES:** No, Your Honor, that's actually simply not  
10 the case.

11 **THE COURT:** Yeah, I doubt that's the case. But can I  
12 get a list?

13 **MS. YATES:** Yes, of course.

14 **THE COURT:** So Levine, Arbor, Grossbard?

15 **MS. YATES:** Steidl, S-T-E-I-D-L; and Al-Khatib, A-L  
16 hyphen K-H-A-T-I-B. Those are Hardeman.

17 **THE COURT:** So those are the only experts you've  
18 designated for Hardeman?

19 **MS. YATES:** And I think there's a Dr. Sullivan as  
20 well.

21 **MS. WAGSTAFF:** Those are the only case-specific. They  
22 designated about six or seven other experts.

23 **THE COURT:** So you're saying you didn't designate  
24 Mucci and like the other epidemiologists who you put up at  
25 Phase I?

1           **MS. YATES:** Yes, Your Honor. These are case specific,  
2 yes.

3           **THE COURT:** Those are the case-specific ones.

4           **MS. YATES:** Yes.

5           **THE COURT:** I was asking who you designated, all the  
6 witnesses.

7           **MS. YATES:** All of them. I'm sorry. So I'm going  
8 with depositions and I don't have our designations. But, yes,  
9 we designated Dr. Mucci and we may or may not call him.

10          **MS. WAGSTAFF:** So, Your Honor --

11          **THE COURT:** Well, I think you better because I don't  
12 think there's any other way you can get in general causation  
13 testimony.

14          **MS. YATES:** Well, let me slow this down a little bit,  
15 Your Honor, because I feel as if we're talking a little bit in  
16 a vacuum here.

17           I would like you to see the reports because I think it's  
18 been a little bit out of context in terms of what they have in  
19 terms of general causation, and I'm very concerned that we're  
20 getting pushed into this quagmire that when you see the  
21 reports, we don't need to go there.

22          **THE COURT:** Okay.

23          **MS. YATES:** It's not starting over. It's not anew.  
24 It's the foundation for their case-specific methodology, which  
25 is based on a differential diagnosis. How do you rule things

1 in? How do you rule things out?

2 And I think if we take a step back, I think you'll see  
3 that we take very seriously what went on and we take those  
4 rulings seriously. We fully understand the Court's opinion as  
5 to what our experts will say at a *Daubert* hearing. And then I  
6 think you will see -- once you see the reports, you'll  
7 understand what our goals are with them being case specific at  
8 trial.

9 **THE COURT:** Well, that statement is fine for now, but  
10 the idea that you -- I'm skeptical of the idea that you will be  
11 able to do much in the way of general causation without  
12 bringing to trial experts who testify on general causation.

13 If you don't bring any of the experts you used at  
14 Phase I on general causation, then I think you are going to  
15 have -- if you are operating under the assumption that you  
16 could pull that off, I'm telling you now that I think you're  
17 going to have a problem because it would seem, then, that you  
18 would be planning to bring in through other witnesses' perhaps,  
19 you know, testimony that seeks to rebut what Dr. Weisenburger  
20 testifies to on the general causation front.

21 **MS. YATES:** Your Honor, if I'm bringing in an expert  
22 to really get into the general science, I understand what the  
23 Court is saying. Why can't I put on a defense that is just one  
24 case-specific expert with the foundation for that testimony?

25 **THE COURT:** Well, you could, but -- you certainly

1 could, but if it's -- as long as it is not using the  
2 case-specific experts who were not put to the test at  
3 Phase I to get in testimony that is similar to the testimony we  
4 considered at Phase I.

5 **MS. YATES:** I understand, but at the same time the  
6 ruling went against us in Phase I and clearly if I call someone  
7 at trial, they're not going to abide by your Phase I ruling  
8 because they are going to say "no general cause" at trial.

9 **THE COURT:** I don't understand what you're saying.

10 **MR. LASKER:** Your Honor, I just want to make one point  
11 because I'm a bit confused.

12 With a differential diagnosis, let's posit it this way,  
13 there are numerous risk factors. Okay? And let's say you're  
14 selecting among risk factors and saying which is more likely,  
15 and let's say that there is one risk factor that has an arch  
16 ratio of five. A specific causation expert, for example, on  
17 the defense would have to discuss what they understand about  
18 the Actel study and the epidemiology with respect to glyphosate  
19 in order to explain how they make a differential.

20 So to that extent, it's impossible, frankly, to be able to  
21 testify to a differential diagnosis without providing that type  
22 of testimony, and that's the issue I think that's confusing  
23 things.

24 **THE COURT:** Right. And I was assuming that it would  
25 be impossible to have a strict delineation between the concept

1 of general causation and the concept of specific causation.

2 I suppose you could just call somebody, as they apparently  
3 plan to do, to testify only about general causation --  
4 right? -- and just not get into Hardeman, but I understand the  
5 concept that when you're testifying about specific causation,  
6 you know, concepts from general causation are going to bleed  
7 into it; right?

8 But if -- and this is not something we're going to resolve  
9 now, but it's just important for me that you know the concerns  
10 that I have about this discussion. If you're going to put up a  
11 specific causation expert and they're going to testify about  
12 the different risk factors and they're going to get to the risk  
13 factor of glyphosate and as part of explaining why they don't  
14 think glyphosate caused Mr. Hardeman's cancer, they're going to  
15 do a repeat of everything that Dr. Mucci said, that's not  
16 appropriate.

17 **MR. LASKER:** Right.

18 **THE COURT:** Because you should have had that person  
19 testify to that at the Phase I proceeding.

20 **MR. LASKER:** Right. I don't think -- I think that may  
21 be where the confusion is. I don't think we have --

22 **THE COURT:** Or even half of what Dr. Mucci said.

23 **MR. LASKER:** I'm sorry. I misspoke.

24 **THE COURT:** If they spent half the time saying what  
25 Dr. Mucci said.

1           **MR. LASKER:** No, I understand that. I don't think we  
2 have an expert who, for instance, is going to be talking about  
3 all the issues of epidemiology or an expert talking about all  
4 the issues of avenue, all that stuff. That's not the issue  
5 with our experts.

6           **MS. YATES:** And apparently I'm just not being very  
7 clear.

8           **THE COURT:** You're not going to bring somebody to  
9 testify about -- what was it? The vault? Where one of your  
10 experts went to, like --

11           **MR. LASKER:** Yes. Right.

12           **THE COURT:** What was that room called? It wasn't the  
13 vault.

14           **MR. LASKER:** It was a glyphosate --

15           **MS. WAGSTAFF:** The glyphosate reading room.

16           **MR. LASKER:** The reading room in Europe, yes.

17 Dr. Steidl is not going to --

18           **THE COURT:** That's like up there with the  
19 Eiffel Tower.

20           **MS. YATES:** Yeah. No, Your Honor. No, Your Honor.

21 And I do think that --

22           **THE COURT:** Glyphosate reading room. I forgot -- I  
23 went to Spain in the spring. I forgot to go to the glyphosate  
24 reading room.

25           **MR. LASKER:** You missed that one, Your Honor.

1           **THE COURT:** Sorry.

2           **MS. YATES:** That's why I think the reports will make  
3 clear what we're doing. I am not going to have my  
4 case-specific expert adopt, repeat, say what Dr. Mucci said.  
5 If I feel I need that part of the science, Your Honor, in front  
6 of a jury, we will call Dr. Mucci. There won't be. And I  
7 think the reports will clear this up. It's part of their  
8 differential diagnosis, their methodology.

9           **THE COURT:** Okay. Well, I think, nonetheless, this  
10 discussion was worth having so that it sort of lays a marker  
11 for what I assume will be future discussions.

12           **MS. YATES:** Would you like me to continue down the  
13 list of experts, Your Honor?

14           **THE COURT:** I mean, I don't know. You listed to me  
15 your case-specific experts.

16           **MS. YATES:** Yes.

17           **THE COURT:** You designated some of the general  
18 causation experts.

19           **MS. YATES:** Yes, many of whom you'll be familiar with,  
20 Your Honor.

21           **THE COURT:** That's probably all I need to know at this  
22 point.

23           **MS. YATES:** Okay. Okay.

24           **THE COURT:** Okay. But, anyway, so there will be, you  
25 know --

1           **MS. WAGSTAFF:** Your Honor, before we move past this  
2 topic, could we have a little bit more guidance on the live  
3 testimony that you have on February 4th, 6th, and 11th?

4           **THE COURT:** Uh-huh.

5           **MS. WAGSTAFF:** You know, we put in our papers that  
6 we're not planning on bringing anyone. Between now and then,  
7 they are going to be -- Monsanto will be deposing every single  
8 one of these experts. They've deposed several of them before.

9           So if we could have a deadline of when they declare  
10 whether or not we need to bring them. Scheduling the experts  
11 is not just like a phone call. It takes a lot of coordination,  
12 and so we'd like some flexibility on if we can bring them on  
13 the 4th, the 6th, or the 11th; or we'd like some guidelines how  
14 long you're going to let each one -- Monsanto cross-examine  
15 each one, or is it going to be similar format as the last time.  
16 Or whatever Your Honor is thinking, I'd like some guidance.

17           **THE COURT:** Well, I mean, I guess I would be inclined  
18 to use an approach somewhat similar to the approach we used  
19 last time where we give each side a certain number of hours. I  
20 guess it will be -- you know, we will -- it will be -- you  
21 know, it will be full days, I assume, on those three days and  
22 each side will have a certain number of hours, and you can kind  
23 of decide how to use those hours.

24           How many hours should we assume in a court day, Kristen,  
25 for these purposes? Like, six?



1           **THE CLERK:** Let me look back at the minutes from --

2           **THE COURT:** It will probably be, like, you know, six  
3 hours a day total of airtime, which means three hours per day  
4 per side of airtime, nine total hours of airtime. Figure out  
5 how to use it. Figure out who your most important experts are.  
6 Figure out who Monsanto really wants to challenge and who you  
7 really want to challenge.

8           If you need further help from me in sort of setting it up,  
9 I'm happy to provide it; but as I sit here today, I'm not sure  
10 what else to say about it.

11           **MS. WAGSTAFF:** Okay.

12           **MS. YATES:** And I assume, Your Honor, that the *Daubert*  
13 challenges will relate to all three cases. We're not going to  
14 do them one at a time. We do have some different experts on  
15 specific cause. The plaintiffs experts do line up the same.  
16 There will be a lot, but you do one and then you have to do  
17 another one and another one. I'm not sure that's appealing to  
18 the Court or anyone else.

19           **THE COURT:** If you-all think it makes more sense to do  
20 the challenges for all three cases at the same time, that's  
21 fine.

22           **MS. YATES:** We can meet and confer.

23           **MR. MILLER:** Your Honor, speaking on behalf of  
24 Stevick, we'd like to do all three at the same time.

25           **THE COURT:** Okay.

1           **MS. YATES:** That's fine, Your Honor. And I can tell  
2 you where are the possible or likely challenges. The  
3 plaintiffs know.

4           **THE COURT:** I mean, it seems to me that what you  
5 should be doing for each other, and I can help you do this if  
6 you want, is maybe -- I mean, it seems like well before the  
7 *Daubert* hearings you guys should be paring down and announcing  
8 who you're going to call at trial so that the *Daubert* hearings  
9 are more efficient and so that the deposition process is more  
10 efficient.

11           **MS. WAGSTAFF:** So I haven't had a chance to talk with  
12 Monsanto's counsel about this except for briefly on a phone  
13 call a couple weeks ago, but at some point we need to get a  
14 more granular trial calendar schedule for these cases and have  
15 deadlines like exchanging witness lists and things of that  
16 nature.

17           So I would ask that I be afforded the opportunity to meet  
18 and confer with Ms. Yates and see if we can find a more  
19 granular trial schedule that allows us to do all this sort of  
20 stuff and maybe present it to the Court next week, if that  
21 works with her. I haven't talked to her about it yet.

22           **MS. YATES:** That works.

23           **THE COURT:** That sounds fine. That sounds fine. If  
24 you need to come back to hash things out more, hopefully we  
25 won't have to waste your time bringing you back in December,

1 but if you need to come back in December, let us know.

2 But why don't you try to hash that out, and what I would  
3 suggest is that you try to hash out a process by which you are  
4 paring down possible experts. Like, you know, agree to some  
5 process where you, you know, take turns eliminating experts  
6 from, you know, your own queue or something. I don't know.

7 But I know -- I'm looking at this list. I know you're not  
8 going to call all these experts. I know Monsanto is not going  
9 to call all the experts it's designated. So it certainly seems  
10 like it's in everybody's interest, including but not limited to  
11 mine, for you to narrow down the list before you file -- before  
12 the *Daubert* hearings and before you file the motions to exclude  
13 each other's experts.

14 **MS. YATES:** Understood, Your Honor.

15 **THE COURT:** So why don't you try to include a process  
16 along those lines.

17 **MS. YATES:** Okay.

18 **MS. WAGSTAFF:** Okay. And then one last question on  
19 the *Daubert* hearing. At the previous *Daubert* hearings, we were  
20 each assigned a room, sort of a prep room. Can we have the  
21 same rooms? And if so, do we talk to Ms. Mellen about  
22 scheduling that, or --

23 **THE COURT:** Is there any problem with that?

24 **THE CLERK:** No. I will work that out with the  
25 parties. I assume we're going to stay in here, or do you want

1 to go back up to Courtroom 8?

2 **THE COURT:** Oh, up to the -- I don't know.

3 **THE CLERK:** I think the only reason you were in there  
4 before was --

5 **THE COURT:** We had a request that it be videoed;  
6 right? Didn't we have a request that it be --

7 **THE CLERK:** Yeah.

8 **THE COURT:** Or maybe the request came from me actually  
9 because I wanted to refer back to it, which, by the way, it was  
10 very useful. I went back and I watched a lot of that testimony  
11 as we were preparing our ruling --

12 **MS. WAGSTAFF:** And our request --

13 **THE COURT:** -- as you may have seen from the ruling.

14 **MS. WAGSTAFF:** Our request would extend on through the  
15 trial as well. If we could sort of have the same room for the  
16 *Daubert* hearing and then the trial.

17 **THE COURT:** So those rooms were up on 19; is that the  
18 deal?

19 **THE CLERK:** Yes. We have two on this floor as well.  
20 However, I think we have a little bit more access to those  
21 rooms up there if we're going to be doing it up there, but I  
22 can still work it out with the parties and we'll figure it out.  
23 I just need to know whether it will be here or there.

24 **MS. WAGSTAFF:** Okay.

25 **THE COURT:** Do the parties -- do you want the -- I may

1 want the *Daubert* testimony recorded. I don't care as much  
2 about the trial, but does anybody have any objection to the  
3 trial being recorded?

4 **MS. WAGSTAFF:** Your Honor, we actually would prefer  
5 that parts of the trial be recorded, and in fact the whole  
6 thing, just simply so that we can have some  
7 cross-examination --

8 **THE COURT:** Wait. Can you say that again? You prefer  
9 that parts of the --

10 **MS. WAGSTAFF:** Sorry. No, we have no objection to the  
11 trial being recorded.

12 **THE COURT:** Okay. You don't have to decide now if you  
13 don't want to.

14 **MR. STEKLOFF:** I think we might need to get back to  
15 you on that, Your Honor.

16 **THE COURT:** Yeah, that's fine.

17 Okay. So is that all we need to discuss right now  
18 regarding the *Daubert* hearings?

19 **MR. STEKLOFF:** I had one additional -- good afternoon,  
20 Your Honor. Brian Stekloff.

21 I had one additional question about the *Daubert* hearings.  
22 I know that they'd been teed up focusing on specific causation.  
23 I anticipate we will be filing motions on other experts. So,  
24 for example, Dr. Benbrook was raised, who I think was described  
25 more as a liability-regulatory-type expert. I feel very

1 confident we will be filing a *Daubert* motion on him.

2 And my only question is whether --

3 **THE COURT:** You may decide it's not necessary to haul  
4 him in to cross-examine him. I mean, it will be sort of up to  
5 you to use your time.

6 **MS. YATES:** Right.

7 **MR. STEKLOFF:** Okay.

8 **THE COURT:** You may decide that's one I should decide  
9 on the papers.

10 **MR. STEKLOFF:** I agree. I just wanted to understand  
11 we could ask to bring him in.

12 **THE COURT:** Sure. Yeah.

13 **MR. STEKLOFF:** Okay. That's all I wanted to ask.

14 **THE COURT:** If it's important to you, yeah,  
15 absolutely.

16 **MR. STEKLOFF:** Okay. Thank you.

17 **MS. YATES:** Thank you, Your Honor.

18 **THE COURT:** Okay. Jury selection. Let's talk about  
19 jury selection.

20 Is it Stekloff?

21 **MR. STEKLOFF:** Yes, Your Honor.

22 **THE COURT:** Is that how it's pronounced?

23 **MR. STEKLOFF:** Stekloff, yes.

24 **THE COURT:** So let's start this discussion with a  
25 little exercise. Let's go to your brief on the issue of jury

1 selection. Let me pull it up.

2 **MR. WISNER:** Your Honor, ours or theirs?

3 **THE COURT:** Theirs.

4 **MR. WISNER:** Okay.

5 **THE COURT:** Okay. Eight pages, lots of cases cited.

6 Can you point me to any noncriminal case that you cited in this  
7 brief?

8 **MR. STEKLOFF:** I don't believe so, Your Honor.

9 **THE COURT:** Okay. So every single case you cited to  
10 me was a case about jury selection in a criminal trial, and  
11 what I said to you at the last hearing was this is not a death  
12 penalty case. It's also not a criminal case.

13 And so I guess the first overarching question I would ask  
14 you is: Why should all of these principles that you've pulled  
15 from these cases about jury selection in criminal cases where  
16 somebody's liberty is at stake and the issue is, you know,  
17 salacious allegations in the press about somebody confessing to  
18 a crime or, you know, the DNA evidence that the police gathered  
19 or whatever, why should those principles governing jury  
20 selection apply here in this civil case?

21 **MR. STEKLOFF:** The answer to that, Your Honor, is that  
22 I think the case law comes from primarily or exclusively from  
23 criminal law because those are the instances in which there is  
24 pretrial publicity of the extent that we have seen here.

25 This is a unique civil case given the circumstances of the

1 pretrial publicity in this context, and so we conceded I think  
2 in our paper that -- I mean, this is unique. Most of these  
3 cases that both parties have cited, if not all of them, involve  
4 change of venue motions and then the Supreme Court or other  
5 courts have weighed in to say whether the change of venue was  
6 necessary given the pretrial publicity.

7 This is very unique in that there's only been one trial.  
8 It was in the same jurisdiction. It was very recent. There  
9 was a large verdict, and there was unique publicity that, I'm  
10 not that old, but that in my experience even in trying several  
11 mass tort litigations have never seen the type of publicity  
12 that we've seen here, particularly around a verdict.

13 And so I think that that's --

14 **THE COURT:** But I think the problem is that you're  
15 adopting certain assumptions. You're adopting a number of  
16 assumptions that I think are incorrect. Okay? The first  
17 assumption is that knowledge of a jury verdict is more likely  
18 to make people believe that Monsanto should be liable.

19 I mean, you know, I'm guessing that all of us have been  
20 involved in conversations, "Did you hear about the big jury  
21 verdict?" And all of us have heard people react differently to  
22 that. Some people have said -- some people just say, "Wow,  
23 that's a big verdict." Other people say, "Right on.  
24 Monsanto's evil." Other people say, "That was ridiculous.  
25 That's an out of control jury." Right? People react in



1 different ways to a verdict.

2       So the fact that a verdict -- lawyers and nonlawyers. And  
3 so the fact that a verdict was handed down in favor of a  
4 plaintiff in a case against Monsanto I think is a lot less kind  
5 of prejudicial than you think. I don't think it's  
6 categorically different from other types of publicity than you  
7 think.

8       And just like, for example, somebody might have learned  
9 about Judge Shubb's ruling in the Eastern District of  
10 California saying that California is not allowed to require  
11 Monsanto to put a label on its product saying that it's known  
12 by the State of California to cause cancer and you should stay  
13 away from it, or whatever the label says. Right? And somebody  
14 might have seen an article and interpreted it as there was a  
15 judge who said that Roundup is safe in California, whatever.

16       But it doesn't follow that that person believes that  
17 Roundup is safe in California. It follows that the person --  
18 the only thing that follows is that -- the only thing we know  
19 is that the person is aware that some judge said that.

20       And that sort of gets me to the second assumption that I  
21 think you're incorrectly adopting, which is that people aren't  
22 capable of making their own decisions. And we have jury  
23 selections all the time in which, you know, we sit around as a  
24 group -- judge, lawyers, prospective jurors -- and we have a  
25 good healthy conversation about things you might presume,

1 things you might have heard, and we talk about how it's  
2 important as jurors to not decide the case based on things you  
3 might assume or things you might have heard but only on the  
4 evidence that comes on inside the four walls of the courtroom.

5 And the jurors who express serious reservations about  
6 being able or willing to do that are excused, and the jurors  
7 who say that they think they can do that and will try their  
8 hardest are not excused.

9 And then the third thing I guess I want to say about this  
10 is that after trial, in my own experience, jurors are even more  
11 serious about fidelity to that role than they are when they  
12 first come into the courtroom. By the time they're done with a  
13 trial, they've spent all this time in the sort of soaking in  
14 the gravity of the situation and spending all this time  
15 examining the evidence and deliberating with their jurors, boy,  
16 they really take their job seriously and they really take  
17 seriously the admonition that they are supposed to limit their  
18 consideration to the evidence that comes into the courtroom.

19 And so I think that your request to treat this like a  
20 death penalty trial -- I mean, I think -- number one, I think  
21 that a lot of the criminal -- a lot of the cases from the  
22 criminal law context adopt these incorrect assumptions about  
23 juror behavior also, but I think the assumptions are -- it's  
24 particularly important for us to avoid falling into those  
25 assumptions in a civil case when somebody's liberty is not at

1 stake.

2 And just to give you one recent example -- I brought my  
3 phone out because I was Googling it before we came out here.  
4 Just to give you one recent example of the kind of juror I'm  
5 talking about, I'm guessing you know who I'm going to bring up,  
6 headline: "Manafort juror Paula Duncan: Manafort is guilty,  
7 but Mueller probe is a witch hunt." Next headline: "Manafort  
8 juror wanted him to be innocent, but he wasn't." Right?

9 This is a woman who wore a "Make America great again" hat  
10 in her car to court every day sitting on a jury on a criminal  
11 trial of Paul Manafort, and she voted guilty because -- and  
12 that sort of goes to the third point that I was making, which  
13 is that however prospective jurors might feel about it at the  
14 beginning, jurors, after going through the gravity of a trial,  
15 take their responsibility very, very seriously. And whatever  
16 knee-jerk tendencies they might have had at the beginning are  
17 usually excised by the end because of how seriously they take  
18 their jobs.

19 And so, frankly, I don't see anything wrong -- we might  
20 not do this, but I don't see anything wrong with just getting  
21 everybody together in a room and having a fulsome discussion  
22 about Monsanto. And if some jurors say, "Well, I heard about  
23 this verdict," and some other prospective juror hadn't heard  
24 about the verdict before the discussion, I don't think there's  
25 anything wrong with that because the discussion among all of us

1 would be, "Yeah, but that prior verdict is irrelevant because  
2 your job is to decide the evidence on your own, and juries come  
3 out differently across the country all the time. And your job  
4 is to consider the evidence individually and not to make any  
5 assumptions about how this case should come out based on  
6 another jury's verdict or about Judge Shubb's ruling or based  
7 on anything that the IARC said or that the EPA said. This is  
8 going to be your job. Are you comfortable doing that? Can you  
9 put aside -- can you make your best effort to put aside all  
10 that stuff and just consider the evidence that came in here?"

11 "Well, I really don't think I can, Your Honor." Okay.  
12 That person's excused. And if they say, "Yes, I believe I can,  
13 I will do my absolute best to -- we're not robots but I will do  
14 my best to consider -- to put aside all assumptions and all  
15 knowledge I have and consider all the evidence, absolutely,  
16 Your Honor," then that person stays on unless you exercise a  
17 peremptory challenge.

18 I don't think there's anything wrong with that. I think  
19 that is a perfectly fair jury -- even if some members of the  
20 prospective jury learn about the verdict and they didn't know  
21 about it before, I think that's a perfectly fair jury selection  
22 process.

23 What I would consider is some sort of mechanism where, you  
24 know, we're going to have the questionnaires -- and I've looked  
25 at the questionnaires that you-all -- the proposed jury

1 questions that you-all have submitted. Overall they looked  
2 pretty good. I'll put together a draft questionnaire taking  
3 the material that you've given me, and I'll circulate it and  
4 get comments from you. We'll put together a questionnaire, and  
5 we'll have an opportunity to see who has strong feelings about  
6 Monsanto and about the verdict. We can ask them a question  
7 about the verdict kind of "Have you heard about a verdict  
8 involving Monsanto," similar to the one you drafted.

9       And some of those people will give answers that will  
10 probably require their excusal before they even set foot in the  
11 courtroom, others we'll need to talk to them; and we'll figure  
12 out a way during jury selection maybe to have a group  
13 discussion with only the people who have heard about the  
14 verdict or have other sort of special knowledge about Monsanto.

15       We'll probably have everybody -- here's what I'm thinking  
16 now is we'll have everybody in. We'll do hardships. Welcome  
17 everybody. Introduce everybody. Do hardships. We will have  
18 screened people for time availability but even after doing  
19 that, there will still be some people who have something going  
20 on that they say that prevents them from serving.

21       And then I'll probably have the prospective jurors  
22 introduce themselves by answering a list of, you know, 10  
23 questions like the one on our Web page, something along those  
24 lines.

25       And then after that, maybe we will preselect the people

1 who we want to stay and have a half-hour discussion with them,  
2 people who have demonstrated knowledge of the verdict or some  
3 other aspect of this case. And we'll excuse everybody else,  
4 tell them they have a half-hour break. We'll talk to the  
5 subset of people. I will explain to them that they have to --  
6 you know, if they want to be a juror, they have to be able to  
7 put that stuff aside and consider only the evidence that comes  
8 in in the case, and we'll get a sense from people whether they  
9 can do that. Excuse those who can't. Leave in the jury pool  
10 those who can. Call everybody back in, and then we'll do --  
11 you know, we'll continue with the normal jury selection  
12 process.

13 That's what I think we will do. I may also write an  
14 opinion on this topic because I think, you know, like I said,  
15 there are a lot of erroneous assumptions about juror behavior  
16 out there in the case law.

17 But, anyway, so that's what I'm very strongly inclined to  
18 do. If you want to say anything else about it, feel free.

19 **MR. STEKLOFF:** I face an uphill battle, so I'm not  
20 sure how far to go into the details. Just if I can make a few  
21 points, Your Honor.

22 I agree that there will be jurors who know about things  
23 other than the verdict. Some I think will probably -- we would  
24 argue would be negative toward Monsanto. Some the plaintiffs  
25 might argue would be adverse toward their position.

1           We are not asking -- I mean, I agree with you that the  
2 normal process applies to those people. The very core group  
3 that we are focused on is a group that would have knowledge of  
4 the Johnson verdict, as I think you've articulated.

5           **THE COURT:** I know you're focused on that, but I  
6 just -- I don't have -- I don't -- I haven't yet wrapped my  
7 brain around why you're so focused on that.

8           I mean, I think you've adopted this assumption that people  
9 cannot think for themselves and that somehow knowledge of a  
10 prior verdict against Monsanto means that they're not going to  
11 be able to assess the -- or means that there's a serious risk  
12 they're not going to be able to assess for themselves the  
13 evidence, and I just think that's wrong. I don't think it's --  
14 I don't see why it's qualitatively different from any other  
15 knowledge that somebody might bring into the courtroom as a  
16 prospective juror.

17           **MR. STEKLOFF:** I was trying to think of the criminal  
18 analogy of this before the hearing, and I had a case where it  
19 was a high-profile criminal case. There were underlying  
20 predicate charges and then a series of 924(c) charges of using  
21 a firearm in furtherance of those underlying charges, and there  
22 was a verdict. The jury was hung on all of the underlying  
23 charges.

24           There was a question during the deliberations about the  
25 924(c) charges, a big dispute with the judge about how to

1 instruct the jury. The jury came back and convicted on all of  
2 the 924(c) charges in part because we had conceded during the  
3 trial that my client, the defendant, had had a gun during the  
4 alleged events, and then media came out where the jurors  
5 explained that that was their rationale.

6 The judge then reversed the verdict or dismissed the  
7 verdicts, and we had a retrial from scratch. And I will  
8 concede that I don't remember the details of the jury selection  
9 process there, but I think that's more analogous to what we're  
10 dealing with here is, in that second trial, if there were --  
11 and none of these cases, I will concede on both sides, involved  
12 those facts. They involved different types of pretrial  
13 publicity in jurisdictions where parties were aimed at seeking  
14 change of venue.

15 In that second trial you don't -- my position in that case  
16 would be you wouldn't want those jurors who knew about the  
17 prior verdict, maybe they didn't understand all the legal  
18 ramifications of the jury instructions, but that there was a  
19 conviction of the client who was then going back to trial.

20 So I sort of use that in that what we are trying to argue  
21 here is that this type of knowledge -- I don't -- I agree with  
22 you. Are there jurors who know about the Johnson verdict who  
23 can come in and be fair and put that to the side? I will  
24 concede that the answer is, yes, there are some jurors like  
25 that; but I think one of the reasons we did the survey, and we



1 didn't know the results beforehand, was to see if there was  
2 objective data to demonstrate that there is a serious risk.

3 **THE COURT:** But the survey is -- I mean, come on.  
4 Like, you have to control for the possibility that people who  
5 are aware of the verdict are more likely to be predisposed  
6 against Monsanto from the beginning. I mean, that survey is  
7 not worth anything.

8 **MR. STEKLOFF:** But I think the same problem -- whether  
9 you control for that or not -- even accepting your view on the  
10 survey, if people here -- I think people here who may come in  
11 and have knowledge of the verdict may be predisposed to have  
12 bias against Monsanto. And so I guess our position -- my  
13 position is: Why introduce this into the trial?

14 If --

15 **THE COURT:** We're not introducing it into the trial.  
16 It's not going to be admissible at trial.

17 **MR. STEKLOFF:** Well, why --

18 **THE COURT:** It's going to be -- again, in juries  
19 across America, every day topics come up during jury selection  
20 that are inadmissible at trial.

21 **MR. STEKLOFF:** I articulated that poorly. I think  
22 even if you subconsciously know that a group of your peers  
23 viewing similar evidence from a lot of overlapping experts -- I  
24 don't know if that will come out or not, but they might gauge  
25 by when there's impeachment that you previously testified.

1 They might assume that it was part of the Johnson trial if they  
2 know about the Johnson trial.

3 So if that -- it is different to say, "Okay. I heard  
4 about some issue with Roundup in the news. I heard about some  
5 issue with Monsanto." That, I think, we want to address  
6 through your process.

7 The Johnson verdict subconsciously, if you know that a  
8 prior version of your peers gauged this evidence and not only  
9 ruled against Monsanto but did so in the amount of  
10 \$289 million, I think that's -- even a potentially subconscious  
11 view, I agree with you, by the end of trial -- I mean, I have a  
12 lot of faith in the jury system so why -- I guess our point is  
13 where approximately a quarter of the jurors, at least in the  
14 survey, which you may view is worthless, but we're not talking,  
15 I don't think, about 80 percent of the jurors, if we excused  
16 the minority of the jurors who have this knowledge, I don't  
17 think it would slow down the trial at all. We would have  
18 opening at the same time.

19 **THE COURT:** Right.

20 **MR. STEKLOFF:** And we would be able to get a jury --

21 **THE COURT:** And my only point is that we can explore  
22 those issues, but I don't believe it's necessary to do  
23 individualized questioning to explore those issues, and I don't  
24 believe there's any harm caused if, you know, some prospective  
25 jurors who were not aware of the verdict became aware of the

1 verdict during jury selection as long as everybody made clear  
2 that they're willing to make their best effort not to consider  
3 anything other than the evidence that comes in in the case.

4 That's my only point.

5 It's totally appropriate to explore that stuff, but I'm  
6 not -- I don't believe it's appropriate to waste multiple days  
7 of people's time -- and by "people" I mean members of the  
8 community -- doing individualized questioning of prospective  
9 jurors in a civil case.

10 Like I said, what I will be willing to do is have a  
11 separate session with the group of people who have some  
12 specific knowledge, and we can figure that out based on the  
13 questionnaires.

14 But I will tell you that if during the jury selection  
15 process jurors who were not aware of the Johnson verdict become  
16 aware of the Johnson verdict, I don't think that's a big deal  
17 at all as long as they make clear during jury selection that  
18 they are willing to not consider it and focus only on the  
19 evidence that comes in at trial.

20 I was going to make one more point, one more comment. I  
21 can't remember what it is.

22 So, anyway, we're not doing a multiday jury selection  
23 process. We will pick the jury in a day. It probably won't  
24 take the whole day. We will get their questionnaires and we'll  
25 go through their questionnaires, and we'll spend some time

1 figuring out who should be excused just on the paper and who  
2 needs to come in, and we'll pick a jury, I'm confident, in less  
3 than a day.

4 **MR. WISNER:** Would the expectation be that we would  
5 open that day?

6 **THE COURT:** No. Probably open the next morning.

7 **MR. WISNER:** Okay.

8 **THE COURT:** Just to preserve everybody's sanity.

9 **MR. WISNER:** Two comments, Your Honor. I'm waiting  
10 because my colleague --

11 **MS. WAGSTAFF:** Just on that, you currently under  
12 PTO 53 have jury selection scheduled for the 20th of February  
13 and then opening statements the 25th. So should --

14 **THE COURT:** It sounds like a good idea.

15 **MS. WAGSTAFF:** So we're going to just keep that and  
16 not do opening the next day?

17 **THE COURT:** Yeah.

18 **MS. WAGSTAFF:** Okay.

19 **THE COURT:** That should -- yes.

20 **MR. WISNER:** Good catch.

21 Your Honor, two comments. One is actually sort of  
22 amusing. One of my clients was actually selected for this  
23 survey, and she sent me a link to it and I actually considered  
24 going into it and writing something really salacious so that I  
25 can show the e-mail that I actually did it to invalidate the

1 survey, but I decided not to and they didn't complete the  
2 survey either.

3 The second issue, Your Honor, and this is something that  
4 we'll probably have to address closer to trial, is this idea  
5 that the Johnson verdict is wholesale inadmissible, and I think  
6 there's some truth to that except for one really important  
7 fact. I'm not sure if the decision has been made to  
8 bifurcate --

9 **THE COURT:** The Neil Young and Daryl Hannah letter?

10 **MR. WISNER:** No, Your Honor. Those we're not going to  
11 be seeking any admission of.

12 But immediately after the Johnson verdict, the CEO for  
13 Bayer went and spoke, we have the recording of it, and said  
14 that the \$250 million in punitive damages changes nothing. And  
15 one of the primary purposes of punitive damages is actually to  
16 deter future wrongful conduct, and so this is actually a  
17 corporate admission that \$250 million is insufficient to change  
18 corporate conduct.

19 **THE COURT:** Okay. Well, we'll talk about that at the  
20 *motion in limine* stage --

21 **MR. WISNER:** Sure.

22 **THE COURT:** -- but it does lead directly into the next  
23 topic that I wanted to discuss, which is this is sort of an  
24 introductory discussion to help us dive into the discovery  
25 disputes, to the extent that any remain. Hopefully you're

1 going to tell me at some point that no discovery disputes  
2 remain.

3 But the general topic that I want to discuss that I think  
4 will inform the discussion on a number of discovery disputes is  
5 a topic that, you know, we've been discussing for many months,  
6 which is the relevance and admissibility of exclusions by  
7 agencies that Roundup is dangerous or is not dangerous or is  
8 potentially dangerous or whatever. Okay?

9 And I guess --

10 (Counsel conferring.)

11 **MR. WISNER:** Sorry, Your Honor.

12 **THE COURT:** That's okay.

13 I guess I've developed a tentative view on this, not a  
14 strong tentative view, a very tentative view. I think my very  
15 tentative view is that certainly there is at least a strong  
16 argument that what the agencies have done, what the EPA has  
17 done is relevant on the issue of punitive damages.

18 I mean, I would think that if I were Monsanto, on the  
19 issue of punitive damages, I would want to parade in front of  
20 the jury all of the agencies that have concluded -- have signed  
21 off on use of glyphosate or have concluded that glyphosate is  
22 safe, or whatever it is their conclusions were.

23 But on the issue of causation, I think that while you  
24 can't say that the EPA's decision or the IARC's decision or the  
25 European Union's decision is irrelevant, it's relevant, but I

1 wonder if all of that stuff should be excluded under 403 on the  
2 issue of causation because the jury's job, again, is to  
3 consider the actual evidence that is presented in the courtroom  
4 about whether glyphosate caused Mr. Hardeman's non-Hodgkin's  
5 lymphoma.

6 And, yes, it's relevant that the EPA concluded that it's  
7 safe. It's relevant that the IARC concluded that it's a  
8 probable carcinogen, but under 403, I wonder if allowing  
9 evidence in at all about those conclusions on the issue of  
10 causation will create too much of a distraction from what is  
11 the more important inquiry, which is: What did the  
12 epidemiological studies show? You know, what are the risk  
13 factors for NHL? And how big of a risk factor was glyphosate  
14 compared to the other risk factors to which Mr. Hardeman was  
15 exposed?

16 I think -- and, you know, I kind of want to go back and  
17 look at how the state court trial went. I haven't done that  
18 yet. But, you know, all that stuff came in in the state court  
19 trial, am I right? IARC --

20 **MR. WISNER:** Define "come in," Your Honor.

21 **THE COURT:** What was the rule governing the state  
22 court trial about the IARC's conclusions and the EPA's decision  
23 and the European Union and all that?

24 **MR. WISNER:** So there was quite a bit of litigation  
25 about this. The IARC monograph came into evidence. The 2016

1 issue report by the EPA, the most recent one, did not come into  
2 evidence for the truth of the matter asserted but was admitted  
3 for the purposes of showing Monsanto's state of mind  
4 specifically to this punitive damages idea --

5 **THE COURT:** Punitive damages, uh-huh.

6 **MR. WISNER:** -- which we objected to strenuously, and  
7 I can get into that later because there's a logical fallacy in  
8 that.

9 **THE COURT:** Yeah.

10 **MR. WISNER:** And the reason why the IARC monograph  
11 came into evidence was because they didn't object to it at the  
12 beginning of the trial, and so that's -- I think the judge made  
13 it clear that if they had objected under hearsay grounds, it  
14 never would have come in, the document itself.

15 Now, the other issue is the existence of IARC's  
16 determination altogether and EPA's classifications over the  
17 years. I don't think either side ever contemplated those as  
18 being off limits completely.

19 For what it's worth, when I tried the case, I focused  
20 primarily on the studies because when you go down to what do  
21 the authorities say, I have IARC and they have the rest of the  
22 world. We couldn't talk about California but they were allowed  
23 to talk about the EPA, Federal EPA. So there was a lot of  
24 hands tied behind our back in that regard. And for what it's  
25 worth, a lot of their experts based a lot of their opinions on



1 the EPA documents and, in fact, that was the bulwark of their  
2 testimony. So it would be hard to see how it unbuckles.

3 The problem that I would see --

4 **THE COURT:** Why? I mean, when we did the general  
5 causation phase, it seemed to me certainly it came up. You  
6 know, certainly it was part of everybody's testimony, but the  
7 bulk of the testimony was about the studies themselves. And,  
8 you know, we didn't -- and I excluded expert testimony whose  
9 methodology was "I adopt the analysis of the IARC"; right? I'm  
10 sure you disagree with that, but I excluded it. It would,  
11 therefore, be excluded -- such testimony would, therefore, not  
12 be admissible at trial.

13 And so I guess I'm thinking back to the testimony that,  
14 like, Dr. Ritz provided, Dr. Portier provided, Dr. Mucci  
15 provided; and I'm thinking, well, if the EPA and the IARC were  
16 off limits to them, they would have given substantially the  
17 same testimony.

18 **MR. WISNER:** Absolutely.

19 **THE COURT:** Their testimony would not have been that  
20 different, and so that makes me wonder why we should be getting  
21 into it at all.

22 **MR. WISNER:** Because the case is not just does this  
23 cause cancer. There's a lot more involved in the liability  
24 context. And let me give you some very specific examples;  
25 right?

1           Monsanto's conduct following the IARC monograph or even  
2 before it came out is very clear evidence of punitive intent.  
3 It shows a desire to manipulate scientists to orchestrate -- I  
4 mean, it's our position. I'm sure they disagree. I'm just  
5 giving our pitch.

6           And it shows --

7           **THE COURT:** Hold on. I think I understand all those  
8 arguments.

9           **MR. WISNER:** Okay.

10          **THE COURT:** So you and I are pretty much on the same  
11 page here, but then the question is: Why not bifurcate the  
12 trial?

13          **MR. WISNER:** So --

14          **THE COURT:** And why not do a punitive damages phase,  
15 if necessary, after the jury conducts an inquiry into causation  
16 that is not muddied up by all of this stuff that you are  
17 talking about right now?

18          **MR. WISNER:** So there's a couple of important parts of  
19 this; right? So, for example, the IARC participation,  
20 Dr. Portier is an important part of the cross-examination.  
21 They tried to impeach his credibility saying he went there to  
22 influence IARC so he wanted to make money as a plaintiffs'  
23 lawyer -- expert; right? There's a whole bunch of sideshows  
24 that are part of it; but I think the core issue, Your Honor, is  
25 this statement.

1           **THE COURT:** Let's assume for the sake of argument that  
2 I said you can't cross-examine Dr. Portier about that.

3           **MR. WISNER:** So this is a statement that's the  
4 problem. The first words that will come out in opening  
5 statement -- and I know this because this is what happened in  
6 the Johnson case -- "Roundup has been on the market for 40  
7 years. It has a demonstrated record of safety." And there's  
8 so much untruth about that that we have to unpack. We will do  
9 that with evidence, but a lot of it involves IARC because what  
10 IARC did is it's the change in the narrative.

11           Because every single juror that I've interviewed, and  
12 we've done a lot of jury science, they go, "Well, it's been on  
13 the market for 40 years. It must be safe." They said the same  
14 thing about tobacco. They said the same thing about asbestos.

15           The simple fact is IARC was a game changer; right? It was  
16 the first time a group of independent scientists -- this is our  
17 viewpoint; you don't have to agree -- looked at it with no dog  
18 in the fight and made a decision, and that's why -- and the way  
19 they responded to it and the way they generated junk science.  
20 Science, by the way, that their experts rely upon; for example,  
21 the Intertek manuscripts; for example, these are all sort of  
22 integrated into the case.

23           And if we did this sort of hermetic look at just does it  
24 generally cause cancer, I think that really creates a lot of  
25 problems. We'd have to bring back the experts afterwards. For

1 example, Dr. Jameson. He's one of our experts. He's also a  
2 fact witness and so is Dr. Portier; right? He was at IARC.

3 And part of his process of understanding the science was  
4 the science that he had to do, the discussions he had with his  
5 fellow scientists at the IARC monograph program, his in-depth  
6 analysis that he's done after the fact looking at the tumors  
7 and all the rodent studies. I mean, it's unbelievable the  
8 amount of work that he's done. And all of that really is  
9 framed around IARC. If it's not, then it looks like he's just  
10 out there just doing all this crazy stuff by himself, and he  
11 isn't. He's actually joined by hundreds of scientists that  
12 support his position.

13 And under California law, the jury instruction  
14 specifically contemplates whether or not the science was  
15 generally knowable at the time when the warning should have  
16 been given. And so that --

17 **THE COURT:** You're talking about on the issue of  
18 punitive damages?

19 **MR. WISNER:** No. That's just general failure to warn  
20 liability.

21 **THE COURT:** Okay.

22 **MR. WISNER:** And so the context and quality of the  
23 science and whether or not it is supported by an authority is  
24 part of the case, and I don't think looking at it in isolation  
25 can possibly work or be fair to us or them.

1           And I don't know how their opening or closing would even  
2 look like without the EPA because that was their case, and it's  
3 a strong case. You know, it's hurtful for us, but IARC is also  
4 very important to our case, and I think we would not want to  
5 bifurcate, at least that issue.

6           Now, the issue of bifurcating punitive damages, which is a  
7 little different because that's talking about Monsanto's  
8 conduct ratification by managing agents, et cetera, I think we  
9 would oppose that, but I think that would be something we'd  
10 need to brief more in depth.

11           But the issue of bifurcating just general causation I  
12 think would not be useful. I also think it would really extend  
13 the length of the trial because --

14           **THE COURT:** It would extend the length of the trial?

15           **MR. WISNER:** Yeah, considerably. Because, let's say,  
16 we -- and this is what we actually argued against bifurcation  
17 in discovery at the very beginning -- right? -- is when you do  
18 that, you have all this time and energy spent we bring in  
19 Portier and Ritz and whoever, they bring in Mucci or Ryder,  
20 whoever they decide to call or not call, the jury decides the  
21 issue. We have closing arguments --

22           **THE COURT:** I want to make sure we're on the same  
23 page. I'm not saying bifurcate general causation.

24           **MR. WISNER:** Okay.

25           **THE COURT:** I'm saying bifurcate causation and damages

1 or maybe causation and damages and then punitive damages.

2 **MR. WISNER:** Okay.

3 **THE COURT:** That's what I'm saying.

4 **MR. WISNER:** So then when it comes to the punitive  
5 issue, this is something we run into in all products liability  
6 cases, and that is a lot of the evidence that's probative to  
7 punitive damages is also probative to negligence. And so  
8 that's the argument we always make.

9 And then typically in California the way it's done, if  
10 there is bifurcation, it's just bifurcation on punitive  
11 damages, not punitive liability. So you ask the jury in the  
12 initial "Do you believe by clear and convincing evidence that  
13 they acted with malice as defined by these instructions," or  
14 whatever the verdict form says; and if they click "yes," then  
15 typically the bifurcation -- and this has happened in every MDL  
16 that I've participated in where punitive damages were on the  
17 table -- then there's an argument about damages. It usually  
18 goes about 10 minutes. It may be like 5, 10, 15, 20 minutes of  
19 testimony from Dr. Mills who says "Their net worth is X" and,  
20 you know, we try to get in that they said 250 wasn't enough or  
21 whatever.

22 **THE COURT:** But you're saying that typically in the  
23 first phase the jury is asked whether the conduct was malicious  
24 so most of that evidence, but why does that have to be the  
25 case? I mean, why does the jury have to answer that question

1 in the first phase of the case?

2 **MR. WISNER:** Because it is almost impossible to say  
3 that this is solely going to malice and not -- or solely going  
4 to negligence. Very often those things coincide. And, in  
5 fact, you know, malice is a higher standard so negligence is in  
6 many ways subsumed in the violation of the duty that is imposed  
7 upon the manufacturer. So it really becomes an intellectual  
8 exercise that will lead to just hours and hours of us arguing  
9 about whether or not that's negligence or punis or both and if  
10 it needs to be dissected, and that's just not how we typically  
11 do trials. And that's why we would oppose that, Your Honor.

12 **THE COURT:** I mean, I understand. Those are fair  
13 points, but I'm still left feeling that on the issue of whether  
14 Hardeman's cancer was caused by glyphosate, in large part  
15 whether the EPA signed off on it, whether the IARC raised  
16 concerns about it is kind of a sideshow. It's kind of, as the  
17 judges like to say, you know, a minitrial about something that  
18 is a bit peripheral to the primary inquiry, and that's the  
19 concern that I have and that's the concern I have of a lot of  
20 these discovery requests.

21 **MR. WISNER:** And I totally understand that,  
22 Your Honor, and I appreciate that issue. I think that for us,  
23 our viewpoint on it is really not so much about 403 but more  
24 under hearsay rules under Rule 8 -- the 800 series. Because,  
25 you know, for example, IARC, they're going to have the benefit

1 of actually having members of the IARC panel testify and  
2 cross-examine them about what they did, didn't do, et cetera,  
3 what they considered, what they didn't.

4 The EPA document comes in without a witness; right? We  
5 don't have the author to cross-examine and say, "Well, why  
6 didn't you follow your guidelines? And here's what the SAP  
7 said."

8 All of that, Your Honor, was actually part of the Johnson  
9 trial. We actually did it, and I think we navigated that  
10 complicated issue pretty well, you know, and we ended up, you  
11 know, presenting both sides and Monsanto ultimately didn't call  
12 all of their experts I think because they knew it would open  
13 doors it didn't want, and so that's sort of how it proceeded.

14 But, I mean, the simple fact is, you know -- like here's  
15 an example --

16 **THE COURT:** Well, it's going so well for them. I  
17 mean --

18 **MR. WISNER:** Here is a great example. Dr. Mucci takes  
19 the stand in Johnson -- okay? -- and she has a textbook about  
20 epidemiology where she discusses examples of carcinogens that  
21 she believes are proper carcinogens where there's no  
22 insufficient epidemiology, and the basis of that list in her  
23 textbook is IARC. It's not EPA. It's IARC.

24 And I had the privilege of cross-examining Dr. Mucci and  
25 saying, "Well, you're saying epidemiology doesn't support



1 causation here, but you agree that you don't need epidemiology  
2 to prove cancer. In fact, here's a list that you created  
3 saying that, and it's based on IARC; right? And you haven't  
4 looked at tox and you haven't looked at all these other things,  
5 and so you don't know if that stuff would actually change your  
6 mind. So really you're just sitting here looking in isolation  
7 at it." So that was my cross-examination.

8 And I think it was --

9 **THE COURT:** It sounds like you're enjoying reliving  
10 that cross-examination.

11 (Laughter)

12 **MR. WISNER:** Few things do I enjoy more than  
13 cross-examining experts, Your Honor, or directing for that  
14 matter.

15 But all that said, at the end of the day, it's part of the  
16 case and I think that when California law specifically looks to  
17 whether or not these are generally accepted scientific --  
18 knowable in the scientific community, what the EPA did and what  
19 IARC did, it has to be part of that. It seems like it would be  
20 very difficult. For example, on appeal it would just create --  
21 I think it would create lots of issues on both sides if none of  
22 that stuff came in.

23 I mean, just I'm saying for us we're looking at this long  
24 term, not just the verdict but also, you know, getting all  
25 these cases towards resolution at some point. And so, you

1 know, for example, if it went up on appeal and it was  
2 overturned on that issue because both sides should have been  
3 allowed, then we have to retry the case and we're back to  
4 square one.

5 And so -- sorry. I'll let you speak. I've been talking  
6 for a long time.

7 **THE COURT:** Why don't you address this kind of general  
8 topic that we've been discussing, then we'll take a little  
9 break and we'll get into whatever discovery disputes. I'll  
10 take a break. You get together and resolve the rest of your  
11 discovery disputes.

12 **MR. STEKLOFF:** Yes, Your Honor.

13 So there is precedent for what you're describing, which I  
14 think is known as reverse bifurcation, in which the jury --

15 **THE COURT:** Sorry. Could you say that again?

16 **MR. STEKLOFF:** Sure.

17 **THE COURT:** What bifurcation?

18 **MR. STEKLOFF:** Reverse bifurcation.

19 **THE COURT:** Okay.

20 **MR. STEKLOFF:** And that is a procedure under --

21 **THE COURT:** I've never heard that phrase.

22 **MR. STEKLOFF:** It is exactly what you, I think, are  
23 contemplating, which is that causation, both general and  
24 specific, is addressed first --

25 **THE COURT:** Okay.

1           **MR. STEKLOFF:** -- and the jury makes a determination  
2 on whether or not the plaintiffs have satisfied their  
3 scientific causation requirements.

4           And only if the jury does so does the case then go to  
5 liability in terms of corporate conduct, corporate  
6 responsibility, all the internal e-mails and documents that the  
7 plaintiffs will want to show through their various experts or  
8 confront our witnesses with.

9           And so there is precedent for that, and that I think is  
10 exactly what you're contemplating. Because in the initial  
11 phase -- I understand on the margins there are arguments where  
12 Mr. Wisner has now made that IARC somehow is even relevant to  
13 the causation point. I mean, he raised Portier. I'm happy to  
14 not cross Dr. Portier about IARC in a world in which IARC is  
15 excluded.

16           And so I think that that's a good idea, would be to  
17 proceed in a world in which the plaintiffs have to establish  
18 both general causation under the -- you know, within what  
19 you're discussing, which is Dr. Ritz would come on and talk  
20 about the epidemiology, and Dr. Weisenburger would come on and  
21 do the same, but then also they would present their  
22 case-specific experts. We would call, you know, potentially  
23 Dr. Mucci, Dr. Ryder, and our case-specific experts. This is  
24 all assuming we get past the *Daubert* stage.

25           And then the jury would have to decide does -- I mean, I

1 don't know what the exact questions would be sitting here now,  
2 but essentially: Roundup or glyphosate, is it capable of  
3 causing cancer? And then if the answer is yes in  
4 Mr. Hardeman's case, was that a substantial contributing factor  
5 to this?

6 **THE COURT:** You don't even have to ask those two  
7 questions. You can just ask whether it caused his cancer.

8 **MR. STEKLOFF:** Sure. If the answer is no, then we're  
9 done. That actually, talk about efficiency, is much more  
10 efficient. That would be a much shorter trial if the answer is  
11 no.

12 If the answer is yes, then witnesses come on the stand and  
13 they talk about -- again, I am confident that there are  
14 internal e-mails or other documents that they want to show. I  
15 think we would have lots of disputes about how much beyond that  
16 we go, and even IARC and EPA I think we might debate whether  
17 those come in in the second stage; but let's assume for  
18 purposes here they do, it would be a different question that  
19 the jury was asking, which is did Monsanto -- I mean, I don't  
20 have the exact claims here, but essentially, like, failed to  
21 warn -- you know, meet their responsibilities to warn  
22 Mr. Hardeman about -- about the -- about glyphosate and its  
23 potential to cause cancer.

24 **THE COURT:** What about the concern that sort of  
25 leaves -- by taking all of that out, it leaves the impression

1 that anybody who might be in charge of assessing whether  
2 glyphosate is dangerous has not done anything to -- not taken  
3 any measures with respect to glyphosate?

4 **MR. STEKLOFF:** Well, if --

5 **THE COURT:** In other words, that was a very  
6 inarticulate way of repeating Mr. Wisner's point, which is it's  
7 been there for 40 years, it must be safe.

8 **MR. STEKLOFF:** But if we are not allowed to argue what  
9 the EPA -- so what the EPA did or what another foreign  
10 regulatory agency -- governmental agency did, I don't really  
11 think it does leave that impression in the sense that -- I  
12 mean, this happens, for example, where -- I don't have a ton of  
13 examples off the top of my head, but where it's happened before  
14 you have an FDA-approved pharmaceutical that's on the market  
15 and there isn't a lot of -- the FDA regulatory experts, for  
16 example, that the plaintiffs like to bring, in those cases  
17 don't testify in this first phase about causation.

18 The question is: Does that medicine cause, both generally  
19 and specifically, the injury that plaintiffs are claiming? And  
20 so this is -- courts are able to resolve that issue in a  
21 reverse bifurcation context.

22 **THE COURT:** Well, I think for now -- I mean, how --  
23 for purposes of your trial planning, when should we decide  
24 whether there is going to be a bifurcation of this? I mean, I  
25 want to seriously entertain the possibility of doing this, but

1 I understand it's a very important decision. I don't want to  
2 decide it off-the-cuff now.

3 When would you need a decision on whether we're going to  
4 bifurcate, you know, along these lines for your planning  
5 purposes?

6 **MR. WISNER:** That's something we really kind of needed  
7 to know already. I don't mean to say that coyly, Your Honor.  
8 It's just --

9 **THE COURT:** So I should make a decision on that very  
10 quickly?

11 **MR. WISNER:** Yes, and I think that we should brief it  
12 immediately if that's going to be really a potential issue. I  
13 think that it raises a lot of serious problems for us,  
14 particularly, for example, that every single juror that sits in  
15 that box is going to know it's on the market and, therefore,  
16 the EPA has approved it. So it's implicit in every single  
17 juror's knowledge so this products approach --

18 **THE COURT:** You are in San Francisco so maybe half the  
19 jurors think that --

20 **MR. WISNER:** Monsanto is evil and whatever.

21 **THE COURT:** -- the fact that EPA approved it, means  
22 that it's dangerous.

23 **MR. WISNER:** Maybe but that fact will be there if we  
24 can't counter that fact that the IARC which, you know -- for  
25 what it's worth, IARC in the realm of academics is like the

1 Blue Bloods of scientists, you know. So it's, like, the fact  
2 that our guys have all been on panels and they were there, I  
3 mean, that's really an important part of the gravitas of their  
4 opinion.

5 There's a reason why when Dr. Portier took the stand in  
6 our trial, it was basically done. His opinion is so thoughtful  
7 and in depth that they have to -- I don't know.

8 So, anyway, that's our position. I don't want to wax  
9 emotion about it, but we'd like to brief this issue immediately  
10 because this really, really kind of goes to the core of  
11 everything and would make our trial significantly more  
12 expensive because we'd have to bring back Portier, for example,  
13 after and he's in Europe, and -- I mean, I know you shake your  
14 head, Your Honor, but this is going to be costs borne by  
15 Mr. Hardeman. It's not being borne by a thousand plaintiffs;  
16 right? And Mr. Hardeman, it's going to be reduced from his  
17 judgment.

18 And so it's something -- that's one of the reasons why we  
19 were so concerned about bringing live testimony is we can't  
20 ethically have another person pay for it. It has to be the  
21 person whose case is going up for trial, and so it's a lot of  
22 money.

23 **THE COURT:** Is that true? Really?

24 **MR. WISNER:** I think it's over \$200,000.

25 **THE COURT:** But, I mean, the plaintiff group, that

1 can't be funded by the group as a whole?

2 **MR. WISNER:** The general causation, absolutely, and  
3 that was applied to everyone.

4 **THE COURT:** Right.

5 **MR. WISNER:** Specific causation is by definition not  
6 general. We can talk about this. I'm not going to say --

7 **MR. MILLER:** We can talk about it later.

8 **MR. WISNER:** We can talk about it later and we can  
9 work it out. I think it's a tricky issue, Your Honor.

10 **THE COURT:** I mean, I'm obviously no expert and so  
11 don't quote me on anything I say, but my gut commonsense  
12 reaction is everybody in the group has a very strong interest  
13 in how this trial goes, you know.

14 But, anyway, you were going to say something? And then  
15 we'll take a break.

16 **MR. STEKLOFF:** I mean, first, Dr. Portier is not  
17 specific causation.

18 Second, I think what we're hearing here, and I would say  
19 sort of regardless of where you --

20 **THE COURT:** But he would have to come back twice.

21 **MR. STEKLOFF:** I agree.

22 **THE COURT:** Okay.

23 **MR. STEKLOFF:** Regardless -- but I don't think that  
24 would actually happen with a lot of people. Like, I don't  
25 think Dr. Ritz would have to come back twice. I don't think



1 Dr. Weisenburger would have to come back twice. I think the  
2 second phase would be very different if we went to it, which  
3 would be Dr. Portier and then I think Dr. Benbrook, who they  
4 told you before, we're going to have challenges to him, but is  
5 sort of a liability regulatory expert. So I think the phases,  
6 with Dr. Portier being an exception, would be very different.  
7 So I will throw that out there.

8 I also -- I want to clarify an issue about Johnson before  
9 I forget, but I think -- the other thing I just want to point  
10 out is what we are hearing, and this came up at the last  
11 hearing, is even if you allow IARC in at any phase, you I think  
12 in your general causation *Daubert* opinion have -- I don't  
13 want -- have made comments about the relevance of IARC.

14 And what we are hearing now time and time and time again  
15 is that IARC needs to be held up as the Holy Grail here, and so  
16 I just want to say I don't think that the Court should be moved  
17 by that argument given what you've already said about IARC, but  
18 that can be maybe something we brief.

19 **THE COURT:** Yeah, and maybe that there needs to be a  
20 limiting instruction about IARC.

21 **MR. STEKLOFF:** Or a limit of how much we hear about  
22 IARC.

23 **THE COURT:** Or both.

24 **MR. STEKLOFF:** Yes.

25 And then I just want to clarify on this Johnson issue, and

1 I was not part of the Johnson trial, Mr. Wisner was, others  
2 were, but this is my understanding and my ultimate conclusion  
3 is that -- I don't know that it will provide much guidance for  
4 you on how to handle this from an evidentiary standpoint -- is  
5 that the defense did not move to exclude the admission of IARC  
6 and it was then admitted.

7 The plaintiffs moved to exclude as hearsay the various  
8 regulatory findings, so EPA but also others. The judge granted  
9 that. The judge said that those documents and exhibits did not  
10 meet the public records exception. So in limited instances she  
11 allowed some of the -- and we have red ribbons and if we have  
12 to get to this in front of Your Honor, I think we will be able  
13 to meet our burden of proving that they do meet the public  
14 records exception.

15 But then there were limited cross-examinations of some of  
16 the plaintiffs' experts by the defense in which they were able  
17 to read from an EPA document. That is where the limiting  
18 instruction came in that Mr. Wisner noticed, which is that the  
19 judge instructed the jury that it could come in for a limited  
20 purpose but not for the truth of the matter asserted because of  
21 her view on hearsay.

22 And so here whatever Your Honor rules we think we will now  
23 address this before the trial as opposed to having one ruling  
24 on IARC and then a different ruling on the regulatory  
25 documents, but I think there should be -- there will be, I

1 suspect, hopefully a goose/gander approach on that.

2 So I just wanted to give you that background so you had it  
3 as you go to look at the Johnson -- the way that these  
4 documents or exhibits or issues were handled in Johnson because  
5 I think it was very complicated and sort of a result of a  
6 nonchallenge to IARC, which, as Mr. Wisner said, the judge said  
7 after the fact had the defense moved to exclude IARC on hearsay  
8 grounds, at least the exhibit, the monograph, she would have  
9 granted that motion. And I just wanted to try to make that as  
10 clear as possible as you consider that issue.

11 **THE COURT:** Okay. So why don't we do this: I can  
12 rule on this issue of bifurcation before Christmas. Why don't  
13 we have Monsanto file a brief on bifurcation in seven days. Is  
14 that okay?

15 **MR. STEKLOFF:** Sure.

16 **THE COURT:** And then the plaintiffs can file a brief  
17 on bifurcation seven days after that. No. We better make it  
18 sooner. Let's hold on a second. Let's -- what's today?  
19 Wednesday?

20 **MR. STEKLOFF:** Wednesday the 5th.

21 **THE COURT:** So let's have Monsanto file a brief on  
22 bifurcation by the 10th and let's have the plaintiffs file a  
23 brief on bifurcation by the 12th.

24 Are those dates -- I mean, I know you-all have a gazillion  
25 things you have to be doing right now. Are those dates -- none

1 of it's going to make sense considering all that you have to  
2 do, but are those dates as good as any given all the things  
3 that you have to do?

4 **MR. WISNER:** I don't know why they would get five days  
5 and we'd get two. That just seems on its face unfair,  
6 Your Honor.

7 **THE COURT:** You can start thinking about it now.

8 **MR. WISNER:** Okay.

9 **MR. STEKLOFF:** I think I've announced our position.

10 **THE COURT:** And I think this is probably something  
11 that you both are expert in so I'm not too worried about that.

12 Okay. So those will be the deadlines, and I'll give you a  
13 decision -- I'm not going to promise definitively, but I will  
14 almost certainly give you a decision before Christmas.

15 And then why don't we take a break, come back at 3:30.

16 All right.

17 (Recess taken at 3:16 p.m.)

18 (Proceedings resumed at 3:31 p.m.)

19 **THE COURT:** Okay. All right. Any discovery disputes?  
20 What's so funny?

21 **MS. WAGSTAFF:** Your Honor, I think that the discovery  
22 disputes fall into three categories: Ones that are sort of  
23 general to all three cases, one that relates to Hardeman, and  
24 some that relate to Stevick.

25 With respect to the Hardeman ones that we've outlined, one

1 of them was satisfied by Your Honor's order last Friday with  
2 the depositions. Those are all -- they gave us new dates.  
3 We've accepted every date. So that issue is taken care of.

4 Monsanto has served amended discovery responses two days  
5 ago, and we're going through those and the meeting and  
6 conferring is still happening with respect to Hardeman on  
7 those; and to the extent we need further attention from you, we  
8 will let you know.

9 **THE COURT:** Okay.

10 **MS. WAGSTAFF:** With Stevick --

11 **MR. BRAKE:** We have some outstanding disputes,  
12 Your Honor.

13 **THE COURT:** Okay.

14 **MR. BRAKE:** For the record, Brian Brake for plaintiffs  
15 Elaine and Christopher Stevick.

16 Your Honor, we -- I sent actually on December 3rd a  
17 discovery letter, which I don't know if Your Honor has had an  
18 opportunity to look at or not. I've got an extra copy here if  
19 you'd like to see that.

20 **THE COURT:** I have it. I don't remember whether I  
21 looked at it. Let's see here.

22 (Pause in proceedings.)

23 **THE COURT:** Yeah, I started looking at this, but I  
24 don't believe that I've been through the whole thing so go  
25 ahead.

1           **MR. BRAKE:** Yes, sir.

2           Here's where we are. We filed that letter on  
3 December 3rd. There were the interrogatories that I wanted  
4 answered more specifically and then Monsanto's responses; and  
5 then after that letter was filed, Monsanto filed amended  
6 responses to the interrogatories, which resolved the discovery  
7 dispute regarding Interrogatory Number 5, 8, and 13 on net  
8 worth. And so what that leaves us with, I'll go over those  
9 interrogatories now and ask Your Honor to rule on them.

10           I only propounded 17 interrogatories, and I chose them  
11 fairly carefully based upon what I needed to prepare.

12           **THE COURT:** What are they?

13           **MR. BRAKE:** Yeah. Number 1, basically asking if you  
14 think glyphosate was not a substantial factor in causing Elaine  
15 Stevick's cancer, tell me all facts, witnesses, documents to  
16 support your contention. The answer is "See our expert  
17 reports." In my view, that's not adequate. I'd like to know  
18 who you're saying is going to say it, what they're relying  
19 upon, and what documents they're relying upon. That's  
20 Number 1.

21           The next one is Interrogatory Number 4, identifying people  
22 with personal knowledge. Basically the answer is "We'll tell  
23 you sometime" --

24           **THE COURT:** Personal knowledge of?

25           **MR. BRAKE:** Personal knowledge of the allegations in

1 the complaint --

2 **THE COURT:** Okay.

3 **MR. BRAKE:** -- and the issues in dispute. And rather  
4 than a list of people, the response was "We'll basically tell  
5 you later and/or it's overly broad."

6 The next one is number -- oh, I'm sorry. I missed one.

7 Number 2, this is a very important one. It's asking for  
8 all people who may provide testimony at trial, and Your Honor's  
9 pretrial order does not include a date to exchange witnesses  
10 for trial; and the response to this from Monsanto is "We'll  
11 tell you when the order says we should tell you."

12 **THE COURT:** Okay. But Ms. Wagstaff just told me that  
13 they were going to negotiate --

14 **MR. BRAKE:** Yes, sir.

15 **THE COURT:** -- still more dates, a more complicated,  
16 detailed set of deadlines between the parties. Why is that not  
17 going to take care of this?

18 **MR. BRAKE:** That may very well take care of this. The  
19 reason I'm bringing it up now is if there are people that are  
20 identified by Monsanto to testify at trial, I'd like to know  
21 that before the discovery cutoff of December -- or the next  
22 discovery cutoff, otherwise we may not be able to be prepared  
23 for trial. But I agree with what you're saying on that.

24 The next one is Number 6, which is "List all potential  
25 factors other than Roundup that you will assert as a potential

1 contributing cause." The answer is "Refer to the expert  
2 reports" rather than a specific answer.

3 The next one is 7, "When do you contend that Mrs. Stevick  
4 developed non-Hodgkin's lymphoma?" The answer "Refer to expert  
5 reports" as opposed to a specific answer.

6 The answer to Number 8 and the amended responses.

7 And then the last two are Numbers 14 and 15. 14 is asking  
8 if any scientist, physician, or government employee basically  
9 has stated to Monsanto the belief that glyphosate products  
10 cause cancer; and if so, identify the specifics of that  
11 interaction, when it happened, who said it, et cetera. And I  
12 did not get a specific answer to that. Basically objections.

13 And then the last one is 15, which is basically asking for  
14 any discussions or meetings in which Monsanto's officers,  
15 agents, or contractors participated in discussions about  
16 whether the public should be warned about the potential dangers  
17 of glyphosate. I did not get a specific answer to that.

18 So we'd ask the Court to order answers to those specific  
19 interrogatories ASAP.

20 **THE COURT:** Okay. Does Monsanto want to briefly  
21 respond on any of these?

22 **MR. GRIFFIS:** Yes, Your Honor.

23 I'd like to raise a procedural point for starters and ask  
24 that Mr. Brake follow Your Honor's rules with regard to both  
25 meeting and conferring about these issues and filing discovery



1 letters.

2 I've had no oral communication with him about this. He  
3 sent me a written discovery letter and then filed that as  
4 his -- he sent me a demand letter, to which I responded by  
5 e-mail; and then he sent you that and attached my e-mail as the  
6 discovery letter rather than incorporating my responses into a  
7 filing to Your Honor. I think it would go more smoothly and be  
8 more intelligible to you, if not to all of us, if it was filed.

9 **THE COURT:** Do you want me to deny it? I'll deny it  
10 on that basis and let you put together a discovery letter and  
11 tee it up for me. I think it's totally appropriate to simply  
12 deny the motion to compel on that basis.

13 **MR. GRIFFIS:** All right, Your Honor.

14 **THE COURT:** Do you want me to do that?

15 **MR. GRIFFIS:** Yes.

16 **THE COURT:** All right. When will be the deadline for  
17 a discovery letter?

18 **MR. GRIFFIS:** Since we have all the material for it,  
19 we can get that on file this week easily.

20 **THE COURT:** Okay. Why don't you file the discovery  
21 letter by Friday --

22 **MR. GRIFFIS:** Okay.

23 **THE COURT:** -- and I'll address it next week.

24 **MR. GRIFFIS:** Thank you.

25 **THE COURT:** Okay. What next?

1           **MR. WISNER:** Your Honor, late yesterday evening we  
2 filed a discovery letter related to the Rule 30(b)(6)  
3 deposition. I don't know if you've had a chance to review it  
4 yet.

5           **THE COURT:** Let me pull it up. I probably have not  
6 reviewed it, but you never know.

7                               (Pause in proceedings.)

8           **THE COURT:** Feel free if you-all want to have a little  
9 chat. Don't feel rushed. My sense is that your chat with each  
10 other is productive so go ahead.

11           **MR. WISNER:** No, it was just do I have an extra copy,  
12 Your Honor. It wasn't -- we talked about it during the break,  
13 and we could not reach agreement on the disputes on these five  
14 topics.

15           **THE COURT:** Okay. No, I haven't really looked at  
16 this.

17           **MR. WISNER:** Okay. Do you want to discuss it now or  
18 would you like to not do that?

19           **THE COURT:** Sure.

20           **MR. WISNER:** So really there's five topics,  
21 Your Honor. The first two are very related and they relate  
22 specifically to Monsanto's lobbying efforts after October of  
23 2014, which is when we became -- we knew that IARC was going to  
24 investigate glyphosate. That's when everyone found out about  
25 it. At least that's when Monsanto found out about it I should

1 say.

2 They relate to GBFs or glyphosate-based formulations and  
3 they relate to IARC specifically. I can give you a lot of  
4 background, but I'll just keep it very brief. These are all  
5 top -- this is -- we have a lot of documents by Monsanto to  
6 FTI Consulting. We actually describe some of those.

7 **THE COURT:** What's FTI Consulting?

8 **MR. WISNER:** It is the lobbying firm for Monsanto on  
9 Congress.

10 **THE COURT:** Okay.

11 **MR. WISNER:** And we have a lot of documents showing  
12 through them that Monsanto did certain things in light of IARC  
13 that I think are relevant even to general causation.

14 Specifically they got a congressman to write a letter  
15 threatening the NCI for not having published the HS data update  
16 and why haven't they and demanding that they do so by  
17 October 22nd. On that date, NCI submitted it for publication.

18 And so we want to explore exactly what communications,  
19 what conduct Monsanto's lobbyists did or did not do in sort of  
20 creating that effect. There was also a full congressional  
21 hearing aimed to defund IARC based upon a Reuters article that  
22 was -- actually we have the documents to support this -- that  
23 was largely not written but put together in a PowerPoint for  
24 Monsanto that was then published. That same Reuters article  
25 was the sole basis for the congressional hearings that accused

1 Dr. Blair of hiding data from its IARC panelists, and they  
2 threatened to defund it.

3 It actually required IARC to come and testify before  
4 Congress, and it was stuff that actually has formed the basis  
5 of some of our general causation briefing, specifically a  
6 letter by Director Wild of IARC talking about what they did and  
7 did not do vis-a-vis exposure, for example.

8 The conduct that Monsanto engaged in in response to the  
9 IARC monograph, both prior to its actual release and subsequent  
10 to it, goes directly to punitive damages. It goes to malicious  
11 intent and that's why we want to discover it.

12 Now, obviously, what testimony we get will be subject to  
13 admissibility decisions later; but for the purposes of  
14 discovery, we think we should be allowed to inquire into that.

15 So those are the first two topics, Your Honor. I'll just  
16 take them up -- I think you should -- it would be probably  
17 easier to respond topic by topic unless you want me to go  
18 through all of them.

19 **THE COURT:** Okay. So this would be topics 11 and 12  
20 that we're talking about?

21 **MR. WISNER:** That's correct, Your Honor.

22 **THE COURT:** Okay. Go ahead.

23 **MR. STEKLOFF:** Sure, Your Honor.

24 Just I want to give a little bit of background. We're  
25 talking about a notice that was issued of a 30(b)(6) witness.

1 There were 26 topics. It's Exhibit A to that in that notice.  
2 During the meet and confer, the plaintiffs withdrew I believe  
3 five topics. So there were 21 topics left.

4 We have agreed to produce a corporate representative under  
5 Rule 30(b)(6) on 16 of those topics; and if you look at those  
6 topics in Exhibit A on which there's no dispute, they are very  
7 broad. I mean, they talk about the company's overall position  
8 on, you know, the science related to glyphosate and NHL. They  
9 talk about all of our regulatory interactions. So I want to  
10 give that context to try to show that this is a more narrow  
11 dispute.

12 With respect to these issues on Congress, I actually think  
13 that there's a lot of similarity. I know we'll talk about  
14 topics 19 and 26, but in some ways I think topics 11, 12, 19,  
15 and 26 all have a lot of overlap. They all involve plaintiffs'  
16 efforts to seek discovery about Monsanto's interactions with  
17 either government -- you know, Congress or other legislative  
18 bodies or with the media.

19 A few other sort of background points for Your Honor. I  
20 mean, Mr. Wisner and his colleagues are going to depose some  
21 fact witnesses before the Hardeman trial where we've agreed to  
22 produce witnesses, and I think that some of those witnesses are  
23 custodians on the documents that he's talking about. So my  
24 sense is that they will explore a lot of these topics through  
25 fact witnesses.

1           With respect to FTI, the third party that he referenced,  
2 he has served -- the plaintiffs have served a subpoena on FTI  
3 both seeking documents and a corporate representative from FTI  
4 to testify.

5           So there's a lot of other discovery going on on these  
6 issues. I mean, I think that -- you know, and so -- and absent  
7 sort of privilege issues that might come up, there is nothing  
8 precluding him from, for example, showing fact witnesses the  
9 documents that he referenced that have been produced in the  
10 litigation.

11           With respect to these topics, I think the danger of sort  
12 of opening -- our fundamental position really on topics 11, 12,  
13 19, and 26 is that there have been a lot of -- there have been  
14 efforts -- and I'm not imputing anyone, but I am confident that  
15 the plaintiffs' attorneys have also had interactions with  
16 Congress, with governmental agencies, with European  
17 governmental agencies, with media, that they have been doing  
18 things. There have been promotional efforts on the Internet.  
19 If you look at topic 26, that they have been doing things in  
20 the media both through advocacy groups, through celebrities,  
21 through jurors in the Johnson case.

22           And I -- there's a goose/gander thing here, and I raised  
23 it with the plaintiffs during the meet and confer, which is  
24 there's no need to open up this can of worms because if they  
25 are entitled, for example, to a company witness deposition

1 about these topics --

2 **THE COURT:** I mean, I'll cut you off for a second to  
3 just say that I do not think -- I mean, if we were just  
4 having -- if this case was only about causation, I would  
5 probably say "No further discovery on this stuff."

6 But when it comes to punitive damages, it's not a  
7 goose/gander thing. I mean, there is a responsibility that  
8 Monsanto has to ensure that its product is safe and to the  
9 extent there are serious concerns about the safety of its  
10 product, Monsanto has a responsibility not to try to snuff out  
11 those concerns but to investigate them.

12 And it seems to me that documents or information that -- I  
13 know we're talking about a 30(b)(6) deposition -- documents or  
14 information that speak to these topics, these four topics --  
15 you keep bracketing 18 so I guess we'll talk about that  
16 separately, but topic 11, 12, 19, and 26 -- it seems like those  
17 are potentially relevant to, you know, the question whether  
18 Monsanto should have been trying to snuff out concerns or, you  
19 know, investigate concerns in a more objective fashion.

20 And in saying what I'm saying I'm not casting any -- I'm  
21 not suggesting that I have an opinion either way about that,  
22 but it's an inquiry that it seems to me is relevant to the  
23 punitive damages part of the case.

24 So I'm going to allow topics 11, 12, 19, and 26.

25 What about topic 18?

1           **MR. STEKLOFF:** Can I make one comment --

2           **THE COURT:** Sure.

3           **MR. STEKLOFF:** -- on 11, 12, 19 and 26, which is that  
4 even punitive damages have to be relevant to the conduct  
5 associated with the plaintiffs; and certainly with respect to  
6 Mr. Hardeman but I think with respect to all three plaintiffs,  
7 they were all diagnosed with their NHL prior to the events that  
8 the plaintiffs are alleging took place.

9           **THE COURT:** Okay.

10          **MR. STEKLOFF:** And so I think that that is a second  
11 problem, which is that, you know, for example, 26, things that  
12 were happening in the last, I don't know, six months in the  
13 San Francisco area have nothing to do even with punitive --  
14 even -- have no bearing on punitives as it relates to these  
15 three plaintiffs, and I think that that is true with respect  
16 really actually to 11, 12, 19, and 26, because all of this  
17 conduct so far -- alleged conduct so far postdates their injury  
18 and the warnings that could have been given to them.

19          So I understand that if punitives are available, if it  
20 goes to the jury, that may occur, but that should be based on  
21 conduct tied to the allegations that relate to the plaintiffs'  
22 claims, and the plaintiffs' claims all predate that.

23          **THE COURT:** It strikes me that it's at least possible  
24 that they would be allowed to make an argument, "Look, they're  
25 still doing it. Even now they're still doing it." So I'm



1 allowing those four topics.

2 Obviously it's a separate issue whether anything  
3 discovered through that is admissible at trial, but I'm  
4 allowing those four topics.

5 Now, what about topic 18?

6 **MR. WISNER:** Topic 18, Your Honor, is a little  
7 different insofar as it involves something called "Let Nothing  
8 Go." It was a promotional scientific campaign, it's unclear  
9 exactly what it is, that was managed and supervised by people  
10 working out of St. Louis in Missouri for Monsanto; but it was,  
11 according to defense counsel's representations to me, it was  
12 limited to conduct in Europe. So that's their big objection,  
13 is that it relates to Europe and, therefore, is irrelevant to  
14 our case.

15 And our position is, well, no, if they're attacking IARC  
16 in Europe, that goes to the same exact issue as if it was done  
17 attacking the IARC from the U.S. And so while -- you know, I  
18 don't know what we'll learn, but it's reasonably calculated to  
19 lead to potentially admissible information. So I think asking  
20 questions about it, learning what the corporation has to say  
21 about it will give us an insight into answering this question.

22 **THE COURT:** Well, I mean, I don't know anything about  
23 this "Let Nothing Go" campaign, but it seems to me that even  
24 aside from IARC, to the extent that Monsanto wants to argue, as  
25 I think it should have the right to do, "Look, how can you say

1 that our conduct is malicious when not only in the  
2 United States have they approved it but in Europe, that place  
3 where they're really careful, you know, the regulators have  
4 allowed glyphosate on the market?"

5 You know, that even putting aside IARC, to the extent  
6 there is, you know -- there were efforts by Monsanto to sort of  
7 obtain that result in the face of evidence, you know, that that  
8 result shouldn't have been obtained, it seems to me that you  
9 would have the right to explore that.

10 But go ahead.

11 **MR. STEKLOFF:** I think this is more -- I think there  
12 is a relevance aspect to this. I also think there's just a  
13 proportionality argument here under Rule 26 --

14 **THE COURT:** Yeah. Okay.

15 **MR. STEKLOFF:** -- which is really -- again, my  
16 understanding is that this "Let Nothing Go," they describe it  
17 as a campaign, was taking place in Europe. They have -- one of  
18 their other topics --

19 **THE COURT:** What is the -- can you give me kind of a  
20 neutral description of what does "Let Nothing Go" mean?

21 **MR. STEKLOFF:** If I could, I would. I can give you a  
22 description -- so the topic 17, I think, was something called  
23 "Freedom to Operate," which is I think potentially -- I don't  
24 want to bind myself to this, but they asked for a 30(b)(6)  
25 representative about what they would describe as a "Freedom to

1 Operate" campaign.

2 **MR. WISNER:** I believe Monsanto describes it as that.

3 **MR. STEKLOFF:** Well, no, it's called "Freedom to  
4 Operate" within Monsanto, I'm not denying that, and we are  
5 producing a witness on that. That was a U.S. endeavor, and so  
6 I think it is -- I would describe it neutrally as an effort to  
7 put accurate science -- make sure that accurate science is  
8 being communicated about Monsanto's products.

9 Nothing precludes --

10 **THE COURT:** But "Let Nothing Go" means -- does it mean  
11 like respond to everything, don't let anything go unresponded  
12 to?

13 **MR. STEKLOFF:** I haven't talked to any company  
14 witnesses --

15 **THE COURT:** Okay. All right.

16 **MR. STEKLOFF:** -- about "Let Nothing Go" to be able to  
17 tell you, Your Honor, so I don't want to try to be able to  
18 characterize it.

19 **THE COURT:** Okay.

20 **MR. STEKLOFF:** What I would say here is, again I have  
21 not looked at the documents myself but I've been told that  
22 there are documents of U.S.-based employees in which "Let  
23 Nothing Go" comes up. Even assuming, which I think is  
24 accurate, it is a European, to use their word, campaign,  
25 nothing precludes them from asking fact witnesses about those

1 documents, but we would now need to go get someone from Europe  
2 to come here potentially or have them go there.

3 We have a lot going on and so our position here was really  
4 under Rule 26, given that it -- even if it -- I'm not sure it's  
5 relevant to punitive damages here where they are asking lots of  
6 witnesses about what they were doing with IARC in the  
7 United States. What was happening in Europe I'm not sure is a  
8 central issue; but then when you throw in sort of I think the  
9 burden and the concept of proportionality under the Federal  
10 Rules, that was our position in asking them to consider  
11 withdrawing this and why we are raising it in front of  
12 Your Honor.

13 **THE COURT:** Okay.

14 **MR. WISNER:** Just for the record, I will be in France  
15 for the Christmas holidays so if that makes anything easier on  
16 your end.

17 No, joking aside, Your Honor, I think proportionality  
18 argument sort of rings hollow when you actually listen to  
19 opposing counsel's comment. He doesn't even know what it is,  
20 and that's literally our problem. That's why we're conducting  
21 discovery, to learn what it was, to learn how it was used.

22 And I can't imagine this testimony would be longer than  
23 15, 20 minutes. I have about 10, 15 documents at most that I  
24 could even conceivably use for this, and I just need to know  
25 what it is, and I need the testimony.

1           And it's an important distinction between a fact witness  
2 and Monsanto -- right? -- because in the Johnson case their big  
3 argument was Donna Farmer, Bill Heydens, all of the main  
4 witnesses that we've taken, none of them are managing agents,  
5 none of their conduct can be imputed to the corporation.

6           Okay. So give me the corporation and I'm going to ask  
7 about their conduct and let's see if you ratify it or not. And  
8 so in a "Let Nothing Go" context, I need the testimony from the  
9 corporate representative so it's binding on the corporation for  
10 trial.

11           **THE COURT:** Okay. I'll allow topic 18.

12           Anything else?

13           **MR. STEKLOFF:** I don't think the defense has any other  
14 agenda items, Your Honor.

15           **MS. WAGSTAFF:** Your Honor, nothing else from the  
16 plaintiffs. We will continue to meet and confer on the  
17 Hardeman discovery issues and submit a discovery letter by the  
18 end of the week if we need to.

19           **THE COURT:** Okay. Sounds good. So, good. That was  
20 fairly efficient.

21           You're going to get together, you're going to talk about  
22 putting together a more detailed pretrial schedule with  
23 deadlines, exchanges of this and that and the other thing. Do  
24 you want to come see us again in the month of December or would  
25 you rather be doing trial preparation?

1 (Counsel conferring.)

2 **THE COURT:** Or early January.

3 **MS. WAGSTAFF:** All right. I'm told by my colleague  
4 that we would like to put something on calendar and then cancel  
5 it if we need to.

6 **THE COURT:** Okay. Do you want to come --

7 **MS. WAGSTAFF:** Because we only have 45 depositions in the  
8 next two weeks.

9 **THE COURT:** Right.

10 **MR. WISNER:** One other request, Your Honor. We  
11 actually would request oral argument on the reverse  
12 bifurcation.

13 **THE COURT:** I'll let you know if I need it.

14 **MR. WISNER:** Okay.

15 **MS. WAGSTAFF:** So I would propose either the week  
16 between Christmas and New Year's or the first week of January.

17 **THE COURT:** We can do the first week of January. How  
18 about --

19 **MS. WAGSTAFF:** January 2nd?

20 **THE COURT:** I was going to suggest the 4th.

21 Let me see, what's that? Pretrial conference in what?

22 We could do the afternoon -- yeah, that's Morgovsky.  
23 That's gone. And then, let's see here, I think we could  
24 probably do Thursday afternoon. We could do Friday.

25 **MS. WAGSTAFF:** The 3rd or 4th work for plaintiffs,

1 Your Honor. I will note that Monsanto has their *Daubert* briefs  
2 due on the 3rd so I don't know if they want to be traveling  
3 that day.

4 **THE COURT:** Oh, okay. I want to ask Gordon too.

5 (Pause in proceedings.)

6 **MR. STEKLOFF:** The 4th works for Monsanto, Your Honor.

7 **THE COURT:** The 4th is better than the 3rd? Oh, you  
8 said you have *Daubert* briefs.

9 **MR. STEKLOFF:** Our briefs are due on the 3rd and we  
10 usually fly out the night before so there's no flight issues so  
11 the 4th might be safer.

12 **THE COURT:** Okay. How about 10:30 a.m. on the 4th, or  
13 would you prefer the afternoon?

14 **MR. STEKLOFF:** The morning is better so we can try to  
15 catch non-redeyes out.

16 **THE COURT:** All right. 10:30 a.m. on the 4th.

17 **MS. WAGSTAFF:** Great. Thank you, Your Honor.

18 **MR. STEKLOFF:** And, then, just to be clear, this is to  
19 really focus on -- I mean, there might be other issues that  
20 come up, I recognize, but this is right now to focus on  
21 pretrial scheduling and if we don't need it, we'll let  
22 Your Honor know?

23 **MS. WAGSTAFF:** Pretrial and also a lot of the  
24 discovery that Mr. Wisner was discussing is happening in  
25 January. So if there's any hiccups along the way, we can at

1 least have a venue to bring them to your attention.

2 **THE COURT:** Sounds good.

3 **MS. WAGSTAFF:** All right.

4 **THE COURT:** All right.

5 **MR. STEKLOFF:** Thank you, Your Honor.

6 **THE COURT:** Thank you.

7 (Proceedings adjourned at 3:58 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Saturday, December 8, 2018



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Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter