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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA, JUDGE

IN RE ROUNDUP PRODUCTS LIABILITY LITIGATION	)	Case No. 16-md-02741

San Francisco, California
Friday, January 4, 2019

TRANSCRIPT OF PROCEEDINGS

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Friday, January 4, 2019 9:30 a.m

P R O C E E D I N G S

THE CLERK: Calling Civil Case No. 16-MD-2741, Roundup Products Liability Litigation.

THE COURT: Hi, everybody. Does somebody want to make appearances for everybody or do you want to line up and make each individually appear? I don't really care, whatever you want to do.

MS. WAGSTAFF: Aimee Wagstaff on behalf of Plaintiffs. Good morning, your Honor, and with me I have Brian Brake, Robin Greenwald, Mark Burton, Jennifer Moore, Yvonne Flaherty, Brent Wisner, and a couple people in the box, Michael Baum, Kathryn Forgie.

THE COURT: The rest of you, do want to introduce yourselves?

MS. FORGIE: Kathryn Forgie. Good to see you again.

MR. TSADIK: Good morning, Tesfaye Tsadik.

MR. STEKLOFF: Good morning, your Honor, on behalf of Monsanto, you have Brian Stekloff and Rakesh Kilaru of Wilkinson, Walsh and Pam Yates and Andrew Solow from Arnold Porter.

MS. BEACH: Good morning, Nadina Beach and Hunter Lundy.

THE CLERK: And the parties on the phone?

THE COURT: I bet they forgot to unmute.

MS. RUBENSTEIN: This is Julie Rubenstein from Wilkinson, Walsh & Esovitz on behalf of Monsanto.

THE COURT: Okay. What do we need to talk about today? I understand you all had a productive session with Kristen yesterday. That may have knocked out a lot of stuff, but what else can we discuss?

MS. WAGSTAFF: Your Honor, over the last 12 hours something has happened that has really disturbed the Plaintiffs. We wanted to come in and bring it to your attention.

First of all, on October 22nd in the case management statement in preparation for the October case management conference, the parties agreed to a page limit for Daubert briefing and summary judgment of 35 pages. A couple months later on December 18th I was talking on the phone with Monsanto's attorneys, and they requested that we change that page limit. We said no. We didn't agree to that, so they asked you -- asked the Court for an additional page limit. They filed a motion on New Year's Eve requesting additional pages, and their motion requested that you allow them 10 more pages for their summary judgment and Daubert brief, which everyone has always contemplated would be one brief for Phase One and asked -- for additional -- for leave to file additional motions. You denied it.

Last night just around midnight, Monsanto --

THE COURT: The last part you said in the New Year's Eve request they asked for leave to file additional motions. What I remember about that -- I mean, I don't have the stuff in front of me.

MS. WAGSTAFF: Sure.

THE COURT: What I remember about that is they asked for an extension of the page limits, and I denied it; but the thing about filing additional briefs, I don't recall that.

MS. WAGSTAFF: Sure. Yeah, their proposed order requests a specific causation opening brief for 10 extra pages. They requested a specific causation reply brief for 5 additional pages.

THE COURT: Right.

MS. WAGSTAFF: They also requested that you allow them to file Daubert briefs, I guess, in addition to the other ones -- I'm not really sure -- that were 15 pages each and an additional summary judgment for 25 pages.

THE COURT: Okay.

MS. WAGSTAFF: And you denied them.

THE COURT: Okay.

MS. WAGSTAFF: And despite that denial of that request, last night they went around and they actually filed somewhere around 96 pages of briefing. They filed a summary judgment motion that was 25 pages, a Daubert motion on half of our experts that was 35 pages; and then they went ahead --

despite the denial -- and filed an additional Daubert on Sawyer for 15 pages, an additional Daubert on Benbrook for 15 pages and a Daubert on our expert Mills for 6 pages.

So whether or not we put aside the additional Daubert that we think should be struck in their entirety, their motion for summary judgment and Daubert motion they filed last night was 60 pages despite asking you for an additional page limit and you denying the same. They went ahead and defied the court order and filed that. So we would ask that those motions be struck in total and the relief denied or they be given 24 hours to cure the page limit problem and that Plaintiffs be given an additional 24 hours in kind to respond.

THE COURT: Okay. I'm trying to pull up the docket and it is not working. I have to use a different route.

MS. WAGSTAFF: I have -- what are you looking for?

THE COURT: I just want to pull up the docket generally as we discuss this.

MS. WAGSTAFF: All right.

(Whereupon, a brief pause was had.)

THE COURT: We have 2,422 docket entries in this MDL which is not my highest number.

MR. STEKLOFF: Plenty of time, Your Honor.

THE COURT: Yeah, it will probably end up being the highest number. I have a case that I inherited from the 1990s that I think has 4,000 docket entries. Just give me a second.

(Whereupon, a brief pause was had.)

THE COURT: Okay. So one preliminary question, so there was -- there was this brief -- this 35-page opening brief that was contemplated. Apparently there was a misunderstanding about what was going to be included in that 35-page brief, but it -- at a minimum it was going to include Daubert motions on specific causation and summary judgment and has that been -- brief been filed yet?

MR. STEKLOFF: Yes.

MS. WAGSTAFF: That was filed last night, your Honor, and that is what Monsanto requested additional pages on.

THE COURT: Right.

MS. WAGSTAFF: You denied, and then they --

THE COURT: And then what else did Monsanto file?

MR. STEKLOFF: Could I maybe just run through what the briefs were that we filed, your Honor?

THE COURT: Yes.

MR. STEKLOFF: There is a 35-page brief on specific causation, and that addresses both our Daubert challenges on specific causation to three of the experts and our summary judgment argument on specific causation. Then there is a separate summary judgment brief on non-specific causation issues. That would be preemption. There is some California law arguments. There is some punitive damages arguments where we think we are entitled to summary judgment. That one is 25

pages. There are three separate Daubert motions.

THE COURT: Can I ask you a question about that?

MR. STEKLOFF: Sure.

THE COURT: I thought -- it was a long time ago admittedly -- I thought we had a Motion to Dismiss on preemption that I denied.

MR. STEKLOFF:: We did, your Honor, and I believe in the colloquy about that motion you spoke with Mr. Lasker about certain arguments that we might make at the summary judgment stage, for example, a clear evidence argument based on the regulatory developments. That is the nature of the preemption argument we made here.

THE COURT: Okay.

MR. STEKLOFF: The other Daubert motions are a motion on Dr. Benbrook -- I'm not sure if he is a doctor -- but doctor or Mr. Benbrook as the regulatory expert for Plaintiffs; Mr. Mills, who is the punitive damages expert and then Dr. Sawyer, who is the exposure expert.

THE COURT: So you filed a 35-page brief on specific causation. You filed a 25-page summary judgment brief on preemption California law and punitive damages.

MR. STEKLOFF: That's right.

THE COURT: And then you filed one other brief --

MR. STEKLOFF: There are three briefs, one on each of those experts. There is one on Sawyer, which is 15 pages.

There is one on Benbrook which, I believe, is either 14 or 15; and there is one on Mills which is less than 15; but I'm not sure where it ended up. I think 6.

MS. WAGSTAFF: Your Honor, this is exactly what they asked you to do and exactly what you denied, and they did it anyway.

MR. STEKLOFF: So I --

THE COURT: I think the problem is we never really had a -- at least as I recall -- we never really had a conversation about what issues needed to be teed up for summary judgment other than specific causation and what issues needed to be teed up for Daubert other than specific causation. At least I don't recall having that conversation. I suspect that if we had had that conversation and, you know, somebody had said, Okay, look we have -- you know, we have the issue of specific causation that we need to deal with through summary judgment motions and Daubert motions; and then we have these other issues we need to deal with through summary judgment motions and Daubert motions, I probably would have said, Okay, that's fine. You can have more than 35 pages to deal with that. I would like you to deal with it all in one brief, so I can have one brief that I can go through. I would assume I would have allowed more pages for that.

Anyway, I don't know if I'm misremembering. I will tell you that when -- you know, part of it just over the holidays

maybe you are not focusing on things as carefully as you might usually do -- but when I denied that request for an extension, what I was doing in my mind was saying, No, you can't have, you know, more than 35 pages for this brief on specific causation that we already established would be 35 pages.

MR. STEKLOFF: And that's how we understood it as well, your Honor. I think in the order -- both in the CMC statement and then in the request -- we noted how we planned to conduct the briefing and how we thought the briefing should unfold, and that was in part based on, you know, comments by Mr. Stekloff at the earlier hearing, the last CMC, about how we would be seeking relief on Dr. Sawyer and Benbrook, who I don't think really relate to specific causation and then also relying on the colloquy I mentioned earlier with preemption being an issue as well, and so we laid out sort of exactly how we planned on filing the briefs.

In fact, in the page motion we indicated that we were seeking an extension only for the brief that has been called the specific causation Daubert summary judgment brief I think. Dating back to October I think that's how it was labeled in the actual CMC statement where the initial proposal was made, specific causation Daubert briefing summary judgment page limits. So we very much understood that to apply only to specific causation. We actually said at the end of that brief that we were planning to file these other briefs on this

timetable.

THE COURT: The Daubert briefs for each expert, how long are each of those briefs?

MR. STEKLOFF: There is one brief that does Daubert and summary judgment on the three specific causation experts for Plaintiffs. That would be Dr. Nabhan, Dr. Weisenburger, Dr. Shustov.

THE COURT: Right.

MR. STEKLOFF: There is a brief of -- on the other brief we basically file the page limits in the pretrial order that Your Honor has. So I think it's 15 pages for Sawyer, 15 for Benbrook and 6 for Mills for those three Dauberts.

THE COURT: Okay. I mean, at this point, I take the blame for this one because I probably could have worked with you all to provide greater clarity on all of this. It doesn't -- in the grand scheme of things it does not seem like a big deal, and really what is important is for us to just find the most efficient way going forward to tee up the issues that the parties have a right to tee up for summary judgment and/or motions to exclude.

What would you like to do at this point? These briefs have been filed. These issues need to be considered. What do you think is the most efficient, effective, you know, way to deal with this going forward; keeping in mind that your comment at -- your introductory comment to this comment that something

happened that was very disturbing is, like, totally out of proportion to what is happening here. It is not very disturbing. It is not a big deal. So keeping in mind that it is not a big deal, and it is not very disturbing; and we just need to move forward and figure out how to address these issues, how would you like to proceed?

MS. WAGSTAFF: First I would like to say, that it is actually disturbing to us that --

THE COURT: I don't want to argue anymore about how disturbing it is.

MS. WAGSTAFF: -- a court order --

THE COURT: I'm issuing a definitive ruling that it is not disturbing. That is my ruling. It is not disturbing. So now, how are we going to move forward; and what is the best way to deal with this?

MS. WAGSTAFF: So we would like extra time to respond. We had planned to respond to 35 pages -- as the parties had agreed and the Court had ordered -- and now we have 96 pages, so if you can let me confer with my briefing team during this conference and perhaps propose a reasonable extension by the end of this conference, I would appreciate that.

THE COURT: That's fine.

MR. STEKLOFF: Your Honor, if I could just note, one of the things we offered up in the briefing order as a proposal is it would be extra time on the non-specific causation briefs

because there was a misunderstanding.

THE COURT: That's fine. All right. What else?

MR. WISNER: Brad Wisner on behalf of the Plaintiffs. A couple things, Your Honor, I believe there was a letter brief filed last night that we would like to address with the Court. Before we get there, I would like to talk about the order the Court issued for bifurcation yesterday. Throughout this litigation you have been honest and frank with us about your viewpoints on evidence and law, and I think you deserve our viewpoint on this; and we think that this is wrong.

Here is why -- if I may provide the Court with a document, this is the California jury instructions that we have to prove at trial.

THE COURT: Okay.

MR. WISNER: So in sort of fashioning our case, this is our Bible, right; this is substantive California law about what we actually have to prove at trial to get a verdict that would be enforceable against Monsanto. If you look at the first one, this is a strict liability failure one. These are the seven elements we have to prove. This is what we did in Johnson. They have to say yes to each one of these for us to prevail.

And going through this yesterday, I'm sort of not sure what would be answered in the first phase of the litigation on this -- on these elements that we have to prove. So obviously

the first one I don't think is in dispute. They made Roundup. The second one, that the product had potential risks that were known or knowable in light of the scientific knowledge that was generally accepted in the scientific community at the time of manufacture.

So, I mean, the causation concept that you articulated --

THE COURT: The answers that we are dealing with number 6 first, right?

MR. WISNER: Okay. That the Plaintiff was harmed. I don't think that is even in dispute that, in fact, Mr. Hardeman or whoever was diagnosed with cancer, right. I think it is the one before that or the one after that -- sorry -- that a lack of sufficient instructions or warnings was a substantial factor in causing Plaintiffs' harm. That is the causation element. Under the California law, the element is the warning causing the injury. That is the legal cause of the injury.

THE COURT: If Roundup didn't cause the injury, then the lack of warnings wasn't a substantial factor in causing the injury?

MR. WISNER: Without question, that issue is subsumed in that element. My problem, your Honor, is in Phase One what are they going to answer?

THE COURT: Whether Roundup was a substantial factor in causing Mr. Hardeman's NHL.

MR. STEKLOFF: So let's say we prevail on that; and

then we move onto the second phase, they are going to have to answer every one of these questions again.

THE COURT: Right.

MR. WISNER: So effectively what you would have done by this bifurcation is we have created a new element that we have to prove.

THE COURT: It is not a new element. As you just said, it is subsumed within one or more of the elements.

MR. WISNER: Sure, but to create an element that we have to prove and sort of parse it into sub-elements would be creating substantive California law.

THE COURT: We do that all the time. We have special verdict forms. I mean, there must be -- every day in product liability cases in California there must be special verdict forms for trials that are used that ask whether the product was a substantial factor in causing, you know, the Plaintiffs' cancer, the Plaintiffs' injury.

MR. WISNER: That is not entirely accurate, Your Honor. The special verdict forms -- used in State court at least -- are actually the next page -- they are written for you. They are not designed -- I mean, the general verdict form is who wins, right? We are not doing one of those or maybe we will. I don't know. A special verdict form is actually written by California code and California substantive law.

And the basis behind this, Your Honor, when you look at

the origins of this, it comes from the fact that the California Supreme Court has acknowledged that bringing a products liability case against a large manufacturer is an onerous burden as actually how the law is written. And what you are doing by the bifurcation approach is you are actually increasing the burden on the Plaintiffs considerably, both financially --

THE COURT: Can I ask you a question real quick?

MR. WISNER: Yes.

THE COURT: It looks like you might have omitted a page from this.

MR. WISNER: I didn't include the notes, Your Honor, I apologize.

THE COURT: No. But -- so I'm looking at -- so on the first page --

MR. WISNER: Oh, I see.

THE COURT: -- you have the instruction that says, Strict liability, failure to warn, essential factual elements. And then you said the next page are the model --

MR. WISNER: Verdict form.

THE COURT: -- special verdict questions.

MR. WISNER: That's right.

THE COURT: And there are more than -- and then the bottom of that page, it says: If the answer to question 5 is yes, then answer question 6; and the next page doesn't have

question 6. So what is question 6?

MR. WISNER: It tracks exactly the elements on the first page, Your Honor. If you look at number 5, for example, Did they fail to adequately warn of the potential risks and side effects. If you look at 5 on the first page, it is that Defendant failed to adequately warn and instruct of the potential side effects. I apologize. I missed a page.

THE COURT: What does it say? Are you reading it to me?

MR. WISNER: Yes. If you look at the first page, number 5 --

THE COURT: But the special verdict --

MR. WISNER: If you turn the page to the special verdict form, it is identical to the yes or no question on the front.

THE COURT: Question 6 is what?

MR. WISNER: It would be, as you see on the first page, that Plaintiff was harmed, yes or no. And then number 7 would be that its lack of sufficient instructions or warnings was a substantial factor in causing Plaintiffs' harm. It tracks it verbatim.

THE COURT: Let me see if I can pull it up.

MR. WISNER: Sure. It is CACI instruction verdict form 12 of 3.

THE COURT: It is CACI instruction what?

MR. WISNER: The instruction is 1205. The verdict form is 1203, so it is VF-1203.

THE COURT: Here is the elements and the notes. Okay. I have got the element and the notes. Where do I find the special verdict form?

MR. WISNER: It would be on page 795. If you type in CACI VF-1203 to Google, you will probably find it.

THE COURT: Okay. So it actually -- okay. Let me see here. It doesn't quite exactly track the --

MR. WISNER: It appears the damages are different.

THE COURT: -- the instruction, but question 6 in the verdict form, was the lack of sufficient instructions or warnings a substantial factor in causing harm.

MR. WISNER: Correct.

THE COURT: So they can answer that question perfectly well in the second phase of the trial if they conclude in the first phase of the trial that, in fact, Roundup was a substantial factor in causing Mr. Hardeman's cancer.

MR. WISNER: I entirely agree with that, Your Honor.

THE COURT: So what is the -- I understand you disagree -- and I'm perfectly happy to entertain -- I will consider this a motion to reconsider, and I'm happy to entertain that now; but I'm trying to understand the point you are making.

MR. WISNER: Sure. So 23 USC 2072, the Rules Enabling

Act specifically provides that rules shall not abridge in large or modify any substantive right.

THE COURT: Okay.

MR. WISNER: By forcing Plaintiffs to engage in this expensive and difficult process of proving a subset element that is not actually contained in the substantive jury instruction, we are, in fact, using the bifurcation rule to modify substantive right.

THE COURT: I don't understand how that's the case if we all agree that you must prove by a preponderance of the evidence that Roundup was a substantial factor in causing Mr. Hardeman's NHL.

MR. WISNER: Well, to be clear, Your Honor, what we have to prove is that Monsanto's negligence was a substantial contributing factor.

THE COURT: Right. But if Roundup was not a substantial factor in causing the NHL, then Monsanto's negligence could not possibly have been a substantial factor in causing the NHL. Monsanto's failure to warn could not possibly have been a substantial factor in causing the NHL, right?

MR. WISNER: Sure. But you could also say we could have a trial on whether or not the Roundup he purchased was actually the Roundup, right? There are many issues.

THE COURT: You could but that wouldn't make sense. I think that it does make sense to have a trial on this predicate

question first.

MR. WISNER: Sure. I understand the Court thinks that it makes sense. From my reading of the order, it seems that the principle behind that decision is not efficiency; but it is fairness. That is what I understood the Court's order to say.

THE COURT: I would say it is a little bit of both.

MR. WISNER: Well, on the efficiency issue, I think I can diffuse you of that very quickly. I think it is going to become very clear as we move closer to trial it is not efficient. I actually spent many hours last night going through our evidence, and I honestly can't tell you if it is on one side of the line or the other. I'm going to have the Court -- in good faith. I'm not saying I'm going to burden the Court -- I don't know what side it is going to fall on. We are going to need multiple days of evidentiary hearings.

THE COURT: I don't think we will need multiple days of evidentiary hearings. I agree with you that it will probably be challenging. I think regardless of how we ordered the presentation of evidence in this case, the pretrial issues are going to be challenging. They are going to be challenging if we do it this way. They are going to be challenging if they do it the other way. We are all going to have to work hard, and we will.

MR. WISNER: Sure. I'm not adverse to hard work, Your Honor. That's not where I'm coming from. What I'm

talking about is an overwhelming amount of work in the next six weeks because, for example, there are 23 to 26 depositions that we may, in fact, use as depositions. I would say about six of them clearly don't fall into the general causation of the causation phase; but 15 or 16 of them do have testimony.

Here is a great example: Monsanto's chief toxicologist, Donna Farmer, she writes in an e-mail: We can't say Roundup doesn't cause cancer. We have not done the necessary testing on the formulated product.

THE COURT: That would not come in -- my gut reaction is that that would not come in in the first phase.

MR. WISNER: So that is literally Monsanto's chief toxicologist -- a person who has more knowledge about Roundup than anyone else in the world -- saying --

THE COURT: The question is whether it causes cancer, not whether -- not Farmer's opinion on what Monsanto can say or not say. It is about what the science actually shows.

MR. WISNER: Sure. She is literally talking about the science that they didn't do.

THE COURT: My gut is that that is actually really a fairly easy question, and the answer to that fairly easy question is that that doesn't come in in the first phase.

MR. WISNER: I will give you another example. Bill Heydens, Dr. Farmer's boss --

THE COURT: This is not a final ruling.

MR. WISNER: I know. I'm just giving you some sense. I don't think anything here is --

THE COURT: Yeah.

MR. WISNER: He says, you know, IARC says they are going to be investigating Roundup over glyphosate. He says, Well, gosh, we are very vulnerable here. There is a lot of epidemiology and toxicology that you can string together and can find essentially causation.

THE COURT: I don't think that's what he said.

MR. WISNER: I appreciate, Your Honor, saying that.

THE COURT: You like to re-interpret what Monsanto people say in their e-mails, but I don't think that's actually what he's saying.

MR. WISNER: Interpretation of what is said --

THE COURT: Which highlights the reason why I think it is a more fair trial to bifurcate the question of causation because during the first phase, we want you focusing not on mischaracterizing statements that Monsanto executives have made. We want you focusing on the science.

MR. WISNER: Sure.

THE COURT: So you are sort of making my point for me about why I concluded it would make more sense in this peculiar case to bifurcate the matter.

MR. WISNER: I would also point out, Your Honor, that -- I'm not trying this case. You say me, but I'm not the

one doing this case.

THE COURT: You are not? Who is trying it?

MR. WISNER: No, I'm not. I'm trying a case in State court starting in March.

THE COURT: Who is that going to be in front of by the way?

MR. WISNER: It will be in front of our new judge, Judge Winfred Smith from Alameda.

THE COURT: When does that start?

MR. WISNER: March 18th. In any event, Your Honor, the reason why I raise this is because of what you just said. Monsanto's knowledge of whether or not it causes cancer -- I mean, there can be no dispute that they of all people should know the answer to that question.

THE COURT: The point is that you are mischaracterizing what Monsanto people have said, and you are putting your own spin on what Monsanto people have said. The question in the first phase is going to be what has the science shown or not shown.

MR. WISNER: Sure. That science has been dictated by Monsanto. They have chosen to not look at certain things. Specifically if we look at the documents, we know why they haven't. That is -- I don't know if that is liability or causation. I mean, their argument is there isn't sufficient evidence to show causation. Our evidence is there is

sufficient evidence. Plus, if there is any deficiences in the evidence, it is because you have suppressed it and/or refused to do that. That is a scientific question about causation.

THE COURT: If Monsanto did it itself, then you would be saying it is a study that Monsanto did itself or funded itself; and it is not worth the paper it is written on.

MR. WISNER: That's not true. There is plenty of stuff that Monsanto has done that we have no objections to. Monsanto has done numerous studies. For example, the TNO study done in Europe. It showed a 10% absorption rate, and they proceeded not to tell anybody about it. They buried that. We know that because we have access to the internal documents. That is a Monsanto study that we have no gripes with.

They simply say, We are canceling this study because it doesn't comport with our objectives. That is what it says in the e-mails as clear as day. We have questioned their witnesses about it, and they give us what they interpret it as. Okay.

THE COURT: Well, I mean --

MR. WISNER: The jury has a right to look at that testimony and say, You know what, that person is a liar. I don't believe them. I actually do think the way Mr. Wisner is describing this -- when you put the pieces together, it does make sense. That is the job of a trial lawyer. It is not the job of this Court or anybody really to say, We are not going to

let you misinterpret evidence that has come in because I don't agree with your interpretation. That is why we have a trier of fact, right, to weed out whether or not my interpretation is right or wrong. But when they are making opinions and statements about causation, when this is a company that has literally created and invented it -- and they are the ones who have studied it for 40 years -- talking about their statements about the science surely is relevant.

They are going to have all of their experts -- all of their internal company witnesses, for example, Dr. Farmer, she is going to testify. I was studying this product for 25 years. It doesn't cause cancer; right. As soon as that is in, as soon as that is in, her credibility is an issue.

THE COURT: I don't know if that would come in in the first phase either.

MR. WISNER: What we are contemplating is a sort of ivory tower viewpoint of science. That somehow we can weed out all of the manipulation. We can weed out all the suppression, all the intimidation and put that all aside and just look at what the science is; but the science, Your Honor, doesn't exist in some isolated untouched world. I wish it did. It just doesn't.

THE COURT: There have been plenty of independent studies done. We have discussed all of them in the first phase of this case.

MR. WISNER: Sure. There has been plenty of Monsanto studies, and they are going to argue that this is bad and this is good. That is all part of it. If you have had a chance to read the closing argument -- have you had a chance, Your Honor?

THE COURT: Glance.

MR. WISNER: You will see that it is largely a scientific argument.

THE COURT: I did notice that.

MR. WISNER: It is not me spinning the wheel about how evil Monsanto -- I do get angry at certain points for sure. It is -- I can argue science all day. The idea that science is somehow detached from Monsanto's influence is very difficult to unpack, in fact, I think impossible. I understand your order kind of contemplates that. I mean, you didn't say all of --

THE COURT: What I said is that if there is real evidence that Monsanto influenced or manipulated the science, as opposed to public opinion or regulatory agency decision making or something like that, it would be part of Phase 1; and we are going to have -- I have no doubt we are going to have some difficult questions about what can come in in Phase One and what can't, and you are going to characterize everything as actions by Monsanto to manipulate the science; and Monsanto is going to disagree, and we are going to have to figure that out and we will.

MR. WISNER: Let me take this a step further because

this is where I think the rubber really meets the road. This is why -- I think we pointed this out in our briefs -- no MDL has ever done this, ever. I couldn't find one. They couldn't find one that had ever done it. The only MDL that we found that had done it was from 1970 that involved a fire that burned down 200 homes, and they wanted to do a trial on Well, did this defect with this transformer or whatever caused this fire, which would then lead to all the other Plaintiffs' cases. This isn't this situation, and it just hasn't been done.

I don't mean to be petty here, Your Honor; but this last hearing, Ms. Wagstaff comes to you and says, I have a client who is dying; and their substantive rights are going to be affected because they are dying. Can you please remand it so we can have a trial before the person dies. And you said, Ms. Wagstaff, has any MDL ever done that? She said, I can't think of any. You said, Then I'm not doing it.

This is a substantive right of a person who is dying, and you said, I'm not doing it because no other MDL has done it. Now we are in the same situation here, and you are doing it. It creates a substantive difficulty for the Plaintiffs, Your Honor. It really does. It just doesn't seem fair. That is just the reality of it.

Now, whining about fairness is not really a good argument, but it is actually a consideration the Court must consider because even in the bifurcation rule, consideration of

prejudice and fairness is central. If you believe Monsanto can't get a fair trial because these other issues -- I mean, really what you are saying -- if you think about it -- is that Monsanto's terrible conduct -- its terrible conduct is so bad that they can't get a fair trial on the merits of their case because they have acted so bad. I mean, I don't know where justice comes in on that; and it doesn't seem remotely fair.

With that all said, I think there are some substantive issues.

THE COURT: Well, I would characterize my view and the view underlying my ruling somewhat differently. I would say that the parties have a major dispute about whether Monsanto's conduct has actually been terrible and which aspects of it have been terrible and which aspects of it haven't been terrible, none of which or most of which does not really relate to the question of whether Roundup causes NHL. I understand your arguments. I'm happy to entertain your motion for reconsideration.

MR. WISNER: I have one more.

THE COURT: Very briefly if you can just make your final point.

MR. WISNER: I will be very quick, Your Honor. Under California law, failure to test is actually a cause of action.

THE COURT: Failure to test?

MR. WISNER: Is a cause of action.

THE COURT: Have you asserted that in your --

MR. WISNER: I believe so. It's constrained within the negligence law, Your Honor. So even if Phase One were to lose -- I think there is a claim for failure to test that would survive to Phase Two -- I guess, not necessarily if you say it doesn't cause his specific -- never mind.

THE COURT: He has to be harmed by the failure to test I assume.

MR. WISNER: Fair enough. There is a bunch of causation issues about warnings. If you look at the sheets in front of you, I just want to show you one last instruction that I think illustrates this point pretty neatly. It is 431. It's multiple causation, multiple causes. It's on page 289 on the bottom. They are out of order, Your Honor.

THE COURT: Okay.

MR. WISNER: Okay. So one of the issues that you are going to be square in the middle of as this Daubert proceeding moves forward is multiple causes. Monsanto has said, for example, with Mr. Hardeman that the prior viral infection he had 15 years ago was actually the cause of his cancer. It was not actually his exposure to Roundup, okay. And this instruction is -- it is actually error to not give this instruction, right, when there is an assertion of multiple causes of action. California case law is very clear on this.

THE COURT: I assume this concept can be covered in

the jury instructions in Phase One.

MR. WISNER: Sure. I'm with you, Your Honor. We would have to replace negligence, right, with Roundup; right?

THE COURT: Yeah.

MR. WISNER: That is the obvious thing. If you find that Roundup was a substantial factor in causing Plaintiffs' harm, then Monsanto is responsible for the harm.

THE COURT: I don't know exactly how we would change the wording. I assume that this concept can be covered in Phase One.

MR. WISNER: Okay. So in Phase Two they are going to have to find another cause question, right, because then they not only have to find that Roundup is the cause, they have to find the negligence related throughout it was a cause.

THE COURT: Right.

MR. WISNER: We have to prove causation actually in both phases, legal and scientific causation, if you want to call it that. In that bifurcation of the issue of causation is essentially never been done because the law is constructed around the negligence causing it; right. That is why reverse bifurcation, Your Honor, if you look at the case law, has the exact opposite of what we are doing here.

Reverse bifurcation is you do damages first, and then you do causation and liability; but separating causation from the liability is essentially never done because of this reason.

You know, for us to be able to do the first phase, we are going to have to rewrite substantive California jury instructions numerous ones, I mean, all of them essentially.

THE COURT: We are going to have to write jury instructions for the trial, which we have to do for every trial.

MR. WISNER: Sure.

THE COURT: As with every trial, we start with the model jury instructions; and then we adjust them, change the wording, to meet the specifications of the particular trial that is happening; and that's what we will do here. Okay. I understand your argument. The motion for reconsideration is denied. What else do we need to discuss?

MR. WISNER: I would like to discuss the discovery dispute if the Court has time.

THE COURT: Okay.

MR. WISNER: Pardon me. I'm going to just go grab the paper.

(Whereupon, a brief pause was had.)

THE COURT: Okay. On the first issue which is the interrogatory responses regarding these PR campaigns -- for lack of a better word -- I'm ruling in favor of the Plaintiffs, and I don't need to hear any argument on that. So the only additional question might be when the responses have to be submitted.

MR. WISNER: We requested January 14th to be sufficient time prior to the deposition.

THE COURT: January 14th it is. Okay. I don't really understand why you are bickering on the issue of RFAs 4 through 7 regarding the animal and carcinogenicity studies. I don't understand why any of this is important.

MR. WISNER: May I approach?

THE COURT: Sure.

MR. WISNER: Do you have Exhibit C in front of you, Your Honor?

THE COURT: I have it on my iPad somewhere; but if you want to hand it to me, fine. Thanks.

MR. WISNER: What I have done is I have highlighted the red and the blue reflecting blue as the responsive aspects of the RFA and red the not responsive. The way RFAs are typically used at trials is they are read to the jury. Monsanto has effectively injected non-responsive argument into their RFAs making their reading of something to the jury including stuff that has nothing to do with the request.

THE COURT: Hold on. Let me look at that the way you have presented it here.

(Whereupon, a brief pause was had.)

THE COURT: Okay. I guess what I'm -- taking a step back from the question of whether these responses are consistent with the rules, my question for you is: Why do you

care about this? Because what is going to happen at trial, right, is that you are going to say that Monsanto hasn't identified any 12 month or longer animal chronic toxicity studies that it has conducted on glyphosate since 1991 or in other words Monsanto has not conducted such a study and Monsanto is going to say, we didn't have to conduct such a study; and that's what the jury is going to hear. And whether this qualification is included in the response to the RFA or not, that is what the jury is going to hear. And so it seems to me that whether this qualification is included in the RFA or not does not matter at all. It's like, you know, you are talking about how much time you have to spend preparing for trial and how much work it's going to be, this strikes me as quite possibly the least important thing you could be spending your time on right now. So what am I missing?

MR. WISNER: Okay. Well, putting aside, you know, how I decide to spend my time, Your Honor -- I appreciate that comment -- at trial the request for permissions I had used them and I anticipate we planned to use them here. At some point we are going to read to the jury the admission and the response.

THE COURT: Right, but what I'm saying is that the jury is going to be like, yes, and Monsanto says that they don't have to. So whether that is in Monsanto's response to the request for admission or not seems totally inconsequential to me.

MR. WISNER: It is consequential insofar as we want to be able to use it in Cross-Examination if it comes up.

THE COURT: You are going to use it, and the Monsanto witness is going to say, Yeah, the reason why we didn't do it is because we are not supposed to do it.

MR. WISNER: Fair enough.

THE COURT: Significant with the other studies. And there is no difference between you cross-examining them on the blue part of the response and them providing verbally the red part of the response and the blue and the red part of the response being in the response to the request for admission.

MR. WISNER: I think it makes a huge difference; and for what it is worth, this is a violation of the rules. It is. You can't do this. You admit it or deny it; and if you have a good faith basis for qualifying, you put it in. These are not qualifications. They are just trial things; and while you might not think I'm spending my time wisely, Your Honor -- that's fair. I disagree -- at the end of the day, this is a violation of the rules. It shouldn't be there. I ask that it be stricken.

THE COURT: Why isn't this an appropriate qualification if the -- if the response to the request for admission threatens to create a misimpression, why isn't it appropriate to qualify it?

MR. WISNER: I mean -- admit that Monsanto has not

conducted a long-term animal carcinogenesis study on glyphosate since 1991, they admit that; and then they proceed to talk about the other companies that have conducted stuff and then describe the results of those studies and how it doesn't show that it causes cancer. The word cancer -- whether or not it causes cancer should not even be in the question. It is just argument. It doesn't belong there.

THE COURT: Okay. All right.

MR. WISNER: We have -- I think we have highlighted all the portions that we thought were wrong. If the Court can take a look at it and let us know, that's fine. For us it is important for having a clean admission.

THE COURT: Okay. I will ask you the same question why -- I would think if I were in Monsanto's shoes and I got these requests for admission, I would be like fine. I admit it. We didn't conduct a 12-month study or whatever the question is; and we will make very clear to the jury at trial why we didn't do that, and the Plaintiffs will look like fools if they stand in front of the jury waiving this admission in front of the jury acting as if it is some major admission because it is going to be very easy to qualify the answer at trial. So why are you -- why are you making a big deal of this?

MR. SOLOW: Your Honor, I think you hit the nail on the head is because of the waiver because this is a statement.

There is a request for admission.

THE COURT: I think it makes them look foolish. Don't you think it makes them look foolish if they waive this front of the jury without the qualification that you will be able to easily present to the jury?

MR. SOLOW: I rather not comment on the foolishness of opposing counsel, Your Honor; but respectfully, the idea that this standalone statement would be used, and then we would have to come back at a separate time and clarify that point, Federal Rules of Procedure, 36(a 4 talks about with good faith, clarifying -- and as Your Honor noted in the case law we cited including out of the Northern District of California -- it is the very reason is to avoid that implication; and the implication is not only were these studies not done, they needed to be done, right. The notion that cancer is not in a question that talks about carcinogenicity is absurd, Your Honor, it is the very definition of it.

So the idea that we are going to have a standalone statement that we complied with Rule 36(a)4 and we are not serving up on a silver platter what -- by the way is an improper exhibit to a discovery dispute; supposed to just be the request here, to the extent we are looking at this blue and red -- they don't get to actually write their answers to their requests for admission. So this is our answer. They can ask somebody a question, and I'm sure somebody who is actually

trying the case can ask a proper Cross-Examination question and get the specific point they want; and the witness will or won't say any additional items; but the idea that this is going to be a request for admission that is going to be read to the jury independent of our proper Rule 36(a)4 clarification as some kind of stipulation is not consistent with the rules.

THE COURT: Okay. I understand the arguments. I will think about that one.

Farm Family Exposure Study. Did I ever hear about that study? I don't recall ever hearing about that study during Phase One. Did that study -- did any of the experts talk about the Farm Family Exposure Study in Phase One?

MR. WISNER: Not in -- not in any detail, Your Honor.

THE COURT: Did any of the experts rely -- did Laura La Mucci rely on the Farm Family Exposure Study?

MR. SOLOW: I don't know. I think it is beyond the scope of the discovery dispute right now.

MR. WISNER: It is not an epidemiological study. I don't think anyone in their right mind would say it's a epidemiology -- it doesn't even look at a disease outcome. Basically farmers were spraying in the field, and they looked at their urine to see if there was any glyphosate in it. That's it. They said there wasn't very much glyphosate in that. That's the entirety of the study. They are saying that that qualifies as an epidemiological study.

THE COURT: Now, I remember -- my recollection now is that none of the epidemiologists testified about this study or relied on this study. It came -- I think it was referenced by the experts who testified on the mechanism issue.

MR. WISNER: That's correct, and whether or not there is sufficient exposure in the real world such that it would be sufficient to cause it; and it talks about a reference dose.

THE COURT: Has he characterized the study correctly; that they studied farmers and the content of glyphosate in their urine?

MR. SOLOW: Correct.

THE COURT: That is not an epidemiological study.

MR. SOLOW: Your Honor, if I may for a moment, that's not the purpose of a request for admission in an interrogatory; to determine whether our answer is proper or not. If they want to cross-examine somebody, they can. To the extent we are now attaching other items to the discovery dispute, Mr. Wisner has attached the actual study here.

THE COURT: Actually, he didn't attach the actual study.

MR. WISNER: I know.

MR. SOLOW: He attached the jury question and then handed me -- this is supposed to be Exhibit D. Ironically, the proper Exhibit D -- if he wants to supplement it -- in the abstract on the first page of the study, key words:

bio-monitoring, epidemiologic studies.

THE COURT: You want to hand it to up to me?

MR. SOLOW: I would be happy to.

MR. WISNER: I have an extra copy if you would like it.

THE COURT: Hold on a second. Where did you say the word --

MR. SOLOW: I just handed you my copy. It is in the last line of the abstract, the upper left-hand corner.

THE COURT: Right. Great.

(Whereupon, a brief pause was had.)

MR. WISNER: If I may, Your Honor, I actually have the sentence that I think hits the nail on the head here.

THE COURT: Sure. Go ahead.

MR. WISNER: On page 325, farthest right-hand column at the very end of the study, there is a paragraph that says, important rationale. Do you see that?

THE COURT: Yes.

MR. WISNER: Then there is a sentence: Obviously this bears consideration for epidemiologic studies that might assign what -- it is specifically saying this is an epidemiologic study.

THE COURT: Right.

MR. SOLOW: This study was conducted in part by an epidemiologist by the company, Dr. arc qua villa. There are

other studies -- which, again, I didn't think this was appropriate to attach to the discovery dispute -- but in studies about the actual Farm Family Exposure Study, the conclusion of the methods and recruitment practices publication of that in conclusion says, Conclusion the Farm Family Exposure Study should provide insights about pesticide exposure under rural conditions and thereby facilitate improved exposure assessment in epidemiologic studies of agricultural populations.

THE COURT: I think that kind of makes his point.

MR. SOLOW: Respectfully, Your Honor, I don't think so, not in the discovery context. The idea that if he wants to cross-examine Dr. arc qua villa and determine whether a study that is a building block as part of a later epidemiologic study, like AHS, can be considered an epidemiological study or bio-monitoring study in the field of epidemiology. Let him cross-examine a witness at trial.

THE COURT: I understand the argument. I will think about it a little bit more.

MR. WISNER: Your Honor, issue 4.

THE COURT: Issue 4 I'm ruling for Monsanto. I don't need to hear argument.

MR. WISNER: I just want to make sure we are clear, Your Honor, this has a bunch of RFAs as well as an interrogatory response. We are not going to get any statement

from Monsanto about who actually is a managing agent?

THE COURT: I'm sorry. I thought this was about requests for admission Nos. 43 through 107. What are you saying about an interrogatory?

MR. WISNER: So interrogatory number 10 does the open-ended. It says, Please tell us who are the managing agents for Monsanto that related to glyphosate from 1970. Instead of doing it person-by-person, like they did in RFAs, the interrogatory is an open-ended, please just tell us. So far it appears that no one is a managing agent at Monsanto, and I don't think that is an appropriate legal position to take. For all intents, they just refuse to answer. They don't actually provide anything. They say, We are not answering this.

THE COURT: Let me ask you another question, sort of a bigger picture question.

MR. WISNER: Sure.

THE COURT: I mean, isn't this another issue that seems very unimportant in the grand scheme of things? I mean, Monsanto collectively and universally has taken the position that it doesn't cause cancer and therefore we are going to keep -- we are going to keep it on the market. If for punitive damages purposes, a jury concludes A, that it actually does cause cancer and B, that Monsanto, writ large, was reckless and malicious in its decision to continue marketing the product,

that is the end of the matter. They are not going to have -- is the jury ever really going to have to ask a managing agent question?

MR. WISNER: It is actually part of the jury instruction. It specifically says, Did they engage in conduct that was in reckless disregard for human health --

THE COURT: Did Monsanto or its managing agents?

MR. WISNER: It asks, Did they engage in any conduct; and then it asks, Was that conduct conducted by a managing agent. It is a separate question, and then it defines managing agent as we defined it in here.

THE COURT: Right, but what I'm saying is it was the entire company. So, of course, it was by a managing at, right. If they conclude that the entire company, you know -- that the company knew that this caused cancer or there was a serious possibility that this product caused cancer and insisted on marketing it anyway, that's -- that's going to be the end of the matter, right?

MR. WISNER: No. They argued -- both in the context of the jury as well as in a motion for judgment notwithstanding the verdict -- that we didn't satisfy our burden of showing that the conduct by Farmer, Heydens, Martin, Goldstein, that these people were not managing agents and therefore their conduct doesn't qualify for punitive damages as a matter of law. If they haven't taken that position, Your Honor, I

wouldn't be fighting this. They took that position. I said, Fine. Tell us who your managing agents are so we can know.

MR. SOLOW: Your Honor, just dealing with Interrogatory No. 10, it is asking us in a single interrogatory between 1970 and the present anybody who was a -- who had substantial discretionary authority -- we are talking about a 50 year period of time -- with respect to Roundup. That is by definition an overbroad interrogatory. As we said in the RFAs, which you just ruled on, it can't be did this person have discretionary authority. A narrow proper interrogatory --

THE COURT: Which would you rather respond to, the RFAs or the interrogatory?

MR. SOLOW: Your Honor, I choose option C, which is a proper RFA or a proper interrogatory, which says this particular conduct, this particular action, on this date by this person was this -- did this person have authority -- and if they want to use substantial discretionary authority -- to make this decision, then we can deal with it. But to talk about somebody had -- Your Honor, with all due respect --

THE COURT: Your beef is more with sort of the more generic wording of the question, exercise substantial discretionary authority over decisions that ultimately determined Monsanto's policies regarding glyphosate?

MR. SOLOW: To say to lawyers that we are quibbling about the word when that's exactly what we do for a living,

Your Honor, I think is a little bit of an overstatement.

THE COURT: What I'm asking is: Would you still be quibbling if the question were a little more targeted at, you know --

MR. SOLOW: Date, time, place, action, yes.

THE COURT: No. At the issue of how to handle the issue of possible carcinogenicity with respect to glyphosate. I mean, there has to be a group of people within the company who are responsible for deciding how to handle the issue of carcinogenicity. In other words, there have to be decision makers within Monsanto -- let me put it this way -- let me ask the question this way: Mr. Wisner, the question you are trying to ask I think -- correct me if I'm wrong -- is who had the power to do something about possible carcinogenicity of glyphosate. Is that basically right?

MR. WISNER: Close. I think it is a little broader in the sense that, for example, if somebody went and bullied a scientist to get studies suppressed, let's say, right, was that person a managing agent from Monsanto because that action itself is malicious conduct we would argue to the jury. So it is not just who had the power to do something about it, but who was given power to do things about glyphosate; and it is not just the carcinogenicity. It is also the warning, advertising related to it insofar as it discloses carcinogenicity. Those are all --

THE COURT: Could I ask another question?

MR. WISNER: Sure.

THE COURT: In the State court case were there RFAs or interrogatories on this question?

MR. WISNER: No.

THE COURT: Why not?

MR. WISNER: Because we didn't think -- as, Your Honor, said in the beginning, we didn't think it would be an issue. We presented the testimony of Dr. Farmer, Dr. Heydens, Dr. Goldstein and Dr. Martins as well as some other company witnesses. We believe we had testimony from them that showed that they were actually managing agents, and we presented that to the jury; and they said No, they are not. We said, Okay. So the jury didn't agree. It is a factual question. It goes to the jury. Instead of having this weird fight, I said, Why don't you just tell us who your managing agents are. I will make sure to take their deposition, so we don't have this problem.

THE COURT: I understand.

MR. SOLOW: Your Honor, as we stated in our portion of the dispute letter, our position is they should be required to identify the specific actions or statements of the individuals; and then we can answer that as opposed to this blanket statement of Hey, this person was a managing agent for 50 years. Give us the date, the action and tell us this person;

and we will give them an answer.

THE COURT: Why would that be so hard because I mean you just went through a trial where you said that you had to pitch to the jury that X action by X person was an action of a managing agent. Y action by Y person was an act of a managing agent. Why not just structure questions to the Defendants that track the arguments that you made at trial?

MR. WISNER: There would be a couple hundred of them if we do that; and also problematically I don't feel I should have to disclose my entire punitive damages Case statement by statement --

THE COURT: You already went to trial.

MR. WISNER: We used a fraction of the evidence we had. There was a lot of stuff we couldn't use, not because of the Court's ruling but also because it just wasn't done yet. I took a lengthy deposition of Dr. Farmer recently that unveiled a lot of misconduct. It is going to be a problem. We are going to have to solve it. It highlights the problem of what we are dealing with here. None of that stuff had proper foundation laid originally, so we have a lot more to work with here. It is a much stronger case today, and it is going to be even stronger in this month after we have done the deposition of Monsanto -- the first one, by the way, the actual company, a bunch of other things.

So while it is going to be -- having to highlight every

single one of our conduct, date, time, place and event for every single thing would be monstrously intense. Just.

So you know, the RFAs said, Donna Farmer, was she a managing agent? Use the definition from jury instructions. Did she exercise substantial discretionary -- that is verbatim from the jury instruction. That is California law. To go through every single person that they have searched for relevant documents -- is this person on medication, is this person, is this person -- and they just denied them all. When I got on the phone with them, I said, Are you denying stuff so we'd have to fight it or is there something else going on? They said, No. We are just denying them because they are hopelessly overbroad and therefore we can't answer them. Okay. Was Donna Farmer a managing agent or not? If she wasn't, okay, fine. Was Heydens her boss one? Was one --

THE COURT: Well, we are already talking about over 50 RFAs and a very broad obviously interrogatory. So we are already dealing with lots of RFAs. What is the problem with making those RFAs more specific and tied to particular conduct that you believe is conduct that gives rise to punitive damages liability?

MR. WISNER: Okay. So, for example, it is not just conduct. It is also lack of conduct, right.

THE COURT: Okay.

MR. WISNER: So there is admissions as well. Putting

that issue aside, for Donna Farmer, we are going to have 50 RFAs for her. For Dr. Heydens, 50 RFAs, for Dr. Goldstein, 50 RFAs. We have 50 individuals we have to go through for specific conduct. We are talking over a thousand RFAs here. You want to talk about a good use of time. This is not it, right. But they can just tell us Hey, listen, these are our managing agents. Stop bickering about it. Then we are there, and we can be done. If we haven't deposed any of them, I will depose them, right. That's what we need to do, and they just need to tell us without us mindlessly looking for the --

THE COURT: Okay. All right. I will think about it. Then let's see. The issue about glyphosate bands, I mean it, I don't need to hear argument on it. I'm ruling in favor of Monsanto on that issue.

MR. WISNER: For record purposes, what is the basis of that, Your Honor? Is it overbroad or what?

THE COURT: That's not -- if Monsanto doesn't have that information in its possession, it doesn't need to gather that information and compile that information.

MR. WISNER: I don't believe that they have put that on the record anywhere; that they don't have that information. At least in the response, that wasn't the objection. I'm not trying to rehash argument, Your Honor, yet I'm doing it. I'm sorry. If they are going to make that position, that's fine. I'm pretty sure I can find them on perjury somewhere.

THE COURT: What they say is they have no central list. This is an interrogatory. Yeah, I don't think this is the kind of information that is, you know, exclusively in Monsanto's possession that you need to do discovery on as opposed to gathering the information itself. I'm ruling in favor of Monsanto on that issue.

MR. SOLOW: Thank you, Your Honor.

THE COURT: Is there anything else that we need to -- issue No. 2 and issue No. 3 and issue No. 4 will remain pending, and I will give further thought to them.

MR. WISNER: Thank you, Your Honor. Just for the Court's background, we have that deposition on the 23rd, so you know.

THE COURT: The Monsanto deposition?

MR. WISNER: Yeah, we are taking of them on all these issues, and getting written discovery prior to that is usually helpful.

THE COURT: Is there anything else we need to discuss?

MR. WISNER: Not for me. I have to let my cocounsel answer that, Your Honor.

MS. WAGSTAFF: Your Honor, I don't know if you wanted to discuss --

THE COURT: Can we just take a 5-minute break because my iPad has died, and I want to get my charger. Be back at a quarter till.

(Whereupon, a short break was had.)

THE COURT: What else do we need to talk about?

MS. WAGSTAFF: We have conferred with Monsanto about a briefing schedule on the motions that were filed last night. We would like to get your approval on them.

THE COURT: Okay.

MS. WAGSTAFF: So we have -- there is the 35-page motion that was filed last night against Dr. Weisenburger, Dr. Shustov and Dr. Nabhan; and that brief will continue to be subject to the PTO53 deadlines.

THE COURT: Okay.

MS. WAGSTAFF: And then the remaining four motions which were -- the summary judgment motion and the motion filed against Mills, Sawyer and Benbrook, the Plaintiffs would file a response by January 25th; and Monsanto would file a reply by February 1st.

THE COURT: That sounds fine to me.

MS. WAGSTAFF: Okay.

THE COURT: Let me say one thing about the briefing, though, particularly as it relates to the Daubert issues. You know, on Phase One if I had to do it over again, I would have required you to file shorter briefs. After -- you know, the briefs may have been helpful to someone who hadn't actually read the expert reports and hadn't actually sat through all of the expert testimony; but after reading multiple times the

expert reports and sitting through the expert testimony, most of the briefing was a waste of time. I would urge you to try to, you know, keep the briefs short and write for somebody who has read the expert reports and has sat through some expert company. Anyway, it will be up to you.

MS. WAGSTAFF: So, Your Honor, we had a very productive call with Ms. Melen yesterday; and we discussed the topic of Dr. Shustov; and we discussed possibly bringing him live on January 22nd. I wanted to let the Court know and I let Monsanto know this morning that that does, in fact, work for the parties.

THE COURT: What date was that again?

MS. WAGSTAFF: January 22nd. She mentioned if the government is still in a shutdown next week, that perhaps your trial will not be going forward.

THE COURT: It's all up in the air; but the main thing is if we can't pay the jurors, we are not going to have a trial. So -- I don't know the answer to that question yet, and so the trial is currently scheduled for the 14th with jury selection to take place on the 9th. What I would probably do is bump -- we have doctor -- what is his name again?

MS. WAGSTAFF: Shustov.

THE COURT: We have Dr. Shustov scheduled now to testify by video on the 28th, the afternoon of the 28th; is that right?

MS. WAGSTAFF: Yeah.

THE COURT: What I would probably do with this criminal trial -- if the shutdown continues, you know, through the middle of January but then ends after that or if the shutdown continues but we have funding to pay the jurors -- is move the criminal trial to the 28th. But we could figure out a way -- what is the time -- what time did we schedule for Shustov's video deposition?

MS. WAGSTAFF: So the video deposition was from 2:00 to 5:00 on the 28th.

THE COURT: We will make that work. Even if I move the trial -- if Shustov can't come on the --

MS. WAGSTAFF: He can come.

THE COURT: If Shustov ends up not coming on the 22nd, we will make that work; but he can come on the 22nd. So basically, just keep him booked right now for both the 22nd and the 28th, and we will let you know what happens with our criminal trial, okay.

MS. WAGSTAFF: Okay. Excellent.

THE COURT: What else?

MR. STEKLOFF: Just briefly, your Honor, in the case management statement on page 4 we sought relief from your standing order limiting the parties to five motions in limine.

THE COURT: Oh, yeah. It seems to me that we -- it does not make sense in this case to have a limit of five

motions in limine. What is your proposal for how many motions in limine we should have?

MR. STEKLOFF: We had proposed on our side trying to go through the evidence in advance of the bifurcation ruling for 14. I think 15 for each side is appropriate limited to five pages.

THE COURT: I think that's fine. My preference particularly in this case -- and particularly since we will have some difficult issues about what fits into Phase One and what fits into Phase Two -- would be to do as much as we can pretrial. So I would be fine with a limit of 15 motions in limine for each side.

MR. STEKLOFF: And one question that we had that came up with Ms. Melen yesterday -- I appreciate that Your Honor handed us the proposed jury questionnaire this morning. We will look through that. On the summons --

THE COURT: Our jury office never includes the case name on the summons, and I can't imagine why we would do that now.

MR. STEKLOFF: We have nothing else on our side.

MS. WAGSTAFF: I just have one question, PTO62 inviting comments, do you have a deadline when you want us to get comments on the questionnaire back to you?

THE COURT: Oh, I was going to ask if you had comments now -- if you wanted to go through it now, but I realize that

we just filed it this morning, like half an hour --

MS. WAGSTAFF: During this conference.

THE COURT: Yeah, so I'm perfectly fine if you want to -- if you want to wait and get us comments. Why don't you -- I don't think there is any rush on this. I thought it would just be one thing that we could kind of get ahead of, but I don't think there is any huge rush on this. So why don't you -- when would you like to submit feedback on the -- my proposed juror questionnaire?

MR. STEKLOFF: We can do it by late next week if that's okay.

MS. WAGSTAFF: That will work for us.

THE COURT: Seven days from today, okay.

MS. WAGSTAFF: Your Honor, it might be worth scheduling a day with Your Honor to go through testimony to decide whether it is in or out of Phase One or Phase Two; and that might be helpful to do --

THE COURT: Well, could that be part -- so that could be part of the pretrial conference or if you all prefer to have a day before that, because it would make, you know, trial preparation logistically easier to have a day before that to go through it, I would be happy to try to schedule a day before that.

(Whereupon, a brief pause was had.)

MR. WISNER: Your Honor, one second.

THE COURT: Please take your time. The only other thing I was going to say about that is particularly if this trial doesn't go forward, I will have plenty of availability in the month of January. I know you all are super busy, but --

(Whereupon, a brief pause was had.)

MS. WAGSTAFF: Your Honor --

THE COURT: Hold on one second. I'm trying to get some information about the shutdown and funding and stuff. Give me just one second.

(Whereupon, a brief pause was had.)

MS. WAGSTAFF: So I think as Your Honor noted, there will be a large gray area of evidence that either is or is not in Phase One. I think it would be beneficial to have some rulings from Your Honor in that regard. If we can come on the 22nd for Dr. Shustov, if the Court is available on the 23rd, perhaps we could schedule --

THE COURT: I'm laughing because I have -- hearing on a Motion to Dismiss in my other MDL, the Facebook/Cambridge Analytical MDL on Wednesday, the 23rd; and that's going to be -- that is going to take a long time. So I --

MS. WAGSTAFF: I'm sure Ms. Weaver wouldn't mind moving that.

THE COURT: I mean, I guess -- I'm happy to do it. It is something you think it would be better dealt with not in the regular course of motions in limine but in a separate session

before motions in limine are being considered?

MS. WAGSTAFF: We are -- just by virtue of your bifurcation order, we are going to have to re-cut a lot of the depositions we had used in the Johnson trial.

So as we go through that process, it would be helpful if we can show you a document -- sort of like Mr. Wisner did just briefly with a couple of pieces of evidence -- if we can go through that exercise with you when both parties are prepared and attach it to deposition testimony and know whether it is going to be in or out, and we will be able to prepare for trial and have the proper testimony. And the sooner -- ideally this would have happened a couple months ago; but, you know, as soon as we can possibly get it in front of you would be better for Plaintiffs.

THE COURT: What about if we did it -- since the current plan is to have Shustov testifying on Monday afternoon, the 28th; and since there is a possibility that that is what is going to happen because there is a possibility that the -- I think a significant possibility that the criminal trial will go forward, why don't we meet on the 28th, on like the morning of the 28th or something.

MR. WISNER: So, Your Honor, here is the issue: We have depo designations that we have to exchange, exhibit lists, witness lists; and all that is effectively completely changed by the bifurcation order we got yesterday, at least from the

Plaintiffs side, right. Just to give you some context, we might want to play some testimony from Dr. Farmer, for example, we will have to edit out certain questions and answers because they are liability questions. They are not causation questions. We have to do all that. Then in addition to that, when we go to Phase Two, we are going to have to replay a lot of portions of that to give context on the liability part. We have already spent thousands of hours preparing for our regular trial. We have to cram all that in between now and trial. The sooner we know what is in or not -- it affects -- right now I don't physically know how we are going to be ready for trial. We will do it somehow. The more guidance we have from the Court, the more we can do that. The sooner we can do this, the sooner we will be able to move forward. It also affects the depositions coming up. Now I have to know when I'm taking the deposition of Monsanto, I'm going to probably have a portion of the deposition that will be in Phase One versus Phase Two. I'm not really sure what's in Phase One. I'm already running into thorns. The sooner we can get some real bear bones clarity, the better we can actually get ready for trial.

THE COURT: Okay. I think the best thing to do would be for us to figure out what is happening with this trial, which we may know by the end of the day today; and I will have Kristen work with you on scheduling.

MR. STEKLOFF: Your Honor, even after receiving the

order, our view on the approach would be that we should treat the motions in limine, treat the exhibit lists, treat the deposition designations as though this was not bifurcated; and then, yes, there will have to be a separate step, an additional step, in which we would then say with respect to this exhibit, whether it comes into Phase One or Phase One Two or with respect to this portion of a deposition designation whether it comes into Phase One or Phase Two.

In the case management statement that we submitted to Your Honor, I mean, we have extensive back and forth to try to agree. We are not opposed to trying to give the Plaintiffs as much notice as possible as to what comes into Phase One and Phase Two. I also think we need deadlines so that, for example, it is very clear that we have enough time to be able to review things that are now going to have to be much earlier than contemplated here so we can look at that deposition testimony and have a position and have meet and confers. So --

THE COURT: I think what would probably be helpful is for us to have a process -- and I'm happy to think of other creative ways to do this. I think it might be helpful for everyone involved to have a process where each side picks their top three items on which they would like a ruling about whether it comes in in Phase One or Two. So find the items that are important to you and you think there may be ambiguity about in terms of whether it would come in in Phase One or Two and tee

those up in a joint discovery letter, how about -- in the format of our joint discovery process; and then we will meet and talk about it.

MR. STEKLOFF: That makes sense. I think that approach is a good one.

THE COURT: And it will provide guidance. We are not going -- there is not going to be an in limine ruling on all of the issues that might come up in the pretrial conference or in the motions in limine. It will actually provide guidance for you as you tee up motions -- for teeing up the motions in limine. When are the motions in limine due?

MR. STEKLOFF: The 16th of January.

MS. WAGSTAFF: Two weeks.

THE COURT: Nevermind.

MS. WAGSTAFF: And, Your Honor, one thing that Mr. Stekloff said is with respect to exhibits, that's fine and motions in limine that you would file them for both trials together; but with respect to deposition designations, as Mr. Wisner said, we just don't know what we can put in which phase.

THE COURT: So pick your favorite three. Each side pick your favorite three. Tee them up in a --

MR. WISNER: Sorry. I just want to clarify what you are talking about, three exhibits, concepts --

THE COURT: Exhibits, depo designations, whatever

tangible thing you want to put in front of me and get a ruling on that will help provide guidance going forward.

MR. WISNER: There is going to be 300 of these.

THE COURT: That's fine. Pick your best three that are really important to you to get into Phase One, and you pick the three that are really important to you to keep out of Phase One; and we will adjudicate them.

MR. WISNER: The problem is the 297 other ones, when will those be decided? Are they going to be decided during trial?

THE COURT: The ruling on the six that are teed up will provide you with substantial guidance on what is going to come in in Phase One and what is going to come in in Phase Two.

MR. WISNER: This is not to belabor or to bore. The problem is we vehemently disagree with the bifurcation order, right. We think that it is unfair. So us complying and not submitting evidence, we are going to need rulings from the Court on every piece of evidence that is excluded out of Phase One to preserve our record.

THE COURT: You will. As you will in good-faith like in every other trial in response to a pretrial ruling, you will attempt to apply with the pretrial ruling; and you can preserve and you -- by making your arguments against the pretrial ruling, as you have done; and by attempting to comply with the pretrial ruling, you will have preserved your arguments.

That's how it works.

MR. WISNER: Sure. I understand. There might be a piece of evidence that we generally think applies to causation, and there is probably 300 of them that they think no, it is liability. That will need a ruling. We can't just say, Well, he didn't like that one, so we are going to assume he won't like this one. By "him," I mean you, Your Honor. We actually have to get a ruling on it so on appeal if we lose, we can say This piece of evidence, this piece of evidence, this piece of evidence was in error, et cetera. That's all I'm trying to say.

THE COURT: I doubt that you actually need to do that. Maybe you need to conduct a little further research on preserving your appellate rights; but whatever rulings need to be made to preserve your appellate rights, I'm happy to make them.

MR. WISNER: Thank you, Your Honor.

THE COURT: So why don't you submit a -- when did you say the motions in limine were due?

MS. WAGSTAFF: The 16th.

THE COURT: They are due to be filed on the 16th?

MS. WAGSTAFF: Served.

THE COURT: Served on the 16th. Okay. When are they due to be filed?

MS. WAGSTAFF: They are due to be filed on the 30th of

January.

THE COURT: Okay. Why don't you file your 5-page discovery letter; attach as exhibits the six items that are teed up in the 5-page discovery letter; and why don't you file that by -- when do you want to file that by? The 16th is when you have to serve your motions in limine?

MR. STEKLOFF: Yes, Your Honor.

THE COURT: Why don't you file this 5-page letter by January 10th? Is that not doable?

MS. WAGSTAFF: Your Honor, if we can have until the 14th or 15th, we have response to the Daubert motions due on the 11th.

THE COURT: How about the 14th? The 15th?

MS. WAGSTAFF: 15th would be great.

MR. STEKLOFF: That's fine, Your Honor.

THE COURT: In the meanwhile, we will try to find a time to meet and have argument on those items.

MR. STEKLOFF: Yes, I think we can probably do it if Your Honor has time either on the 22nd or the 28th.

THE COURT: Whenever we end up meeting for --

MR. STEKLOFF: Dr. Shustov.

THE COURT: Okay. That probably sounds like a good idea. Wait, is there anything else to talk about like -- there might be a small item or two left on the agenda here.

MS. WAGSTAFF: Your Honor, one of the agenda items was

the attendance of experts at Daubert hearing.

THE COURT: Yes.

MS. WAGSTAFF: Just sort of an update, Dr. Shustov will obviously be held separately from the Daubert hearings you currently have scheduled for the 4th, 6th and 11th. Monsanto told us this morning that it only requests us bring Dr. Weisenburger and Dr. Nabhan.

THE COURT: Okay.

MS. WAGSTAFF: Which is obviously two experts during those three days. Our current position -- we haven't finalized our Daubert briefs on them, but our current position is we aren't going to request Monsanto bring any of their experts. That leaves two experts over three days. We are just giving you a heads-up. We are not in any position at all to request that it be shortened, but it could be.

THE COURT: What days have you calendared Weisenburger and Nabhan?

MS. WAGSTAFF: Nabhan needs to come on the 4th, which is the first day; and Dr. Weisenburger needs to come on the 11th.

THE COURT: Okay.

MS. WAGSTAFF: We are going to check to see if Weisenburger can come earlier on the 4th. It is my understanding from my colleague that that date is pretty set for Dr. Weisenburger. I don't know. Monsanto mentioned this

morning they may bring some of their experts anyway, so I don't have a position on that.

MR. STEKLOFF: We want to see their Daubert filings on the 11th, and then we discussed that we would let them know if we plan on bringing any of our experts to help put our criticisms of their experts in context and then figure out a schedule from there, whether we need all of the days and whether the dates might work.

THE COURT: And so the idea -- the idea here -- just to make sure I'm remembering this correctly -- is I left it for you all to decide which of the other side's experts you wanted to cross-examine in connection with the Daubert motions; is that right?

MR. STEKLOFF: That's correct, and I have -- my recollection is the last time we were together, you also I thought left open the possibility even if they didn't request one of our experts, we might bring one of our experts to help -- I mean we are going to be criticizing their differential diagnosis and saying it is not viable.

THE COURT: That's fine.

MR. STEKLOFF: They haven't followed methodology correctly, and we might bring in one of our experts to put that in context and explain why certain risk factors have improperly ruled in Roundup, et cetera.

THE COURT: That's fine.

MR. STEKLOFF: We haven't made the final determination on that. I told Ms. Wagstaff that we could do so shortly after, so we can consider their criticisms of our experts on the 11th and thereafter make a quick decision on who we would bring, what dates they are available on the 4th, 6th or 11th, so we can all then contemplate how many experts there are, how much time we think we need with, Your Honor.

THE COURT: All that sounds good.

MS. WAGSTAFF: And just sort of to be clear on that -- I just wanted to get Your Honor's opinion on this -- several of Monsanto's experts we did not depose. We are not filing Daubert motions on their expert reports. So it is our expectation that they don't come in and change their expert reports in anyway at the Daubert hearing.

THE COURT: Right. I mean, there is always an issue about whether somebody is testifying on a topic that was not identified in their report or if they are merely explaining what is in their report. As always, we will have to deal with those kinds of questions.

Okay. On the issue -- is everybody okay with videotaping the Daubert? I can't remember -- I think Kristen told you this, but my inclination is that we shouldn't be recording the trial probably but -- mainly for logistical reasons. I think it would be hard to do in this courtroom, and I think it would be much easier to have the trial in this courtroom; but the

Daubert hearings, I found it helpful to record those last time; and so I would like to record them again this time. Does anybody have a problem with that?

MS. WAGSTAFF: No, Your Honor.

MR. STEKLOFF: No, Your Honor.

THE COURT: Okay. So they will probably -- I assume it will be the courtroom we used for the Daubert hearings last time. You can double-check with Kristen if you haven't already. Anything else to discuss? Let me go through my notes real quick.

On the issue of jury instructions, I understand you asked yesterday about final jury instructions -- given the length of the trial, I was operating under the assumption that we wouldn't go through the process of finalizing jury instructions and probably wouldn't even have argument on jury instructions at the pretrial conference. That we would just do that, you know, sometime in the middle of trial. Given, however, that we are bifurcating, I wonder if in connection with -- I wonder if we should hammer out instructions for Phase One or at least if we should figure out -- hammer out the substantive instruction that -- or instructions that we are going to give the jury for Phase One; and I wonder if we should do that at the same time that we have our little hearing on the six items that are disputed about whether they will go into Phase One or Phase Two.

MS. WAGSTAFF: Your Honor, for Plaintiffs I think we would prefer that so we know what we have to prove and what we are trying to prove at the trial.

THE COURT: You know what you have to prove and what you are trying to prove at the trial at Phase One but it's -- even though you already know what you have to prove, it's useful for analytical purposes to figure out the precise language that we are giving to the jury. So why don't -- on the same day that you are submitting your discovery -- your joint letter regarding whether a particular exhibit or testimony will come in in Phase One or Phase Two, why don't you also each submit proposed substantive instruction or instructions that the jury will be given -- should be given for Phase One only, and why don't you exchange -- when is the due date for your letter?

MS. WAGSTAFF: 15th of January.

THE COURT: Why don't you exchange proposed instructions on the 13th of January, and then see if you can come to an agreement on the instruction to submit to me on the 15th. If not, you can submit competing instructions in a separate document on the 15th. Does that make sense?

MR. STEKLOFF: Just to clarify, these are just the substantive instructions on the issue of causation in Phase One?

THE COURT: Correct.

MR. STEKLOFF: Then I assume we would -- if evidence plays out through certain expert testimony, we would be able to supplement those or seek additional instructions?

THE COURT: Yeah, just --

MR. STEKLOFF: Before the jury was instructed at the end of Phase One?

THE COURT: Correct. This is just the substantive causation inquiry that we are asking the jury to engage in in Phase One.

MS. WAGSTAFF: So, Your Honor, just one question because this bifurcation is sort of new to us. Will the jury -- is it your opinion the jury will be told that there are two phases?

THE COURT: The way I propose to handle that is -- the way I think most trial courts handle bifurcated trials that take place regularly all around the country everyday, which is to say that we are going to have a trial; and we have budgeted a month for the trial, and from time to time we are going to send you back to deliberate on particular questions. And, you know, the first question we are going to send you back to deliberate on is this question. So the parties' opening statements will be directed at that, and they will have an opportunity to give an additional opening statement on additional issues as the trial goes on. But this is the -- the first phase and the first thing we will have you deliberate

about is causation, and the parties are going to give you opening statements about that; and we are going to have -- we are going to hear from witnesses about that. That is basically what I will tell the jury.

MS. WAGSTAFF: So as far as time for trial, have you decided yet how long you are going to give us? Ms. Melen told us we will be on a chess clock.

THE COURT: Yes, I think that -- I will be in a better position to assess -- I mean, both sides estimated what, four to five weeks? Is that what you estimated?

MS. WAGSTAFF: We estimated -- yeah, probably five to six weeks. I think just receiving the bifurcation order yesterday, we haven't really anticipated how that will cut down. So --

THE COURT: I will give you a -- I will give you some general comments now, and then I will get into more specifics later. But the general comment is that typically we use four hours of court time on each trial day. Often it is a little bit more than four hours, but conservatively we can estimate that it is four hours of court time or airtime per trial day. So if we are going four days a week, that is by my math 16 hours of trial time per week. So if we went for four weeks, what would 16 times 4 be?

MS. WAGSTAFF: 64.

THE COURT: So if we went for four weeks, each side

would get 32 hours. Now, what I always tell people in civil trials is that if the time is being used efficiently; and I determine, like a quarter of the way through or a third of the way through or something, that I have not given you enough time, I will expand the time. But it's -- I have done that in one civil trial. In every other civil trial I have had, the time limits that I have imposed have been more than what the parties needed, and the parties finished before the time limits, often well before the time limits.

MS. WAGSTAFF: So will we have a time for the entire trial or will you give us time for the bifurcated portion?

THE COURT: I think you should think about that.

MS. WAGSTAFF: Okay.

THE COURT: And I should think about that, and we should have further discussions about that.

MR. STEKLOFF: And just while I can't predict how long Plaintiffs' case will take, we will -- say this should be three to four week trial, five to six given the witnesses we have now briefed about. We just think this is a shorter trial.

THE COURT: I will think about that, and I will be in a better position to -- obviously by the pretrial conference I will be in a much better position to assess how long the trial should be.

MR. STEKLOFF: One additional, I guess, request when we submit the substantive jury instructions to Your Honor on

the 15th, can we also submit maybe an agreed to proposed verdict forms?

THE COURT: Sure.

MR. STEKLOFF: I think if we are going to be talking about those, we need the verdict forms at that time.

THE COURT: Generally speaking, I don't like to get into lots of different sub-questions with the jury. Generally, I like to give them just the general question. It may be that that is not called for here. It may be that there needs to be a set of sub-questions relating to causation. I don't know. My general philosophy is not to ask the jury a whole bunch of sub-questions.

MR. STEKLOFF: I think off the cuff, you proposed a question earlier to Mr. Wiser, which probably would be very close to what we propose, we would like notice of what the question was.

THE COURT: Anything else?

MS. WAGSTAFF: No, Your Honor.

THE COURT: Great. Thank you.

MS. WAGSTAFF: Thank you, Your Honor.

MR. STEKLOFF: Thank you, Your Honor.

(Proceedings concluded.)

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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: January 6th, 2019

Marla Knox

Marla F. Knox, RPR, CRR
U.S. Court Reporter